

## First Supplement to Memorandum 2019-17

**Revocable Transfer on Death Deed: Follow-Up Study —  
Issues Identified by the Commission**

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This memorandum discusses two related revocable transfer on death deed (“RTODD”) issues that the Commission<sup>1</sup> identified for study:

- Whether an RTODD beneficiary should have standing to contest the revocation of an RTODD.
- Whether an RTODD beneficiary is an “interested person” for the purposes of the Probate Code generally.

Unless otherwise indicated, all statutory references in this memorandum are to the Probate Code

## STANDING OF RTODD BENEFICIARY TO CONTEST REVOCATION

In 2016, the Commission decided that it would consider the following issue:

Whether the beneficiary of an RTODD has standing to contest an instrument that would revoke or otherwise defeat the effect of the RTODD.<sup>2</sup>

The analysis of that issue is complicated. It turns on the following factors:

- What was the method of revocation (express or implied)?
- Does the RTODD statute authorize a contest of the revocation?
- Is there other law that would authorize a contest of the revocation?
- Would the beneficiary have standing as an “interested person” for the purpose of contesting the revocation?
- Would a successful contest of a revocation revive the revoked RTODD?

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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](http://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.

2. Minutes (July 2016), p. 5.

## Standing Generally

Before beginning a close analysis of the factors listed above, it is helpful to discuss the general law on standing, to understand the policies that it serves and how those policies would apply to the revocation of an RTODD.

As a matter of general law:

To have standing, a party must be beneficially interested in the controversy, and must have some special interest to be served or some particular right to be preserved or protected, and this interest must be concrete and actual, not conjectural or hypothetical. The issue of whether a party has standing focuses on the plaintiff, not the issues he or she seeks to have determined. As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator.<sup>3</sup>

There are two general policy purposes served by the standing requirement. First, it conserves judicial resources by ensuring that there is an actual controversy that needs to be adjudicated. In general, the court should not waste its time on matters that are merely conjectural or hypothetical. Second, it ensures that the plaintiff will be an adequate representative for the cause of action. The plaintiff must have a concrete interest in the matter of such magnitude that the plaintiff will be motivated to present all relevant facts and issues to the court.

*Would a beneficiary of an RTODD who seeks to contest its revocation meet those general standards? Not during the transferor's life.*

Recall that an RTODD is freely revocable during the transferor's life, without the beneficiary's assent.<sup>4</sup> The transferor could revoke the RTODD and give the property to another, and the beneficiary of the RTODD would have no basis for complaint. The RTODD statute drives that point home, expressly providing that a beneficiary has no legal or equitable interest in the property governed by an RTODD, until the transferor has died.<sup>5</sup> During the transferor's life, any claim that an RTODD beneficiary makes to property governed by an RTODD would be speculative, based on a mere expectancy.

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3. 1A Cal. Jur. 3d Actions § 40 (footnotes omitted).

4. Sections 5630-5632.

5. Section 5650(b).

It is therefore not surprising that the RTODD statute expressly prohibits an RTODD contest during the transferor's lifetime.<sup>6</sup> Only after the transferor's death will the interests affected by an RTODD be sufficiently concrete to justify litigation.

*Would the beneficiary of a revoked RTODD satisfy the general standing requirements after the death of the transferor?* Probably.

When the transferor dies, any RTODD in effect will take effect by operation of law. The interests created by the RTODD will be concrete and determinable.

If instead an RTODD is revoked, it will not operate and its beneficiary will not receive property by operation of the RTODD. That is a tangible harm, personal to the beneficiary of the revoked RTODD. It would seem to be of sufficient magnitude to ensure that the beneficiary would present all of the relevant facts and issues to the court.

If the beneficiary is barred from contesting the revocation, it is not clear that there would be anyone else with a sufficient interest in the matter to bring the contest. The decedent's personal representative could perhaps do so, as a way of making sure that the decedent's testamentary intentions were carried out. However, if the personal representative does not act, there might be no way to challenge a revocation that was the product of fraud, undue influence, or mistake.

