

Memorandum 2019-46

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

In May, the Commission¹ approved a tentative recommendation regarding the revocable transfer on death deed (“RTODD”).² It was circulated for public comment, with a deadline of August 15, 2019.

The Commission has received three letters commenting on the tentative recommendation. The Commission also received an emailed response to a staff inquiry, from estate planning attorney Angela Petrusha. Those communications are attached as an exhibit, as follows:

- Exhibit p.*
- Craig Page, California Land Title Association (8/15/19)1
 - Erinn Ryberg, California Judges Association (9/3/19)6
 - Angela Petrusha, Eureka (9/3/19).....8
 - Executive Committee, Trusts and Estates Section, California
Lawyers Association (9/4/19).....9

Those communications are discussed below.

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

BACKGROUND

In 2006, the Commission recommended that California authorize the use of an RTODD to transfer real property on death outside of probate.³ Legislation to implement that recommendation was introduced in 2007 (AB 250 (DeVore)), 2009

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.

2. See *Revocable Transfer on Death Deed: Follow-Up Study* (May 2019) (hereafter “Tentative Recommendation”).

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

(AB 724 (DeVore)), and 2011 (AB 699 (Wagner)). None of those bills were enacted.

In 2015, legislation to implement most of the Commission's recommendation was again introduced. This time it was enacted.⁴ However, the final version of the bill included some important limitations on the effect of the law.

Most significantly, a "sunset" provision was added. It will repeal the statute by operation of law on January 1, 2021, unless the sunset date is modified or repealed before that date.⁵ The statute also requires the Commission to complete a follow-up study of the statute on or before January 1, 2020:

(a) The California Law Revision Commission shall study the effect of California's revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.

(b) In the study required by subdivision (a), the commission shall address all of the following:

(1) Whether the revocable transfer on death deed is working effectively.

(2) Whether the revocable transfer on death deed should be continued.

(3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.

(4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.

(5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.⁶

It is clear from the timing that the Commission's study was intended to provide the Legislature with the information it will need in deciding whether to adjust or delete the sunset provision before it operates.

In 2016, legislation was introduced to provide that a trust can be named as the beneficiary of an RTODD.⁷ However, before it was enacted, that bill was amended to remove those changes and replace them with language expanding

4. See 2015 Cal. Stat. ch. 293 (AB 139 (Gatto)).

5. Prob. Code § 5600(c).

6. 2015 Cal. Stat. ch. 293, § 21(a)-(b).

7. AB 1779 (Gatto) (2016).

the scope of the Commission's study. Specifically, the Commission was directed to consider:

Whether it is feasible and appropriate to expand the revocable transfer on death deed to include the following:

(A) The transfer of stock cooperatives or other common interest developments.

(B) Transfers to a trust or other legal entity.⁸

The Commission's tentative recommendation on *Revocable Transfer on Death Deed: Follow-Up Study* (May 2019) is the product of the assigned study. *In order to meet the statutory deadline for completion of the study, the Commission must approve a final recommendation by the end of this calendar year.*

This memorandum presents the Comments on the tentative recommendation that the Commission has received to date. It begins by providing a general overview of the positions taken by the organizations that have commented. It then discusses the comments that were made on specific issues.

PUBLIC COMMENT GENERALLY

Before turning to the individual comments that address specific issues, this part of the memorandum provides a general overview of the positions taken by the groups that commented.

California Land Title Association

Craig Page writes on behalf of the California Land Title Association ("CLTA"). He notes that "CLTA's member companies possess substantial experience in dealing with matters of trusts and estates as they relate to real property and are well-positioned to provide a 'real-world' perspective on non-probate transfers such as those attempted via the use of RTODDs."⁹

CLTA has long asserted that the RTODD will do more harm than good and should be repealed. That is still their position.¹⁰

If the RTODD statute were to remain in effect, CLTA opposes expanding its application. They do not believe that the law should be made applicable to property in a planned development or community apartment project.¹¹ Nor, in

8. 2016 Cal. Stat. ch. 179.

9. See Exhibit p. 1.

10. See Exhibit pp. 1-2, 5.

11. See Exhibit p. 2.

CLTA's view, should the law permit a trust or other legal entity to be named as the beneficiary of an RTODD.¹²

CLTA does not directly comment on any of the other reforms proposed by the Commission.

California Judges Association

Erinn Ryberg writes on behalf of the California Judges Association ("CJA"). She makes clear that the comments in her letter "are intended to assist with the recommendation at this stage and are not representative of a position on the proposal."¹³

CJA is generally concerned about the "appropriateness of the deed in the first place whereby any improper use of it may not be known by affected persons for many years and not until after the grantor passes."¹⁴

However, CJA suggests that it might be too early to evaluate whether the RTODD statute should be repealed. As an alternative, they suggest extending the sunset provision to a later date. That would allow more time to assess the effect of the RTODD statute.¹⁵

Finally, CJA notes four "additional concerns" on specific issues.¹⁶ Those concerns are discussed further below.

TEXCOM

The Executive Committee of the Trusts and Estates Section of the California Lawyers Association ("TEXCOM") is appreciative of the Commission's work, but remains concerned about the RTODD statute.¹⁷

TEXCOM also notes that any increase in the complexity and burden of the RTODD statute would be at odds with its original purpose of providing a simple process for transferring real property on death. In particular, TEXCOM is concerned about reforms that would impose burdens on beneficiaries.¹⁸

In addition, TEXCOM provides specific comments on three issues.¹⁹ They are discussed below.

12. See Exhibit pp. 2-4.

13. *Id.*

14. *Id.*

15. See Exhibit p. 6.

16. See Exhibit p. 7.

17. See Exhibit p. 9.

18. *Id.*

19. See Exhibit pp. 10-12.

ORDER OF PRESENTATION OF ISSUES

The weightiest question in this study is one that has not yet received much direct attention: whether to allow the sunset provision to operate on January 1, 2021, thereby repealing the RTODD statute by operation of law (RTODDs executed before that date would remain effective).

That question has not yet been directly addressed because its answer depends on other questions that the Commission needed to resolve first: whether the RTODD statute is causing serious problems in practice and whether those problems could be avoided or minimized through reform of the statute.

In order to answer those questions fully, the Commission needs to consider all of the other issues presented in this memorandum. For that reason, the question of how to handle the sunset provision is presented last.

UNDUE INFLUENCE AND FRAUD

The risk of an RTODD being misused through undue influence or fraud has been a persistent legislative and stakeholder concern. It is one of the specific topics that the Commission was directed to address in this study. The Commission was also directed to consider whether changes to the RTODD statute could help to reduce that risk.

There will always be bad actors who exert undue influence or perpetrate fraud by means of an estate planning instrument or deed. The fact that an RTODD can be misused, just as a will, trust, or grant deed can be misused, does not seem to be enough of a reason, by itself, to discontinue the RTODD.

Furthermore, the Commission did not find clear evidence that an RTODD is more prone to abuse than other kinds of instruments that can be used to transfer property on death.²⁰ One risk that is presented by an RTODD is the likelihood that it will be executed by a layperson, without the benefit of counsel. But that may also be true of a will, trust, or grant deed.

