

First Supplement to Memorandum 2019-4

**Revocable Transfer on Death Deed: Follow-Up Study —
Trust as Beneficiary**

The Commission¹ has received further communications regarding the question discussed in Memorandum 2019-4, whether the law should permit a trust to be named as a beneficiary of a revocable transfer on death deed (“RTODD”).

They are attached in the Exhibit as follows:

- | | |
|---|-------------------|
| | <i>Exhibit p.</i> |
| • Angela Petrusha, Eureka (1/25/19) | 1 |
| • Angela Petrusha, Eureka (1/31/19) | 5 |

In her first letter, Ms. Petrusha provides useful practical advice about how to identify a trust with sufficient particularity. The second letter comments on some points made by the California Land Title Association in a prior letter.

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.

January 25, 2019

*Via email to: bhebert@clrc.ca.gov
and U.S. Mail*

Mr. Brian Hebert, Executive Director
California Law Revision Commission
c/o UC Davis School of Law
400 Mrak Hall Drive
Davis, CA 95616

Re: Study L-2032.1 (Revocable Transfer on Death Deed: Follow-Up Study)
Memorandum 2019-4 Trust as beneficiary

Dear Mr. Hebert:

I am writing in response to staff requests for comments and suggestions as described in the recent Memorandum 2019-4. The Memorandum discusses the issues of “confusion” and “fraud” which were raised by TEXCOM and CLTA, respectively. As previously stated, I am a California-licensed attorney practicing exclusively in the area of trusts and estate law, including planning and administration regarding non-probate transfers such as those made by RTODD’s.

CONFUSION

In response to TEXCOM’s concern about the risk of the “confusion and error” from naming a trust as beneficiary, staff asks for suggestions on how to unambiguously identify a trust. Staff correctly observes that this as an issue that comes up regularly in estate planning. In addition to lifetime asset transfers into trusts, trusts are commonly named as beneficiaries of non-real property assets, including motor vehicles, bank accounts, investment accounts, life insurance policies, and annuities. Most institutions, including the California DMV, provide standard forms and instructions for the layperson to identify a trust as beneficiary.

Trust as Beneficiary – Current Practices for Non-Real Property Assets. While beneficiary designation forms vary, the following information (or a portion of it) is typically required to identify an *inter-vivos* or *living* trust as beneficiary: name of trust, date of trust, tax ID number, trustee name, and trust address. For a *testamentary* trust (created upon a future death) typical requirements are: trustee name, trust name, and the title and date of the instrument which provides for the creation of the trust. An example of verbiage to identify a testamentary trust is “Sam Smith, Trustee of the Jane Doe Trust, created under the Last Will and Testament of Daniel Decedent dated January 1, 2015.”

Some institutions also require supporting documentation for a living trust. If so, they usually accept an Affidavit or Certification of Trust, which is a sworn statement signed by the current Trustee reciting pertinent information. Some require a copy of certain pages from the trust agreement, such as the first page and signature pages. Either method

provides the pertinent information while still protecting the privacy of other information in the trust agreement (such as beneficiaries, distribution plan, and asset schedules).

Trust as Beneficiary – Suggested Practices for RTODD’s. The methods outlined above provide plenty of options for reasonably identifying a trust as beneficiary of a RTODD. For a living trust, I suggest requiring the trustee name, trust name, and trust date. Since the recorded RTODD is a public record, a tax ID number should not be required. For a testamentary trust, I suggest requiring the trustee name, trust name, and title/date of the instrument creating the trust. If the instrument creating a trust does not recite a trust name, stakeholders may reasonably be concerned about confusion and error, in which case I suggest limiting RTODD trust beneficiary to only those for which a trust name has been recited in the underlying instrument.

I do not believe it is necessary to require additional documentation to be recorded with the RTODD. Californians transfer real property to living trusts on a regular basis without having to record additional documents. However, if the Commission wishes to require additional documentation for recording with a RTODD, it should be limited to an Affidavit of Trust or Certification of Trust, to protect the privacy of any sensitive information in the trust agreement.

