

Second Supplement to Memorandum 2019-4**Revocable Transfer on Death Deed: Follow-Up Study —
Trust as Beneficiary**

The Commission¹ has received a letter from the California Land Title Association, commenting on the issues discussed in Memorandum 2019-4. It is attached.

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.



February 6, 2019

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

RE: Comments from CLTA on CLRC Study L-3032.1 Memorandum 2019-4
(Revocable Transfer on Death Deed: Follow-Up Study, Jan. 23, 2019)

Dear Mr. Hebert:

The California Land Title Association ("CLTA") is writing in response to a solicitation by the California Law Revision Commission ("CLRC") for a "fuller explanation"¹ from CLTA of its concern with specific aspects of the revocable transfer on death deed ("RTODD"). We appreciate the CLRC's attempt to understand and address CLTA's concerns, as well as giving us an opportunity to provide further input on this matter.

The CLRC's proposed solution seeking to address CLTA's concerns fails to recognize that a trust is not a legal entity capable of holding title:

In a memo dated January 23rd, 2019, CLRC staff propose a solution seeking to address some of CLTA's concerns with RTODDs, specifically those relating to the instruments' potential for fraud:

"...it might be possible to address [CLTA's concern] by expressly precluding (and warning against) naming a trustee as beneficiary [to an RTODD], rather than naming the trust itself."²

We appreciate the CLRC taking into consideration CLTA's serious concerns with RTODDs and attempting to craft a solution in response. However, we do not view the CLRC's proposed solution, if we are understanding it correctly as advocating for naming a trust, rather than a trustee of a trust, beneficiary to a RTODD, as one that is viable, because a trust is not a legal entity capable of holding title. (See *Portico Management Group, LLC v. Harrison*, 202 Cal.App.4th 464 (2011)).

RTODDs are often created late in the life of the transferor without legal counsel, raising fraud concerns related to deeding property directly into a trust:

When a RTODD is recorded, the naming of the beneficiary on the deed, if that beneficiary is an individual or entity, acts as a safeguard against fraud by allowing interested parties to determine if a bad actor has succeeded in having themselves named beneficiary through fraud or abuse. This safeguard would not exist were a RTODD to name as beneficiary a trust. Given that a settlor will often name himself or herself as the original trustee of the trust, when the

¹ CLRC Memorandum 2019-4, p. 8.

² *Ibid.*

trustee under the trust dies, the identity of the successor trustee of the trust may not be determinable without resorting to extrinsic evidence.

As an example, this would equate to Samantha Smith recording a RTODD naming Samantha Smith, as trustee of the Smith Family Trust, beneficiary. While this act would not cause any concern amongst Samantha Smith's family members or caregivers at the time the RTODD is recorded, subsequent to Samantha Smith's death potential undue influence might then be revealed, wherein a bad actor was named as beneficiary of the trust or as the successor trustee, making it clear that fraud or abuse had taken place.

While these concerns arguably are present any time a property is deeded into a trust, we urge the CLRC to consider the issues of property deeded directly into an inter vivos trust via a RTODD, as opposed to being correctly deeded to a trustee as trustee of an inter vivos trust. Deeding property to a trustee of an inter vivos trust may be done as part of a longstanding estate plan with assistance of counsel, whereas title companies often see RTODDs created very close in time to the death of the transferor, without assistance of counsel, which raises serious concerns about the potential for fraud or abuse.

Other numerous problems with naming a trust as beneficiary to a RTODD exist:

In addition to the above concerns, we have identified a number of other issues with regard to naming trusts as beneficiary to RTODDs:

- If the trust is a family trust of the transferor, the revocable trust could be revoked prior to the death of the transferor, raising the question as to the continued validity of the RTODD.
- In the creation of the trust, the settlor / transferor may have relied upon the RTODD as the conveyance of the real property to fund the trust, when the conveyance did not occur until after the death of the transferor.
- The trust was created in name only, without the appropriate legal documentation, meaning that there may not be a valid legal trust to act as beneficiary to a RTODD.

In addition to these concerns, if the trust (other than a family trust of the transferor) is named as the beneficiary under a RTODD, it would be very difficult for a title company to ensure that it is dealing with the particular trust and trustees as identified in the RTODD. Since the transferor is not required to advise the beneficiary, it is likely that the information used to identify the trust may not be unique and will not likely be how, if in title, the trust would be referenced as title holder.

Thank you for your consideration of our comments on this matter. Please do not hesitate to contact us should you wish to discuss this issue further.

Respectfully,

A handwritten signature in black ink, appearing to read 'Craig C. Page', written in a cursive style.

Craig C. Page
Executive Vice President
and Counsel