Nonetheless, the risk of fraud is a serious matter and reasonable steps should be taken to minimize that risk.

20. That conclusion was reached after reviewing case law in the 10 states that have authorized the use of an RTODD for the longest time. See Tentative Recommendation at 6-7.

Existing Fraud Protections

Under existing law, there is a presumption of undue influence or fraud when a donative instrument makes a gift to the person who drafted the instrument or to the donor's "care custodian."²¹ That presumption is expressly applicable to an RTODD.²² That law helps to guard against and cure some of the most likely ways in which an RTODD might be abused.

The law also grants any "interested person" standing to contest an RTODD, after the transferor's death.²³ There is no way to insert a no contest clause into an RTODD (because it can only be executed using a statutory form), so the barriers to contesting an RTODD are lower than those that exist for a will or trust that includes a no contest clause.

In addition, the RTODD statute requires that an RTODD be authenticated by a notary at the time of execution.²⁴ That should help to avoid blatant fraud involving forgery. It would also expose the execution process to scrutiny by a disinterested third party. In some cases, that might be enough to deter or unravel an attempt at fraud.

Proposed Fraud Protections

In the Tentative Recommendation, the Commission proposed two reforms to further protect against fraud:

- (1) Require an RTODD beneficiary to provide notice to a transferor's heirs, as a precondition to transferring title.²⁵ Both CJA and TEXCOM had concerns about this proposed reform. Their concerns are discussed below.
- (2) Expressly authorize the transferor's personal representative or an RTODD beneficiary to contest the *revocation* of an RTODD, but only after the transferor's death. This would fill an apparent gap in existing law, which does not seem to provide a sufficient remedy if a revocation is fraudulently executed. CJA commented on this proposal; their comment is discussed below.

In addition to discussing those two proposed reforms, the comments from TEXCOM and CJA prompted the staff to consider another possible way to

21. Section 21380.

22. Section 5690(a)(1).

23. Section 5690(a)(2).

24. Section 5624.

25. See Tentative Recommendation at 9, 41-42 (proposed Sections 5680, 5682).

reduce the risk of fraud — require that an RTODD be witnessed. That possibility is discussed first.

Witnessing

In expressing concern about the proposal that an RTODD beneficiary give notice to heirs, TEXCOM writes:

If the Commission believes that there is a risk of fraud associated with RTODDs, then it should address that problem directly by building in safeguards at the time of the transfer, not by imposing more onerous requirements on beneficiaries.²⁶

That comment led the staff to consider what kinds of fraud protections could be imposed “at the time of the transfer” (presumably this is the time when the RTODD is executed, rather than when it operates on the transferor’s death).

An answer to that question can perhaps be found in the following statement by CJA:

If [contest] litigation is not until after death of the grantor, the grantor will not then be available to testify relating to the circumstances surrounding execution of the deed. *Unlike with a will, there will not have been the required witnesses present and other formalities to assure this is what the grantor truly intended.*²⁷

When the Commission made its recommendation on which the RTODD statute is based, it had this to say about witnessing:

Although the revocable TOD deed is a will substitute, no state requires that it be witnessed. In California a witness is not required for any of the authorized types of nonprobate transfer — e.g., creation of a trust or designation of a pay on death beneficiary for an insurance policy, pension plan, securities account, or account in a financial institution. Many of the authorized nonprobate transfer instruments involve a third party intermediary that oversees the execution of the transfer. To some extent, acknowledgment before a notary serves a similar function with respect to a real property deed.²⁸

Given the concerns that were expressed about the adequacy of the fraud protections that are in effect at the time of execution of an RTODD, it might make sense for the Commission to reconsider its original position on witnessing.

26. See Exhibit p. 9.

27. See Exhibit p. 7 (emphasis added).

28. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 146-47 (2006) (footnote omitted).

There are at least three ways in which witnessing can serve as a check on fraud in executing a will:

- There is a statutory presumption of undue influence if a will makes a devise to a subscribing witness.²⁹ To avoid that presumption, the will must be witnessed by two disinterested witnesses. This helps to prevent a situation where the person who is perpetrating the fraud also serves as a validating witness.
- A will must be witnessed by two different people, both present at the same time, who witness the signing of the will and understand that it is the testator's will.³⁰ This requirement should make it more difficult to get away with fraud, as there will be two other people who observe the transferor's condition when the will is signed. Disinterested witnesses might raise questions if the transferor seems cowed or confused.
- A witness to a will is permitted to provide evidence as to the testator's mental state at the time of execution.³¹

The witnessing requirements are not foolproof. But witnessing should help to deter some fraud that might otherwise take place if the only safeguard is notarization. In that scenario, the bad actor only needs to worry about being challenged by the notary, who does not appear to have any legal duty to report suspected elder abuse.

For all of those reasons, the Commission should consider whether to recommend witnessing rules for RTODDs, similar to those that govern wills. If so, it might make sense to remove the existing notary acknowledgment requirement.

Notice to Heirs

As an added way of guarding against fraud, the proposed law would require the beneficiary of an RTODD to provide notice to the transferor's "heirs" as a precondition to the operation of the RTODD. The Tentative Recommendation explains the purpose of the proposed new requirement:

Under the Trust Law, when a trust becomes irrevocable because of the death of the trustor, the trustee must, among other things, provide written notice to the trustor's heirs. This alerts the heirs that the trust exists and will operate to dispose of the deceased trustor's property. If it appears that the trust is the product of fraud

29. Prob. Code § 6112.

30. Prob. Code § 6110.

31. Evid. Code § 870.

or undue influence, the heirs will have a timely opportunity to bring a contest.

The Commission recommends that the same approach be applied to RTODDs. In order to take title to property transferred by RTODD, the beneficiary should be required to give notice to the deceased transferor's heirs. The beneficiary should also be required to record an affidavit affirming that the required notice has been given. Until the affidavit is recorded, the law would not protect the interest of a bona fide purchaser or encumbrancer of the property and the time limit for filing a fully effective contest would not commence. These requirements would ensure that persons who have an interest in the deceased transferor's estate have a meaningful and timely opportunity to assess the validity of the RTODD and, if necessary, bring an action to contest it.³²

CJA and TEXCOM both expressed concern about the proposed notice requirement. Their concerns are discussed below.

Identifying Heirs

As the Commission has acknowledged, one of the practical problems that the notice requirement presents is the difficulty a beneficiary might face in identifying a transferor's heirs.³³ "Heir" is a defined term, that means "any person, including the surviving spouse, who is entitled to take property of the decedent by intestate succession under this code."³⁴ Consequently, determining heirs would require a beneficiary to be familiar with the rules of intestate succession and apply them to the transferor's family.