Thus, as a general matter, it would seem to make sense for the law to permit the beneficiary of a revoked RTODD to contest the validity of an RTODD, so long as the contest is brought after the transferor's death.

In the discussion below, the staff will analyze whether existing law permits such a contest.<sup>7</sup>

### **Method of Revocation: Express or Implied?**

There are two ways in which an RTODD can be revoked.

First, in what this memorandum will call an "express revocation," an RTODD can be revoked by execution and recordation of a statutory revocation form.<sup>8</sup>

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6. Section 5692. There is a narrow exception for a transferor who lacks capacity; a guardian or conservator can petition for invalidation of an RTODD during the transferor's life. Section 5696(b).

7. That analysis is entirely based on examination of the governing statutes and their legislative history. Unsurprisingly, given that California's RTODD statute only took effect in 2016, the staff did not find any appellate decisions construing it.

8. Section 5644.

Second, an RTODD can be revoked by the execution and recordation of a later RTODD.<sup>9</sup> This memorandum will refer to that kind of revocation as an “implied revocation.”<sup>10</sup>

The key distinction between these two methods, for the analysis that follows, is that express revocation leaves no RTODD in effect, while implied revocation does leave an RTODD in effect.<sup>11</sup>

Thus, if an RTODD is expressly revoked, the property at issue will remain in the transferor’s estate and there will be no transfer of property by RTODD on the transferor’s death. Conversely, if the RTODD is impliedly revoked, the property will not be part of the transferor’s estate at death, because it will have been transferred to a beneficiary by operation of the RTODD. As will be shown below, that distinction will affect the standing of a beneficiary of a revoked RTODD to contest the revocation.

### **Express Revocation**

As noted above, if an RTODD is expressly revoked, the property will remain in the transferor’s estate and there will be no transfer by RTODD on the transferor’s death. The implications of that posture are discussed below.

#### *Contest Under Section 5690*

The Commission’s recommendation notes that some RTODD jurisdictions leave the treatment of contests to general law. The Commission’s recommendation does not follow that approach. Instead it recommends that the RTODD statute expressly address the “core procedural issues” of the “grounds for a contest, nature of the proceeding, venue, pleadings, statute of limitations, and remedies.”<sup>12</sup> Based on that recommendation, the RTODD statute devotes a chapter to RTODD contests.

The first provision of that chapter, Section 5690(a), authorizes contests in two circumstances:

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9. Section 5628(a) (“If a revocable transfer on death deed is recorded for the same property for which another revocable transfer on death deed is recorded, the later executed deed is the operative instrument and its recordation revokes the earlier executed deed.”).

10. That term is somewhat misleading. Revocation of an RTODD by executing and recording a new RTODD does not depend on any inference or implication. It is the result of an express statutory rule. *Id.* The term is used here simply for convenience.

11. The staff recognizes that later events could affect whether there is an RTODD in effect at the time of the transferor’s death. The distinction drawn above focuses on the effect of each kind of revocation, as if it was the transferor’s last act with respect to the property at issue.

12. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 158 (2006).

5690. (a)(1) An action for the disqualification of a beneficiary under Part 3.7 (commencing with Section 21360) of Division 11 may be brought to contest the validity of a transfer of property by a revocable transfer on death deed.

(2) An action to contest the validity of a transfer of property by a revocable transfer on death deed may be filed by the transferor's personal representative or an interested person under Part 19 (commencing with Section 850) of Division 2.

Paragraph (a)(1) makes clear that a beneficiary may be disqualified under the statutory presumption of fraud and undue influence that applies when a beneficiary has a specified relationship to the donative instrument or to the transferor (e.g., the beneficiary drafted the instrument, was a fiduciary who transcribed the instrument, or was the transferor's "care custodian").<sup>13</sup>

Paragraph (a)(2) provides for an action to contest the validity of a transfer of property pursuant to an RTODD.

Neither paragraph would seem to provide authority for a contest of an express revocation. If there is no RTODD in effect on the transferor's death, there would be no beneficiaries to challenge under paragraph (a)(1) and no transfer of property by RTODD to contest under paragraph (a)(2).

