

Memorandum 2017-12

**Revocable Transfer on Death Deed: Follow-Up Study
(Draft Tentative Recommendation)**

At its February meeting, the Commission¹ directed the staff to prepare a draft tentative recommendation to achieve two goals:

- (1) Make clear that recordation of the FAQ page of the revocable transfer on death deed form is not required. In other words, a failure to record the FAQ should have no effect on the validity of the deed.
- (2) Apply that rule retroactively, so that deeds recorded before the effective date of the new law are not invalidated based on the fact that the FAQ was not recorded.

The staff's draft of such a tentative recommendation is attached for the Commission's review.

Because the issue addressed by the proposed law is urgent and is quite narrow, the staff has proposed a relatively short public comment period. Quick completion of this study might enable any resulting recommendation to be amended into a bill this year, which would accelerate resolution of the problem that it addresses.

The Commission needs to decide whether to approve the attached draft as a tentative recommendation, with or without changes.

Respectfully submitted,

Brian Hebert
Executive Director

1. Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

CALIFORNIA LAW REVISION COMMISSION

STAFF DRAFT

TENTATIVE RECOMMENDATION

Revocable Transfer on Death Deed: Recordation

April 2017

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **May 18, 2017.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
4000 Middlefield Road, Room D-2
Palo Alto, CA 94303-4739
650-494-1335
<commission@clrc.ca.gov>

SUMMARY OF TENTATIVE RECOMMENDATION

Under existing law, a revocable transfer on death deed (“RTODD”) must be recorded. It is not entirely clear whether that requirement applies to the “Common Questions” instructional page that is part of the statutory RTODD form (the “FAQ”).

Ambiguity on that point is a problem.

At worst, it could lead to the invalidation of an otherwise valid deed, simply because the transferor failed to record the FAQ.

Even if the validity of such a deed is eventually upheld by a court, any uncertainty as to the validity of the RTODD would itself be problematic. If the legal validity of the deed is in question, a beneficiary may be unable to obtain title insurance. A quiet title action may then be required to obtain clear title. That would defeat the purpose of the RTODD as a means of transferring real property on death without the cost and delay of a judicial proceeding.

The Commission recommends that the law be revised to make clear that recordation of the FAQ is not required and that failure to record the FAQ has no effect on the validity of an RTODD. This rule would apply retroactively. This recommendation was prepared pursuant to Section 21 of Chapter 293 of the Statutes of 2015.

REVOCABLE TRANSFER ON DEATH DEED: RECORDATION

1 The Commission has been directed to study the law that authorizes the use of a
2 revocable transfer on death deed (“RTODD”) to transfer real property on death,
3 outside of probate.¹ As part of that study, the Commission is to recommend
4 changes to the RTODD statute to make it more effective and avoid
5 misunderstanding.

6 The deadline for completion of the report is January 1, 2020. However the
7 Commission has learned of one problem that warrants more immediate action. An
8 ambiguity in the provision that requires recordation of an RTODD could have
9 serious problematic consequences. This tentative recommendation proposes
10 revisions to resolve the ambiguity.

11 THE PROBLEM

12 In order to be legally effective, an RTODD must be recorded, within 60 days of
13 the date that it was executed.²

14 The RTODD must be executed using a specified statutory form.³ That form has
15 two parts:

- 16 (1) A “deed” page with fillable fields, which must be completed, signed by the
17 transferor, and notarized.⁴ This page provides all of the necessary
18 information and authentication required for an effective property
19 conveyance.
- 20 (2) An “FAQ” page that provides answers to common questions about the effect
21 of an RTODD and the procedure for executing one.⁵ This page is purely
22 instructional.

23 It is not entirely clear whether the provision that requires recordation of an
24 RTODD only requires recordation of the deed page, or instead requires
25 recordation of both the deed and FAQ pages.