Both CJA and TEXCOM are concerned about this. CJA writes: "How is the recipient supposed to know who and where the heirs are?"³⁵ TEXCOM raises the same concern, asking "whether the beneficiary will be able to correctly identify the 'heirs' of the transferor."³⁶

The proposed legislation addresses this issue by borrowing rules from a similar provision of trust law. Specifically, proposed Section 5680(e)(3)-(4) provides:

(3) The beneficiary shall, for purposes of this subdivision, rely on any final judicial determination of heirship, known to the beneficiary, but the beneficiary shall have discretion to make a good faith determination by any reasonable means of the heirs of

32. Tentative Recommendation at 9 (footnotes omitted).

33. Memorandum 2019-28, p. 4.

34. Section 44.

35. See Exhibit p. 7.

36. See Exhibit p. 11.

the transferor in the absence of a final judicial determination of heirship known to the beneficiary.

(4) The beneficiary need not provide a copy of the notice to an heir who is (1) known to the beneficiary but who cannot be located by the beneficiary after reasonable diligence, or (2) unknown to the beneficiary.

Paragraph (3) gives the beneficiary two ways to identify the persons who are entitled to notice as heirs. The first is a safe harbor — if there has been a judicial determination of heirship, the beneficiary can rely on that determination. The second is a rule of reason and good faith — a beneficiary can make a “good faith determination by any reasonable means.” The only clearly improper way to determine heirs under that provision would be to behave unreasonably or in bad faith.

Paragraph (4) excuses the failure to provide notice to heirs that are unknown to the beneficiary or cannot be located. Again, this is a kind of reasonableness rule, excusing nondelivery in circumstances where the omission is reasonable.

In addition, the proposed law would add language to the statutory FAQ that accompanies an RTODD form, to suggest that beneficiaries obtain legal advice about how to identify beneficiaries. TEXCOM agrees with that proposal.³⁷

No commenter suggested any changes to the proposed rules on identifying heirs for purposes of giving notice.

Consequences of Defective Notice

TEXCOM expressed concern about the consequences of a failure to give the required notice:

[M]any on TEXCOM have raised concerns that a beneficiary may not correctly provide the required notice. For example, the beneficiary may omit an heir of the transferor from the notice or send the notice to the wrong address. The consequences of a defective notice regarding an RTODD are not clear. With respect to a Notification by Trustee, a trustee can be held personally liable for damages associated with the failure to provide notice or providing defective notice. (see Probate Code 16061.9) Perhaps similar consequences should exist for the beneficiary of an RTODD.³⁸

The provision referenced by TEXCOM, Section 16061.9, provides in relevant part:

37. *Id.*

38. See Exhibit p. 11.

A trustee who fails to serve the notification by trustee as required by Section 16061.7 on an heir who is not a beneficiary and whose identity is known to the trustee shall be responsible for all damages caused to the heir by the failure unless the trustee shows that the trustee made a reasonably diligent effort to comply with that section. For purposes of this subdivision, “reasonably diligent effort” means that the trustee has delivered notice pursuant to Section 1215 to the heir at the heir’s last address actually known to the trustee.³⁹

Incorporating such a provision into the proposed law would require some wordsmithing, but the language above is sufficient to illustrate the concept.

How would the Commission like to proceed on this point? Should the proposed law include such a provision? If the Commission decides against imposing such a penalty for a notice defect, is there some other consequence that would be appropriate? If no sanction is specified, would that fatally undermine the value of the notice requirement as a reform?

Form of Notice

If the notice requirement is included in a final recommendation, TEXCOM recommends that the statute specify the form that the notice must take:

[I]n order to ensure the notice to the heirs will adequately alert them of their right to contest the RTODD, as well as the consequences of failing to timely contest the RTODD, TEXCOM recommends that the statutes include a form for the notification. The notification should include language akin to Probate Code § 16061.7(g), such as information about the property (address, parcel number, etc.), the identity of the transferor, and the identity of the beneficiaries (with contact information). The notification should also include a warning like the one set forth in § 16061.7(h), which would alert the heir of the consequences of failing to timely bring an action to contest the RTODD.

The trust law provisions that TEXCOM references provide as follows:

(g) The notification by trustee shall contain the following information:

(1) The identity of the settlor or settlors of the trust and the date of execution of the trust instrument.

(2) The name, address, and telephone number of each trustee of the trust.

39. Section 16061.9(b).

(3) The address of the physical location where the principal place of administration of the trust is located, pursuant to Section 17002.

(4) Any additional information that may be expressly required by the terms of the trust instrument.

(5) A notification that the recipient is entitled, upon reasonable request to the trustee, to receive from the trustee a true and complete copy of the terms of the trust.

(h) If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows:

“You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is delivered to you during that 120-day period, whichever is later.”

A standardized form of notice could be required to ensure that certain useful information is provided to heirs. It might also reduce the scope for dispute over the adequacy of the notice, by providing a bright line rule as to its required content. **If the Commission decides to keep the notice requirement as part of its recommendation, it should consider specifying the content of the notice, as suggested by TEXCOM.** In that case, the staff will prepare implementing language as part of a draft recommendation, for presentation at the November meeting.

Recorded Affidavit

Another important part of the proposed notice requirement is language that conditions the protection of bona fide purchasers or encumbrancers on the beneficiary recording an affidavit attesting to having given the required notice to heirs.⁴⁰ Because a failure to record the affidavit would impair marketability, beneficiaries should have a strong incentive to prepare and record the required affidavit.

TEXCOM suggests that it would be beneficial for the statute to specify the form of the affidavit:

40. Proposed Section 5682(c).

The tentative recommendation provides that the beneficiary must record an affidavit stating that the notice requirements have been met. Again, TEXCOM recommends that the form for the affidavit required to be filed following the death of the RTODD transferor also be set forth in the statutes. Including forms for the notice and affidavit in the statutes would simplify the process and reduce mistakes.⁴¹

The staff sees merit in that suggestion. It is especially important that the validity of the recorded affidavit be determinable from its face, because title insurers will be evaluating the document in determining whether they can insure good title for BFPs. If the form of the affidavit is allowed to vary, it will be slightly more difficult to evaluate whether any particular affidavit is sufficient to meet the statute's requirements. If, instead, the RTODD statute were to mandate the content of the affidavit, it would be easier for title insurers to evaluate whether the beneficiary has complied with the requirement.

If the Commission agrees, the staff will prepare language as part of a draft recommendation, for presentation at the November meeting.

Should the Notice Requirement be Included in a Final Recommendation?

TEXCOM has expressed general concern about putting the burden of fraud avoidance on the beneficiary, rather than the transferor:

Since their enactment, the RTODD statutes have evolved into a much more complicated process. The proposed amendments in the tentative recommendation appear to make the process more burdensome, with those burdens falling on the RTODD beneficiary. Beneficiaries may feel compelled to hire a lawyer to navigate and advise them, which undermines the stated purpose of making RTODDs a simple process. If RTODDs are going to provide a simple, cost-effective way to transfer real property, then they should be simple and cost effective from both the transferor's side and the beneficiary's side. If the Commission believes that there is a risk of fraud associated with RTODDs, then it should address that problem directly by building in safeguards at the time of the transfer, not by imposing more onerous requirements on beneficiaries.⁴²

The last sentence of that passage was part of the staff's rationale for considering a witnessing requirement as an additional fraud prevention. The burden of finding two disinterested witnesses and gathering them together for a

41. See Exhibit p. 12.

42. See Exhibit p. 9.

signing would fall on the transferor rather than the beneficiary. It would also be a much simpler requirement to satisfy than the proposed notice to heirs. There would be no need to determine and track down heirs, mail statutory notices, and record an affidavit. You would simply need two people to sign the RTODD form. Compliance with that requirement would be determinable from the face of the form.