**Based on a literal reading of Section 5690, the staff concludes that it does not authorize a contest of an express revocation of an RTODD.**

#### *Contest Under Section 850*

There is another provision of the Probate Code, which is not part of the RTODD statute, that might provide a means of contesting an express revocation. Section 850(a)(2)(C) provides that a decedent's personal representative or an interested person may petition a court for an order determining the status of property

[w]here the decedent died in possession of, or holding title to, real or personal property, and the property or some interest therein is claimed to belong to another.

If an RTODD is expressly revoked, the property at issue would be part of the decedent's estate at death. The decedent would have died holding title to the property and the beneficiary of the revoked RTODD would be making a claim to ownership of the property (on the argument that the revocation was legally ineffective). That would seem to fit within the letter of Section 850(a)(2)(C).

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13. See Section 21360 *et seq.*

However, the staff is not sure that Section 850 was intended to apply to an RTODD; the RTODD statute's contest provisions may have been intended to be exclusive. As discussed above, the Commission's recommendation expressly discussed the benefit of adopting a detailed statutory scheme for contests, which would address the "core procedural issues." That implies that the RTODD statute's contest provisions were intended to be comprehensive.

That implication is perhaps weakened by Section 5696(a), which provides:

Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a transfer of property by a revocable transfer on death deed.

That provision could be read to mean that other common law *causes of action* are preserved, notwithstanding Section 5690. Or it could be read more narrowly, as only preserving common law *grounds* for a contest (which would be conducted under the authority provided in Section 5690).

**Ultimately, the staff is not sure whether Section 5690 was intended to be exclusive, but the argument seems plausible enough to create some uncertainty about whether Section 850 would apply.**

#### *Interested Person*

Under Section 850(a)(2)(C), only the decedent's personal representative and an "interested person" have standing to petition the court for an order determining the status of contested property. Unless the beneficiary of a revoked RTODD happens to also be the decedent's personal representative, the beneficiary would need to be an interested person to have standing under Section 850(a)(2)(C).

"Interested person" is defined, for the purposes of the Probate Code, in Section 48:

48. (a) Subject to subdivision (b), "interested person" includes any of the following:

(1) An heir, devisee, child, spouse, creditor, beneficiary, and any other person having a property right in or claim against a trust estate or the estate of a decedent which may be affected by the proceeding.

(2) Any person having priority for appointment as personal representative.

(3) A fiduciary representing an interested person.

(b) The meaning of "interested person" as it relates to particular persons may vary from time to time and shall be determined

according to the particular purposes of, and matter involved in, any proceeding.

Section 48(b) recognizes that a person may be an “interested person” in one context, but not another. What matters is whether the person has a legal right in or claim against the decedent’s trust or probate estate that would be affected by the proceeding at issue.<sup>14</sup>

If an RTODD is expressly revoked, the property that would have passed by RTODD would instead remain in the transferor’s estate. If the revocation is invalid, then the beneficiary could argue that the revoked RTODD should be revived and should transfer title to the beneficiary. **That claim to property in the decedent’s estate would arguably make the beneficiary an interested person for the purposes of contesting the validity of the express revocation of the RTODD.**

#### *Revival of Revoked RTODD*

The discussion above assumes that a successful contest of an express revocation would revive the revoked RTODD. That would seem to make sense as a matter of policy. An express revocation does only one thing — it negates an already existing RTODD. If it can be proven that the revocation was the product of fraud, undue influence, or mistake, then it would not be a genuine expression of the transferor’s intentions. In that case, the purported revocation should not be given effect; the revoked RTODD should be revived.

However, there is no language in the RTODD statute that expressly addresses the issue. The statute does have language governing the effect of a failed *transfer*,<sup>15</sup> but nothing on the effect of a failed *revocation*.<sup>16</sup>

#### *Conclusion Regarding Express Revocation*

The contest provision in the RTODD statute — Section 5690 — does not seem to authorize a contest of an express revocation. If an RTODD is expressly revoked, there would be no beneficiary to disqualify. Nor would there be a transfer of property by RTODD to challenge.