26 Any uncertainty on that point could cause serious problems. First, if a court
27 construes the statute as requiring recordation of the FAQ, any RTODD that was
28 recorded without the FAQ could be invalidated. The property would then
29 presumably be subject to probate, exactly what the transferor intended to avoid by
30 executing an RTODD. Furthermore, the property could transfer to someone other

1. 2015 Cal. Stat. ch. 293, § 21.

2. Prob. Code § 5626(a) (“A revocable transfer on death deed is not effective unless the deed is recorded on or before 60 days after the date it was executed.”).

3. Prob. Code § 5642.

4. Prob. Code § 5642(a).

5. Prob. Code § 5642(b).

1 than the intended beneficiary (by operation of an otherwise inapplicable will or
2 rules of intestate succession).

3 Even if the failure to record an FAQ does not invalidate an RTODD, it could
4 cast a problematic cloud on the title of property conveyed by an RTODD. If there
5 is any uncertainty as to the validity of such an RTODD, the beneficiary may be
6 unable to obtain title insurance. In that situation, the beneficiary may need to
7 pursue a quiet title action in order to obtain clear title. This judicial proceeding
8 would add cost and delay, which the transferor specifically intended to avoid
9 through execution of an instrument that would transfer the property on death
10 outside of probate.

11 RECOMMENDATION

12 The FAQ page provides beneficial information to persons who are considering
13 executing an RTODD. It explains the legal consequences and limitations of the
14 RTODD, and gives instructions on how to successfully execute one. A person who
15 carefully reads the FAQ will make a more informed choice about whether to
16 proceed and will be less likely to make a procedural mistake.

17 Theoretically, requiring recordation of the FAQ would increase the likelihood
18 that a transferor will see the FAQ and have an opportunity to read it. This could
19 reduce the incidence of error and misuse.

20 However, that possible benefit seems to be outweighed by the severity of the
21 harm that could result if recordation of the FAQ is required as a precondition for
22 the validity of an RTODD. No matter how prominently the statutory form warns
23 that recordation of the FAQ is required, it seems inevitable that some transferors
24 would erroneously fail to record the FAQ. That technical error, which would not
25 be directly related to the effect of the RTODD or the transferor's intentions, would
26 result in the invalidation of an otherwise valid RTODD. This would defeat the
27 transferor's clearly expressed intentions.

28 For that reason, the Commission recommends that the law be revised to make
29 clear that recordation of the FAQ is not required. That rule should be made
30 retroactive, to remove any doubt about the validity of an RTODD that was
31 recorded, without the FAQ, before the new law goes into effect.

32 REQUEST FOR PUBLIC COMMENT

33 The Commission seeks public comment on its tentative recommendation.
34 Comments supporting the proposed approach are just as important as comments
35 suggesting changes to that approach or expressing other views.

PROPOSED LEGISLATION

1 **Prob. Code § 5626 (amended). Recordation, delivery, and acceptance**

2 SECTION 1. Section 5626 of the Probate Code is amended to read:

3 5626. (a) A revocable transfer on death deed is not effective unless the deed is
4 recorded on or before 60 days after the date it was executed.

5 (b) The transferor is not required to deliver a revocable transfer on death deed to
6 the beneficiary during the transferor’s life.

7 (c) The beneficiary is not required to accept a revocable transfer on death deed
8 from the transferor during the transferor’s life.

9 (d) Subdivision (a) does not require the recordation of the “Common Questions”
10 language that is specified in subdivision (b) of Section 5642. The failure to record
11 that part of the statutory form has no effect on the effectiveness of a revocable
12 transfer on death deed. This subdivision applies to all revocable transfer on death
13 deeds executed pursuant to this part, regardless of whether the revocable transfer
14 on death deed was executed before, on, or after the effective date of the act that
15 added this subdivision.

16 **Comment.** Section 5626 is amended to expressly provide that recordation of the “Common
17 Questions” portion of the statutory revocable transfer on death deed form is not required. This
18 rule applies retroactively, to revocable transfer on death deeds that were recorded before the
19 effective date of the new law.