If the Commission decides to require witnessing as a form of fraud protection, it should consider whether that additional protection is sufficient by itself, or whether to require both safeguards — witnessing at execution and notice to heirs after the transferor’s death.

In addition, the Commission should consider generally whether the disadvantages of the proposed notice requirement, discussed above, would outweigh its benefits.

How would the Commission like to proceed?

Contest of Revocation

The second proposed new fraud protection would clearly establish standing to contest the revocation of an RTODD:

An action to contest the validity of a revocation of a revocable transfer on death deed may be filed by the transferor’s personal representative or a beneficiary of the revoked deed under Part 19 (commencing with Section 850) of Division 2. If the contest is successful, the court shall determine the appropriate remedy, which may include revival of the revoked deed. In deciding the remedy, the court shall attempt to effect the intentions of the transferor.⁴³

CJA asks whether the grounds for contesting the revocation of an RTODD should be specified and narrowed:

Should standing be given to the recipient to challenge the revocation on any basis? Perhaps the standing should be limited only to asserted fraud or undue influence. Otherwise, it’s not much of a revocable instrument.⁴⁴

The language of the proposed law authorizes specified persons to contest the “validity” of a revocation. Grounds for such a contest would include alleged fraud or undue influence, but those are not the only possible grounds for

43. Proposed Section 5690(a)(3).

44. See Exhibit p. 7.

invalidating an RTODD. An RTODD could also be contested on the grounds of transferor incapacity or defective execution. **The staff does not see a problem in permitting a contest on any of those grounds.**

CREDITOR PROTECTION

Overview

Under existing Section 5672, the beneficiary of an RTODD is personally liable for the deceased transferor's unsecured debts up to the value of the property received.

Under proposed Section 5676, if a probate is opened the beneficiary would be liable to the deceased transferor's estate for a share of the transferor's unsecured debts.⁴⁵

Any payment that the beneficiary makes pursuant to Section 5672 would be credited against any subsequent liability to the estate under Section 5676.⁴⁶ Conversely, payment of the amount owed to the estate under Section 5676 would preclude any liability under Section 5672.⁴⁷

CJA Concern

CJA believes that the proposed creditor protections are insufficient:

The attempts to protect creditors are insufficient. In probate cases, creditors are entitled to actual notice if known, and to publication if unknown. Will they require publication? Creditors have a strict statute of limitations. How is that going to work?⁴⁸

CJA is correct that creditors are entitled to notice when a decedent's estate is being administered.⁴⁹ The creditor notice requirement makes sense in that situation because a decedent's creditors have a very short time in which to make claims against the estate.⁵⁰ A claim that is not timely is barred.⁵¹ To the staff's knowledge, those claim procedures only apply in probate.

It is therefore important to assess the adequacy of the proposed law's treatment of creditors in two distinctly different scenarios:

45. Proposed Section 5676.

46. Proposed Section 5676(d).

47. Proposed Section 5674(a).

48. See Exhibit p. 7.

49. Sections 9050-9054.

50. Section 9100.

51. Section 9002(b).

- (1) *The decedent's estate is being administered.* In this case, the probate claims procedure would be in effect. All creditors would be entitled to notice and would be required to make timely claims against the estate. Once the creditor claim process has been completed, the RTODD beneficiary would be liable to the estate for a share of the amount that had been paid to creditors. **That seems unproblematic.**
- (2) *The decedent's estate is not being administered.* In this situation, creditors would not be entitled to notice, but **that seems appropriate because the short time lines and strict claim requirements of the probate process would not be in effect.** Instead, the decedent's creditors would have the same amount of time to file an action against the RTODD beneficiary that generally governs an action against a decedent, one year after the date of death.⁵²

Viewed from that perspective, the staff does not see why the proposed treatment of creditors would be insufficient.

Possible Expansion of Liability

Because of the substantive similarity between the RTODD creditor liability provisions and the provisions from which they were drawn (in the existing statutes that permit certain parts of a decedent's estate to be taken without administration), the Commission has been conducting parallel studies of both bodies of law. The study of the "disposition without administration" statutes has been conducted as Study L-4130.⁵³

There has been a fair amount of "cross-pollination" between the two studies, with ideas developed in one applied to the other. Most recently, the Commission approved a tentative recommendation on *Disposition of Estate Without Administration: Liability* (July 2019), which asked for public comment on the following questions:

[A]re the provisions that establish a transferee's personal liability for the unsecured debts of the decedent (Sections 13110 and 13204) understood to apply to funeral expenses, expenses of last

52. See Code Civ. Proc. § 366.2(a) ("If a person against whom an action may be brought on a liability of the person, whether arising in contract, tort, or otherwise, and whether accrued or not accrued, dies before the expiration of the applicable limitations period, and the cause of action survives, an action may be commenced within one year after the date of death, and the limitations period that would have been applicable does not apply."). See also Section 5672 ("Each beneficiary is personally liable to the extent provided in Section 5674 for the unsecured debts of the transferor. ... Section 366.2 of the Code of Civil Procedure applies in an action under this section.").

53. For the materials considered in that parallel study, see <<http://clrc.ca.gov/L4130.html>>.

illness, and wage claims? If not, should the provisions be broadened to include such obligations? Should the transferee's liability include expenses of administration and the family allowance?⁵⁴

When approving that tentative recommendation, the Commission also decided to consider the same questions in the study of RTODDs.⁵⁵

Specifically:

- Should an RTODD beneficiary be personally liable for the decedent's funeral expenses, expenses of last illness, wage claims, expenses of administration, and family allowance?
- If the decedent's estate is opened, should an RTODD beneficiary be liable to the estate for a share of the decedent's funeral expenses, expenses of last illness, wage claims, expenses of administration, and family allowance?

We do not yet have the benefit of stakeholder comment on those points. The staff's analysis is presented below.

General Cost of Administration

As a starting point, the staff does not believe that an RTODD beneficiary should be liable for a share of the general cost of administering the decedent's estate. One of the main purposes of the RTODD as an estate planning device is to pass property outside of probate, thereby avoiding paying a share of probate costs.

There is a narrow exception to that general principle in the proposed law: if probate is opened and the personal representative is required to calculate a RTODD beneficiary's share of the decedent's unsecured debts, the RTODD beneficiary would be required to pay the cost of making that calculation. In other words, the RTODD beneficiary would only pay any extraordinary costs that are attributable to the RTODD. The beneficiary would not be liable for a pro rata share of the general cost of administration.

The staff recommends sticking to that approach.

54. *Disposition of Estate Without Administration: Liability* at 3 (July 2019).