Section 850 might provide a way to contest the effect of an express revocation. The beneficiary of the purportedly revoked RTODD would be making a claim of ownership of property that was held by the decedent at the time of death. Such a

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14. See *Lickter v. Lickter*, 189 Cal. App. 4th 712, 732 (2010).

15. See Section 5652(a)(2) (single beneficiary), (a)(4) (multiple beneficiaries).

16. But see Section 5628(b) (revocation of RTODD does not revive earlier revoked RTODDs).

claim would seem to be governed by Section 850(a)(2)(C). However, there is some uncertainty as to whether Section 5690 was intended to provide the exclusive authority to contest an RTODD, in which case Section 850 might be inapplicable.

If Section 850 is available to contest an express revocation, the beneficiary of the revoked RTODD would likely have standing as an “interested person” to petition the court (because the beneficiary of the revoked RTODD would have a claim against the decedent’s estate).

Finally, the statute is silent on whether a successful contest of an express revocation would revive the revoked RTODD.

**In short, existing law may provide a path to contesting an *express* revocation of an RTODD, but there are some points of uncertainty along the way.**

### **Implied Revocation**

As noted above, this memorandum uses the term “implied revocation” to refer to the revocation of an RTODD by executing and recording a later RTODD. In that situation, the end result is that there will be an RTODD in effect on the transferor’s death.

The staff will now run through the same line of analysis that it did for an express revocation, above. The results will be significantly different.

#### *Contest Under Section 5690(a)(1)*

Recall that Section 5690(a)(1) provides for an action to disqualify the beneficiary of an RTODD under the statutory presumption of fraud and undue influence that applies when a beneficiary has a specified relationship to the donative instrument or the donor.<sup>17</sup>

Because implied revocation leaves an RTODD in effect, there would be a beneficiary who could be challenged under paragraph (a)(1).

However, it does not appear that disqualification of a beneficiary under paragraph (a)(1) would invalidate the RTODD as a whole. Instead, the statutory presumption of fraud or undue influence provides:

If a donative transfer fails under this part, the instrument making the donative transfer *shall operate* as if the beneficiary had

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17. Sections 21360-21392



predeceased the transferor without spouse, domestic partner, or issue.<sup>18</sup>

In other words, it appears that the disqualification of a beneficiary would affect the disposition of the disqualified beneficiary's share, but would not necessarily prevent the donative instrument from operating in other ways (e.g., revoking an earlier instrument). **If that is correct, Section 5690(a)(1) could not be used to indirectly contest an implied revocation of an RTODD.**

*Contest Under Section 5690(a)(2)*

Section 5690(a)(2) authorizes a contest of the validity of a transfer of property by operation of an RTODD. Because an implied revocation leaves the later RTODD in effect, there would be a transfer of property by RTODD that could be contested under Section 5690(a)(2). **Consequently, it seems likely that the beneficiary of an impliedly revoked RTODD could indirectly contest that revocation by contesting the later RTODD under Section 5690(a)(2).**

*Contest Under Section 850*

Section 850(a)(2)(C) authorizes a petition to contest the ownership of property that is held by a decedent at death. Because an implied revocation would leave an RTODD in effect, the property at issue *would not be part of the decedent's estate at death*. It would pass outside of the decedent's probate estate by operation of the RTODD. **For that reason, Section 850(a)(2)(C) does not seem to be available to contest an implied revocation.**

*Interested Person*

In order to bring a contest under Section 5690(a)(2), a beneficiary would need to be either the decedent's personal representative or an "interested person." Among other things, in order to be an "interested person" the person must have a property right in or claim against the decedent's trust or probate estate.<sup>19</sup>

In the case of an implied revocation, there will be an RTODD in effect on the transferor's death. Consequently, the property will transfer by operation of the RTODD and *will not be part of the decedent's trust or probate estate at death*.

**For that reason, the beneficiary of an impliedly revoked RTODD would probably not be an interested person for the purposes of contesting the revocation.**

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18. Section 21386 (emphasis added).

19. Section 48.

### *Revival of Impliedly Revoked RTODD*

There is no language expressly addressing whether a successful contest of an implied revocation of an RTODD would revive the revoked RTODD. Nor is it clear that revival would always be the appropriate result.