FRAUD

I share staff’s request for clarification of CLTA’s assertion that naming the “trustee of a trust” creates a risk of fraud. If CLTA is referring to naming only the trustee (and not including the name of the trust), I agree with its concern. Title to property held by a trust typically includes the current trustee name and the trust name, as well as the trust date. For example, a deed may describe the Grantor or Grantee as “Sam Smith, Trustee of the Jones Family Trust dated July 30, 2010.” The Commission should not allow only the trustee name to describe a RTODD beneficiary, if that is the concern.

In its August 16, 2018 letter, CLTA only uses the term “testamentary trusts” in describing its position. It specifically opposes *testamentary* trusts; no mention of *living* trusts or why they should not be allowed as beneficiaries. Further, CLTA’s reasoning states that testamentary trusts are “governed through probate courts.” I am unsure what is meant by this. While all California trusts are subject to the Probate Code, testamentary trusts do not necessarily go through any probate court proceeding. A testamentary trust may be created via will or living trust, the former which typically does require a probate court proceeding, the latter which typically does not.

On a related note, in Memorandum 2018-44, staff asked for practical reasons to exclude any “specific type” of trust as beneficiary. I see no reason why that the types of trusts allowable as beneficiary of a RTODD should not be the same as the types of trusts eligible to hold current title to California real property. This would include any existing valid, revocable or irrevocable trust.

By comparison, current RTODD law only requires the full name of and relationship to a natural person beneficiary. Just as staff pointed out there could be thousands of “Jones Family Trusts” in existence, there could also be thousands of individuals named “John Paul Jones” and if the stated relationship is “friend” it would be easy for many people named John Paul Jones to claim friendship with the decedent. It is also possible to have multiple friends with the same name. Requiring a date of birth and/or current address along with name and relationship would avoid ambiguity here as well, although I realize this is not part of the current study. It seems unfair to demonstrate so much skepticism over sufficiently identifying a trust when the standards for identifying an individual are so simplified, and when both are considered a “person” under Prob. Code Sec. 56.

Thank you for your consideration. If you have any questions or if I may provide further information, please do not hesitate to contact me by telephone at (707) 798-6030 or by email to angela@petrushalaw.com.

Respectfully submitted,



Angela Petrusha
Attorney at Law
State Bar of CA License No. 297287

AMP:ah

January 31, 2019

*Via email to: bhebert@clrc.ca.gov
and U.S. Mail*

Mr. Brian Hebert, Executive Director
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Re: Study L-2032.1 (Revocable Transfer on Death Deed: Follow-Up Study)
Memorandum 2018-59, Supp. 2

Dear Mr. Hebert:

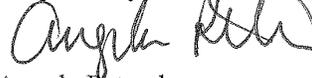
As a supplement to my letter dated January 25, 2019, I offer the following comments in response to California Land Title Association's letter dated December 6, 2018, which addressed Memorandum 2018-59.

In Item 5, CLTA expresses concern over the timing of the RTODD transfer, asserting that when the grantor dies it is "too late to convey the property to a trust." Isn't that the entire point of the RTODD – to create a valid transfer upon death? There is otherwise no reason a trust settlor cannot make a transfer to the trust effective upon death. Property is commonly transferred to trusts upon the settlor's death, including life insurance, bank account funds, etc. pursuant to a valid pay-on-death or transfer-on-death document naming the trust as beneficiary.

In Item 6, CLTA advocates against allowing a trust as beneficiary of a RTODD, claiming that the grantor should transfer property to a trust "while still alive and competent to make a conscious decision." Why shouldn't the grantor, while alive and competent, be allowed to name a trust as beneficiary? While this may be the exception rather than the rule, as previously stated by me and by Ms. Whitehurst, there are important situations in which a lifetime transfer to the trust is not possible or is otherwise disadvantageous. Examples include the parent who does not have a living trust but wants to transfer her home to her child's Special Needs Trust upon death; and the trust settlor whose mortgage/refinancing needs prohibit the property from being constantly held in the trust during life, creating a risk of unintended probate upon death.

Thank you again for considering my comments.

Respectfully submitted,



Angela Petrusha
Attorney at Law
State Bar of CA License No. 297287

AMP: ah