55. Minutes (July 2019), p. 5.

Family Allowance

The “family allowance” is a payment from the estate to the decedent’s surviving spouse, minor children, or dependent adult children for their “maintenance” during the administration of the estate.⁵⁶

The family allowance serves to keep the family afloat while waiting for the conclusion of probate and a final distribution of the decedent’s estate. As such, the family allowance is closely tied to the process of administration, and could be seen as a cost of that process. Perhaps for that reason, existing law provides that the family allowance shall be “paid by the estate as expenses of administration.”⁵⁷

The question of whether an RTODD beneficiary should be liable for a share of the family allowance depends on how one sees the family allowance. If the family allowance is seen as a debt that the decedent owes to surviving family members, then it might make sense to make the RTODD beneficiary liable for a share of that debt. But if instead the family allowance is seen as part of the cost of administration, then the RTODD should probably not be liable for a share of that cost. As discussed above, one of the purposes of the RTODD is to transfer property to the beneficiary without the cost of probate (other than any extraordinary costs caused by the RTODD itself). **The staff is inclined to see the family allowance as a cost of administration that should not be borne by an RTODD beneficiary, but the Commission may see it differently. How would the Commission like to proceed on that point?**

Funeral Expenses, Expenses of Last Illness, Wage Claims

Funeral expenses, expenses of last illness, and wage claims may arise after a person has died or has lost the capacity to contract. Aside from that fact, such obligations seem indistinguishable from other kinds of unsecured debts.

In fact, it is not clear whether such obligations would already be considered to be “unsecured debts of the transferor” for which an RTODD beneficiary is already liable under existing Section 5672. **The staff sees no good policy reason to treat such debts differently from all others. We recommend that the proposed law be revised to make clear that a beneficiary is liable for such debts.**

56. Section 6540

57. Section 6544.

APPLICATION TO CIDS

One of the questions that the Commission was specifically directed to answer in this study is “[w]hether it is feasible and appropriate to expand the revocable transfer on death deed to include ... transfer of stock cooperatives or other common interest developments.”⁵⁸

Part of the Commission’s answer to that question was a recommendation that the RTODD be expanded to apply to property in two kinds of common interest developments that are currently excluded from the law’s application: (1) a planned development and (2) a community apartment project. The Tentative Recommendation explains the Commission’s reasoning:

The Commission did not find any good policy reason to exclude community apartment projects or planned developments from the definition of “real property.” They are similar to condominiums in that all of those types of property are made up of separate interests (with appurtenant interests in common area) that can be transferred by deed. There do not appear to be any distinctions between those types of property that would present an obstacle to transfer by RTODD. The proposed legislation would revise the definition of “real property” to include community apartment projects and planned developments.⁵⁹

CLTA disagrees with that recommendation:

In its recommendation, the CLRC found that there are no good policy reasons to “exclude community apartment projects or planned developments” from transfer via RTODD. As we have pointed out in numerous letters and formal comments, we believe this determination ignores the fact that some contractual or legal restrictions and requirements — such as low-income requirements established at the local level — could lead to title problems or disputes that are best addressed through use of legal counsel and consideration of all issues flowing from the transfer of such properties.

The transfer of these types of property via RTODD is more problematic than conveyance via will or trust, wherein if a co-op board were to disapprove the beneficiary the estate or trustee would simply have to sell the property.

Assuming that RTODDs are intended to avoid conflicts and provide consumers benefits not provided for under current law, we strongly disagree with the CLRC’s determination that RTODDs be

58. 2016 Cal. Stat. ch. 179.

59. See Tentative Recommendation at 13, 29 (proposed Section 5610(a)(2)).

expanded to permit the transfer of ownership interests in community apartment projects or planned developments.⁶⁰

The staff sees two points that the Commission should bear in mind when considering that input:

- (1) *The concerns that CLTA raises also apply to a condominium project.* With respect to those concerns, the staff sees no reason to allow the use of the RTODD to transfer a condominium unit but disallow the transfer of a unit in a planned development or community apartment project. All of those types of developments could be subject to occupancy restrictions.⁶¹ In fact, it seems more likely that occupancy restriction would apply to a condominium project than a planned development consisting of detached single family homes.
- (2) *The staff sees no reason why CLTA's concerns are any different for an RTODD, as compared to a will or trust.* CLTA maintains that an occupancy restriction would be more problematic for an RTODD than for a will or trust because "the estate or trustee would simply have to sell the property."⁶² The staff sees no reason that an RTODD beneficiary could not handle it in the same way.

As the staff observed in a prior memorandum, this issue must occur frequently with respect to the inheritance of age-restricted property.⁶³ Although the staff could not find firm authority on how such matters are handled, it seems likely that the result would be fairly straightforward. An heir or devisee who receives age-restricted property may not occupy that property, but could still hold title and either rent the property to an age-eligible tenant or sell it. That overall assumption was affirmed by an attorney who specializes in real property law, Kelly G. Richardson.⁶⁴

Nonetheless, the fact that CLTA sees a problem makes it likely that title insurers will be reluctant to insure title to use-restricted property that is conveyed by RTODD. *That itself would be a problem.*

It might be helpful to address the issue directly. Section 5652(b) already provides that a limitation on the transferor's interest in transferred property remains enforceable after property is received by an RTODD beneficiary. That

60. See Exhibit p. 2.

61. See Tentative Recommendation at 13-14; Memorandum 2018-59, pp. 6-7.

62. See Exhibit p. 2.

63. See Memorandum 2018-59, pp. 8-9.

64. *Id.*

provision could be revised to make clear that a use restriction is not a bar to transfer of title:

5652. ...

(b) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor's interest that is of record at the transferor's death, including, but not limited to, a lien, encumbrance, easement, lease, or other instrument affecting the transferor's interest, whether recorded before or after recordation of the revocable transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed. An enforceable restriction on the use of property does not affect the transfer of title to the property by a revocable transfer on death deed.

Comment. ...

Subdivision (b) is amended to make clear that a use restriction does not affect the transfer of title by revocable transfer on death deed. A beneficiary who receives use-restricted property takes title subject to the restriction, but remains free to convey or encumber the property.

**Would the Commission like to add such language to the proposed law?
Should the matter be handled in some other way?**

TRUST AS BENEFICIARY

Another question that the Commission was specifically directed to answer in this study is “[w]hether it is feasible and appropriate to expand the revocable transfer on death deed to include ... transfers to a trust ...”⁶⁵

The Tentative Recommendation proposed that the law be revised to allow a trust to be named as beneficiary of an RTODD:

The Commission found good reasons to allow use of an RTODD to transfer property to a trust. The only apparent disadvantage is the possibility that the transferor will not name the trust with sufficient clarity and certainty, especially if the transferor is a layperson. The Commission recommends (1) that the law be revised to expressly permit a transferor to name a trust as a beneficiary of an RTODD, and (2) that the statutory form and “Common Questions” document be revised to provide guidance on how to do so.⁶⁶

65. 2016 Cal. Stat. ch. 179.