In general, the staff believes that the question of whether the invalidation of a revocation should revive the revoked RTODD should turn on the most likely intentions of the transferor. When a revocation is implied, the transferor is not simply rejecting an earlier RTODD; a new RTODD is being put into place. That may make it more difficult to discern the transferor's intentions. Rather than presenting a simple binary choice between revocation and nonrevocation, the implied revocation also presents a question of whether any part of the later RTODD should be given effect. If so, then revival of the earlier RTODD may not be appropriate.

### *Conclusion Regarding Implied Revocation*

It is possible that the beneficiary of an impliedly revoked RTODD could bring an action under Section 5690(a)(2) to indirectly contest the revocation, because there would be a transfer of property by RTODD that could be contested.

By contrast, Section 850(a)(2)(C) seems inapplicable to an impliedly revoked RTODD, because the property at issue would not be held by the decedent at the time of death.

It is not clear that the beneficiary of an impliedly revoked RTODD would be an "interested person" for the purposes of contesting the revocation, because that person would not have a legal right in or claim against the decedent's *trust or probate estate* — the property would pass outside probate by operation of the RTODD.

Nor is it clear that invalidation of a transfer of property by RTODD under Section 5690(a)(2) would necessarily result in revival of an impliedly revoked RTODD. There is no statutory language on point. Moreover, in a situation where a later RTODD replaces an earlier RTODD, the transferor's intentions may be difficult to discern.

In summary, while Section 5690(a)(2) may provide grounds to indirectly contest an implied revocation of an RTODD, the beneficiary of the revoked RTODD would not seem to have the required standing as an interested person. **If the Commission concludes that such a contest should be permitted, the**

statutes would need to be revised to provide standing for the beneficiary of the revoked RTODD.

It would also be helpful to address the effect of the contest. Should revival of the revoked RTODD always be the result? Should it be left to judicial discretion, based on the circumstances?

### **Possible Tort Remedy**

Memorandum 2019-18 surveyed cases in other RTODD states to look for guidance on RTODD issues that have come up in those states. One of the cases discussed in that memorandum addressed the tort of intentional interference with an expectation of inheritance (“IIEI”).

That case prompted the staff to wonder whether a similar tort might exist in California and, if so, whether it might provide a remedy for a beneficiary of an RTODD that was revoked through the undue influence or fraud of another. If that tort is recognized in California and can be applied in that way, its availability might ameliorate any harm suffered by a beneficiary who lacks standing to contest the validity of a revocation.

In 2010, a case arose in California that involved the tort of IIEI.<sup>20</sup> The petitioner alleged that his sister and brother-in-law had unduly influenced his mother to execute a will codicil that disinherited his children. Although the petitioner had standing to contest the codicil, he did not pursue that remedy because the will contained a no contest clause that could have defeated *his* inheritance. Instead he brought an action alleging IIEI. The trial court demurred, stating that “no California case has ever expressly held that the cause of action of Intentional Interference with an Inheritance Expectancy is recognized in California...” The Court of Appeal discussed the tort as it existed in other states and considered whether to recognize it in California. It decided against doing so, because the petitioner could have contested the codicil. The court did not want to disturb the law and policy on no contest clauses by creating a new way around them.

However, in 2012 the tort of IIEI was recognized in California.<sup>21</sup> The case involved a man facing surgery who instructed his long-term partner to prepare a will for him to execute that would leave everything in equal shares to his partner and sister. The sister argued that a trust would be better and volunteered to have

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20. *Munn v. Briggs*, 185 Cal. App. 4th 578 (2010).

21. *Beckwith v. Dahl*, 205 Cal. App. 4th 1039 (2012).

one prepared. She apparently never took steps to do so and the decedent died of surgical complications. Because he had no will or trust, the sister inherited everything through intestacy.