66. Tentative Recommendation at 5, 16-17.

CLTA, CJA, and TEXCOM all have concerns about that proposed change in the law. CLTA believes that the law should not permit the naming of a trust as beneficiary of an RTODD.⁶⁷ TEXCOM takes much the same position.⁶⁸

Naming Trust as Beneficiary is Contrary to Original Purpose of RTODD

CLTA maintains that representations to the Legislature about the value of the RTODD emphasized its character as a “cheap, simple, easy-to-understand and quick method of transferring real property that did not require involvement of an attorney” and presented the RTODD as “an *alternative* to the formation of a trust.”⁶⁹ They go on to suggest that using an RTODD as a means of transferring real property into an existing trust is “antithetical to the original stated purpose of RTODDs as an alternative to using trusts....”⁷⁰

The staff does not believe that allowing the RTODD to name a trust as beneficiary in any way negates the value of the RTODD as a simple and inexpensive will substitute. Instead, adding the option of naming a trust as beneficiary would expand the utility of the RTODD, by allowing it to be used for other helpful purposes as well.

No Good Reason to Name Trust as Beneficiary

The Tentative Recommendation points out two scenarios in which a person might benefit from using an RTODD to transfer real property to a trust:

- A person may wish to transfer property to an irrevocable special needs trust on their death, while maintaining ownership and control of the property during life.
- Some lenders require that property be transferred out of an inter vivos revocable trust when the property is refinanced. If the owner forgets to convey the property back into the trust after the refinance is completed, there could be problems with the operation of the trust on death. The use of an RTODD to transfer property into the trust on death provides a backstop to avoid such problems. Even if the owner forgets to reconvey the property to the trust, the RTODD would effect the transfer on the owner’s death.⁷¹

As discussed below, CLTA questions the validity of both of those rationales.

67. See Exhibit pp. 1-5.

68. See Exhibit p. 10.

69. See Exhibit p. 2 (emphasis in original).

70. See Exhibit p. 3.

71. Tentative Recommendation at 16 (footnotes omitted).

Transfer to Irrevocable Special Needs Trust

As noted above, the Commission concluded that it would be helpful to be able to use an RTODD to transfer property on the owner's death to an irrevocable "special needs trust."

The principal purpose of a special needs trust (SNT) is to preserve public benefits for disabled or aged beneficiaries. The benefits at issue are principally benefits that are "asset sensitive" — that is, benefits that require the recipient to have resources and income below a certain level to qualify.⁷²

...

An inter vivos trust may receive gifts from several donors. For example, parents may establish an inter vivos SNT for a child with a disability and then notify the grandparents of its existence. If the grandparents wish to leave assets to the person with a disability, the inter vivos SNT can be used to consolidate asset management in a single entity, preserve public benefits, and alleviate the need for the grandparents to establish a testamentary SNT.⁷³

CLTA disagrees with the Commission's observations about SNTs:

The CLRC reasoning regarding behind using the RTODD for "special needs trusts" doesn't hold water:

The terms of an "irrevocable special needs trust" can be written so that the settlor/grantor can use the real property for the length of his or her lifetime before it reverts to the special needs trust upon his or her death. It seems totally illogical for a special needs trust to be created in such a way that this condition is not addressed by the attorney/estate planner when the trust is created without it being malpractice on the part of the attorney creating such a trust.⁷⁴

The staff had not previously heard that an irrevocable SNT could be drafted so as to allow the settlor free use of the trust corpus during the settlor's life. The staff could not find any discussion of that possibility in a CEB treatise chapter on SNTs.⁷⁵

It is possible that CLTA is thinking of a scenario where a settlor creates two interconnected trusts, the first a revocable intervivos trust and the second an irrevocable SNT. The bulk of the settlor's property would be transferred to the revocable trust where it would remain available for the settlor's use. On the

72. Drafting Irrevocable Trusts § 13.1 (Cal. Cont. Ed. Bar, 2017).

73. *Id.* at § 13.4.

74. See Exhibit p. 4 (emphasis in original).

75. Drafting Irrevocable Trusts §§ 13.1-13.54 (Cal. Cont. Ed. Bar, 2017).

settlor's death, the first trust would transfer the property to the second trust, the irrevocable SNT.

To obtain more information on this issue, the staff reached out to Angela Petrusha, an estate planning attorney who has been providing input in this study and who first made the point that it would be helpful to use an RTODD to transfer property to an SNT. She confirmed that it might be possible to achieve the result described by CLTA through the use of two trusts, but had not heard of anyone placing significant property in an SNT while still alive. She said "this is not something I've seen done and I would caution anyone about doing this, as it could trigger unexpected results."⁷⁶

While the two-trust approach might work for the original settlor, it would probably not be feasible in a situation where an SNT is set up to allow for multiple third-party funders. One example of this is the scenario mentioned in the treatise passage quoted above, the parent of a child with a disability sets up an SNT, which the child's grandparents will fund through at-death transfers.

Ms. Petrusha provides another example of this kind of third-party funding:

For example, sometimes (and I've seen this happen more than once) the parents of a child with disabilities are divorced, and one parent creates a SNT for the child's benefit. The other parent wants to direct that same child's inheritance into the existing SNT through his/her Will or Trust, rather than create (and incur the expense of creating) a separate SNT for the sole purpose of receiving the real property.⁷⁷

To avoid losing lifetime control and use of their property in that kind of situation, the third-party funders would use at-death transfers to convey their property to the SNT. Under existing law, that could be done by will or trust. **The staff sees no reason to preclude the use of an RTODD to achieve the same result.**

CLTA also makes a related point:

[W]hy not address the issue with the execution and recordation of a new grant deed on the real property that vests title in the irrevocable special needs trust as beneficiary right before death? If the settlor/grantee has the presence of mind to have an RTODD recorded right before he or she dies, why wouldn't they have the presence of mind to record a new grant deed that vests title in the special needs trust with which they are familiar?

^{76.} *Id.*

^{77.} *Id.*

If the staff understands correctly, CLTA is suggesting that a person who wishes to retain ownership and control of real property during life but transfer it to an SNT on their death need only wait until “right before death” to execute a grant deed that effects the transfer. CLTA suggests that this would be as practicable as the transferor recording an RTODD “right before he or she dies.”

No one has suggested that a transferor wait to execute and record an RTODD until shortly before death. That would almost always be impossible. The value of an RTODD is that it can be executed long before death and will not have any effect on the transferor’s ownership of the described property until the transferor dies.

Transfer to Revocable Intervivos Trust after Refinancing

CLTA also disputes the Tentative Recommendation’s second example of a situation where it would be valuable to use an RTODD to convey property to a trust on the transferor’s death:

If a person refinancing forgets to have the real property vested in the trust after the refinancing, why is a RTODD easier to remember than executing a new grant deed to accomplish the same task?

On page 16 of the CLRC’s tentative recommendation, in discussing the expansion of the RTODD to name trusts as beneficiaries, the argument made is that sometimes settlors who have created a trust involving real property will refinance the real property and often find the lender requires the loan to be in the name of the settlor. This is, in fact, true.

In order to make sure the real property remains clearly in the trust, the settlor must remember to subsequently record a grant deed that once again vests the real property in the trust. For example, to “Susan Smith, trustee, of the Smith Family Trust.”

However, why would it be easier for a settlor to remember to use a RTODD rather than a grant deed to make sure the vesting is corrected? If they can’t remember to execute and record a new grant deed, are they now somehow going to remember to use an RTODD? Is there something special about RTODDs that makes them easier to remember?

If a grantor/settlor on his or her death bed suddenly realizes that real property within their control must be added to their trust, there is already in place a document to quickly, easily, and cheaply accomplish this goal: the grant deed.⁷⁸

78. See Exhibit p. 4.

It seems that the Commission's point was not stated clearly enough. The Commission was not suggesting that a transferor would remember the need to reconvey property to a trust after a refinance and then create an RTODD to effect the conveyance. The point was that an RTODD could be created *at the same time that the inter vivos trust is created*. If the property were later removed from the corpus of the trust, the RTODD would serve to return the property to the trust on the transferor's death. With that backstop in place, the property owner would not need to remember to reconvey the property to the trust. The already-executed RTODD would take care of it.

Risk of Error in Naming Trustee

As the Tentative Recommendation points out, the main disadvantage of allowing an RTODD to name a trust as beneficiary is the increased risk of error involved in correctly naming a trust. The Commission considered how to minimize that risk and recommended as follows:

Those kinds of problems could be minimized by adding instructions to the RTODD form and "Common Questions" to require that the transferor state the name of the trustee, the name of the trust, and the date of execution of the trust. That should provide sufficient specificity to avoid any ambiguity about the identity of the trust that is being named as beneficiary.⁷⁹

Public Comment

All three of the organizations that commented have concerns about the risk of error if the law were to permit a trust to be named as a beneficiary.

CJA writes:

Naming a trust as a beneficiary may not be the best idea. It is our understanding of current law that a deed that names a trust, but does not name a trustee, is invalid. How would this deed be different? What do title insurers say about that?⁸⁰

CLTA makes much of the fact that the Commission acknowledged the possibility of an increased risk of error, but it does not comment specifically on the language that the Commission proposed to reduce that risk.⁸¹

TEXCOM writes:

79. See Tentative Recommendation at 17, 31, 34-35.

80. See Exhibit p. 7.

81. See Exhibit p. 3.

Mistakes in Naming, Subsequent Amendments or Revocation. Despite the proposed instructions, TEXCOM remains concerned that individuals may make mistakes in naming a trust as a beneficiary of an RTODD. It is not clear what the consequences of the mistake may be. Would the deed fail? In addition, trusts are often amendable and revocable. If an RTODD names a trust as beneficiary, would the property pass to the trust on the terms that existed on the date of the RTODD or as of the date of the transferor's death. What if the trust is revoked entirely? Will the deed fail?⁸²

Discussion

The proposed law would address the risk of error in naming a trustee as beneficiary by trying to *avoid* such errors. It would provide guidance on the face of the form and in the FAQ to help transferors understand how they are to name trusts. Even with the guidance recommended by the Commission, the organizations that commented on the issue remain concerned.

Perhaps it would be helpful to come at the issue from another side, by addressing the *result* if there is an error in designating a trust as beneficiary.

The staff believes that such an error should not wholly invalidate an RTODD. Instead, the beneficiary should be able to obtain judicial review to construe the meaning of the deed. After such review, the deed should be given its intended effect. Only if the intended beneficiary cannot be determined by the court should the deed fail.

That appears to be consistent with the general law on deeds:

An unintentional error in the name of the grantee does not prevent a transfer of the property to the intended party. ... The deed must describe the grantee with sufficient clarity and certainty that he or she can be identified, and extrinsic evidence is admissible to prove the identity of the parties mentioned in the deed, except when the identity is inherently uncertain and indeterminate by the terms of the document.⁸³

Even a defect in describing the property affected by a deed can be cured through judicial construction:

A deed will be sustained if it is possible from the whole description to ascertain and identify the land conveyed with reasonable certainty. No particular form of description is required....

82. See Exhibit p. 10.

83. Miller and Starr, California Real Estate § 8.26 at 66-67 (2015) (footnotes omitted).

A conveyance is void when the description in the deed is omitted or is so vague as not to be capable of being made certain.... However, mere *ambiguity* or uncertainty will not defeat the effectiveness of the conveyance if it can be cured by extrinsic evidence.⁸⁴

General policy favors upholding an ambiguous deed if possible:

The tendency of the decisions is to uphold conveyances regardless of technical rules of construction. The interpretation of a deed must not only be reasonable but must also give effect to the instrument rather than defeat it, if possible. Thus it is presumed, unless the contrary appears, that a grantor intends by his or her deed to make a valid grant of some property. However, the intention of the parties must be lawful, and the construction may not be contrary to some positive rule of law.⁸⁵

There might be value in codifying the broad principle discussed above, along these lines:

An error or ambiguity in describing property or designating a beneficiary does not invalidate a revocable transfer on death deed if the transferor's intention can be determined by a court. The general law that governs judicial construction or reformation of an error or ambiguity in a deed applies to a revocable transfer on death deed.

Such language might help to avoid any question about whether the existing law on judicial construction of deeds also applies to an RTODD.

Relying on the courts to cure a defect in an RTODD is not ideal. It would result in the beneficiary paying litigation costs, despite the transferor's desire that the transfer be free of such costs. But it would be better to pay such costs than have the gift go to someone other than the intended recipient (which could occur if the RTODD were to simply fail). This is particularly true given that the gift at issue is real property. The high value of such property would make it easier to accept the added cost of receiving the gift.

Should a provision of the type suggested above be added to the proposed law?

Separate and Community Property

In its letter, TEXCOM points out a possible unintended consequence of naming a trust as beneficiary of an RTODD:

84. *Id.* § 861 at 171-73 (emphasis in original) (footnotes omitted).

85. 26 Cal. Jur. 3d *Deeds* § 162 (2018) (footnotes omitted).

Ambiguities Regarding Separate Property and Community Property. In addition, naming a trust as beneficiary of an RTODD may raise issues regarding the community property or separate property character of the real property transferred. For example, if a parent executes an RTODD in favor of their son and daughter-in-law's revocable living trust, when the property passes from the trust upon the death of the parent is it the separate property of the son or community property of both the son and daughter-in-law? If the parent had named the son as the beneficiary of the RTODD, the property would be his separate property. Transferors may not understand or appreciate the difference without consulting legal counsel.⁸⁶

The scenario that TEXCOM describes seems possible, **but the staff is not sure that it would be a common enough occurrence to cause significant problems.**

It seems more likely that a transferor who wishes to use an RTODD to transfer property to a son on death *would simply name the son as the beneficiary of the RTODD.* Why would the transferor go to the added difficulty of naming the son's trust as beneficiary, unless the transferor intends that the property be subject to the terms of the trust (e.g., joint ownership between the son and son's spouse)?

Class Gifts and Contingent Beneficiaries

TEXCOM points out that the use of an RTODD to transfer property to a trust could result in the application of more complicated disposition rules than are permitted for an RTODD:

Class Gifts and Contingent Beneficiaries. The RTODD statutes impose many limitations designed to minimize the risk of ambiguity or mistake (i.e., no class gifts, no unequal gifts, no conditional gifts, etc.). However, a transferor could easily circumvent those limitations by naming a trust that does all of those things as the beneficiary of an RTODD.⁸⁷

The staff does not see that as a problem. When the Legislature decided that an RTODD should be limited to one simple form of transfer, the point was to keep the RTODD itself simple, to minimize the risk of execution error.