The court recognized the new tort of IIEI, describing its elements as follows:

To state a claim for IIEI, a plaintiff must allege five distinct elements. (Munn, *supra*, 185 Cal.App.4th at p. 588.) First, the plaintiff must plead he had an expectancy of an inheritance. It is not necessary to allege that “one is in fact named as a beneficiary in the will or that one has been devised the particular property at issue. [Citation.] That requirement would defeat the purpose of an expectancy claim. ... It is only the expectation that one will receive some interest that gives rise to a cause of action. [Citations.]” (Plimpton v. Gerrard (Me. 1995) 668 A.2d 882, 885–886.) Second, as in other interference torts, the complaint must allege causation. “This means that, as in other cases involving recovery for loss of expectancies ... there must be proof amounting to a reasonable degree of certainty that the bequest or devise would have been in effect at the time of the death of the testator ... if there had been no such interference.” (Rest.2d Torts, § 774B, com. d, p. 59.) Third, the plaintiff must plead intent, i.e., that the defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it. (See Carlson v. Warren (Ind.Ct.App. 2007) 878 N.E.2d 844, 854.) Fourth, the complaint must allege that the interference was conducted by independently tortious means, i.e., the underlying conduct must be wrong for some reason other than the fact of the interference. (Doughty v. Morris (Ct.App. 1994) 117 N.M. 284 [871 P.2d 380, 383–384].) Finally, the plaintiff must plead he was damaged by the defendant's interference. (Munn, *supra*, 185 Cal.App.4th at p. 588.)

Additionally, an IIEI defendant must direct the independently tortious conduct at someone other than the plaintiff. The cases firmly indicate a requirement that “[t]he fraud, duress, undue influence, or other independent tortious conduct required for this tort is directed at the testator. The beneficiary is not directly defrauded or unduly influenced; the testator is.” (Whalen v. Prosser (Fla.Dist.Ct.App. 1998) 719 So.2d 2, 6, italics added (Whalen).) In other words, the defendant's tortious conduct must have induced or caused the testator to take some action that deprives the plaintiff of his expected inheritance.<sup>22</sup>

The existence of the IIEI tort may provide an alternative remedy for a beneficiary of an RTODD that is revoked through the fraud or undue influence of another. However, given the relative novelty of the cause of action, the staff is not sure how much effect it would have in practice. It is noted here for the

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22. *Id.* at 1057-58.

Commission to consider in deciding whether the law governing contests of an RTODD should be revised.

### **Possible Reforms**

The Commission needs to decide the following substantive questions:

- Should the beneficiary of a revoked RTODD have standing to contest the revocation after the transferor's death?
- Should a successful contest always revive the revoked RTODD? Or should revival be left a matter of court discretion?
- If such a contest is authorized by the RTODD statute, should the RTODD contest provisions be made expressly exclusive?

**How would the Commission like to proceed?** Once the Commission has decided the substantive points, the staff will prepare implementing language for presentation in a future memorandum.

#### RTODD BENEFICIARY AS INTERESTED PERSON GENERALLY

In 2016, the Commission decided that it would consider the following issue:

Whether the beneficiary of an RTODD is an "interested person" for the purposes of the Probate Code.<sup>23</sup>

**Having looked closely at the definition of "interested person" that governs the Probate Code, the staff now recommends that the issue be substantially narrowed.**

There are over 150 Probate Code sections that refer to an interested person. The main thrust of those provisions seems to be to identify who has a sufficient interest in a decedent's trust or probate estate to warrant their participation or protection in various trust or probate proceedings.

There is no reason to believe that the beneficiary of an RTODD will always have an interest in a decedent's trust or probate estate, that would justify categorically treating a beneficiary as an interested person for the entire Probate Code. If, under a certain set of facts, the beneficiary of an RTODD actually has an interest in the decedent's trust or probate estate, the existing definition in Section 48 should be sufficient to cover that contingency. The staff sees no need for any adjustment to the general definition.

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23. Minutes (July 2016), p. 5.

That said, it might be helpful to add an express provision making clear that, for the purposes of any action that affects the validity or operation of an RTODD, the beneficiary of an RTODD is an interested person. That would help to counter any argument that an RTODD beneficiary is not interested in such actions, simply because the beneficiary has no interest in the decedent's trust or probate estate.

**If the Commission agrees, the staff will develop implementing language for presentation in a future memorandum.**

Respectfully submitted,

Brian Hebert  
Executive Director