If an RTODD were to name a trust as beneficiary, the complexity of the trust would have no connection to the complexity of the RTODD. An RTODD that transfers property to a very complex trust would be no more difficult to execute

86. See Exhibit p. 10.

87. *Id.*

than an RTODD that transfers property to a very simple trust. The complexity is in the trust, not the RTODD.

The staff does not believe that the Legislature’s goal of keeping RTODDs simple would in any way be undermined by allowing them to be used to transfer property to complicated trusts.

If anything, TEXCOM has pointed out another benefit of naming a trust as beneficiary of an RTODD. It would allow for a more complicated disposition of the property (pursuant to the terms of the trust) than the RTODD statute would otherwise permit.

Overall Decision

With all of the foregoing in mind, the Commission needs to decide whether to recommend that the RTODD statute allow a trust to be named as beneficiary.

REVOCATION

TEXCOM points out an existing timing rule that it finds problematic:

TEXCOM has previously raised the issue that there is an inconsistency between Prob. Code § 5628 (which provides a subsequent RTODD revokes a prior RTODD and can be recorded after death) and Prob. Code § 5632 (which requires a revocation of an RTODD be recorded prior to transferor’s death). We believe that this issue should be addressed and that the Commission should consider allowing the revocation of an RTODD to be recorded after the transferor’s death.⁸⁸

TEXCOM’s description of the law is correct. Direct revocation of an RTODD by execution of a revocation form requires recordation of the form “before the transferor’s death.”⁸⁹ By contrast, if a transferor indirectly revokes an RTODD by recording a new RTODD, the new instrument need only be recorded within 60 days of execution. There is no express requirement that a new deed be recorded before the transferor’s death.

TEXCOM urges the Commission to resolve that inconsistent treatment by making the timing rule for a form revocation the same as the rule that governs

88. See Exhibit p. 10.

89. Section 5632(a).

revocation by execution of a new RTODD — in both cases, recordation after the transferor’s death should be permitted.

In its original recommendation on RTODDs, the Commission recommended that recordation before the transferor’s death should always be required (both when executing a new deed or executing a form revocation).⁹⁰ The Commission explained: “If the deed is not recorded during the transferor’s life, there may be no assurance that the transferor intended to go through with the transfer.”⁹¹

This is a point on which the Legislature chose not to adopt the Commission’s recommendation. It replaced the Commission’s proposed rule, requiring recordation of an RTODD before the transferor’s death, with the current rule — an RTODD must be recorded “on or before 60 days after the date it was executed.”⁹² However, the Legislature did not make a parallel change to the provision on recordation of a revocation form. This created the inconsistency that TEXCOM has noted.

As a matter of policy, the staff agrees that there is no obvious reason for the timing rules to be different when revoking an RTODD directly or indirectly. Given the Legislature’s clear policy choice that recordation of an RTODD should be permitted after the transferor’s death (provided that it occurs within 60 days of execution of the RTODD), it would seem that the same policy should govern recordation of a revocation form.

The staff recommends that the timing rules be made consistent, in the way that TEXCOM has proposed. If the Commission agrees, Section 5632(a) could be revised as follows:

- (a) An instrument revoking a revocable transfer on death deed shall be executed and recorded ~~before the transferor’s death~~ in the same manner as execution and recordation of a revocable transfer on death deed.

That drafting approach would ensure that the process for execution of a revocation form remains in sync with the process for execution of a new RTODD, even if the latter were to change.

90. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 149, 163 (2006).

91. *Id.* at 149.

92. Section 5626(a).

SUNSET PROVISION

As noted at the outset of this memorandum, the existing RTODD statute includes a sunset provision that will repeal the statute, by operation of law, on January 1, 2021. Perhaps the most important question presented in this study is whether to recommend that the sunset provision be repealed or have its date extended, before it operates to repeal the statute.

As explained above, this issue is being presented last so that the Commission will have the benefit of all of the preceding comment and discussion in weighing whether the advantages of the RTODD outweigh its disadvantages.

The Tentative Recommendation did not reach any conclusion on that overarching question. However, it did report that the Commission had not found evidence that an RTODD is more prone to mistake or fraud than any other kind of estate planning instrument or deed. To the contrary, the RTODD includes safeguards (i.e., the FAQ and fixed mandatory form) that might make it less prone to error and abuse than other existing devices (e.g., a grant deed).⁹³

CLTA disagrees with that assessment:

For many years, CLTA has consistently viewed the implementation of RTODDs in California with concern given that there is not always a simple fix for the transfer of real property. While we understand the desired goal of a cost-effective, uncomplicated mechanism of property transfer, we maintain that RTODDs, as enacted and proposed to be amended, would continue to pose substantial risks for transferors and beneficiaries, as they could:

- a) Potentially encourage the exploitation of at-risk and unsophisticated individuals (primarily seniors and ESL consumers) through fraud and abuse;
- b) Result in unmarketable titles to real property and create curative work to remove the clouds on title of real property attempted to be transferred via RTODD;
- c) Trigger lengthy litigation required to determine the validity of RTODDs, often in a probate court arena;
- d) Require that real property using RTODDs be forced into costly and time-consuming probate actions to resolve estate and title issues – an ironic result given that RTODDs were pitched as being a bullet-proof alternative to traditional estate planning, and;
- e) Often result in the unexpected and unwelcome liability on beneficiaries of the property conveyed by the RTODD because

93. Tentative Recommendation at 3.

debts owed to creditors and the decedent's estate were missed through the simple execution of the RTODD.

The above-mentioned risks mostly arise from the use of RTODDs by consumers *without benefit of counsel*.

The transfer and vesting of title has many legal consequences and filling out and executing the RTODD forms, which appear "simple" on their face, can often lull a consumer into filling out and recording the RTODD without fully understanding the consequences of their use. Such misunderstandings can often result in undesirable consequences for the intended beneficiaries and surviving family members. Furthermore, the lack of an unbiased "check", in the form of probate administration, on the validity of the instruments heightens concerns with respect to fraud and undue influence.⁹⁴

CLTA concludes:

CLTA agrees in principle with the CLRC's goal of a simplified estate planning process. However, despite efforts at reform, we continue to view the RTODD as a well-intended tool that nevertheless exposes transferors and beneficiaries to many unintended – and undesirable – consequences. Given that many individuals who utilize an RTODD are unlikely to be, or even assisted by, a capable estate attorney, we think it likely that an elevated risk of error is inherent to the process, notwithstanding the already discussed potential for fraud and abuse.

As evidenced by the CLRC's continued efforts to clarify these instruments, such as by adding more guidance to the "Common Questions" portion of the RTODD, it is becoming increasingly clear that RTODDs offer a method of transferring property that is neither simple or straightforward, and that their continued use puts consumers at risk. Therefore, we continue to assert that individuals would be better served by seeking the services of the state's many qualified estate attorneys whom understand the other, better options for estate planning.

For the aforementioned reasons, we do not believe that the RTODD statute should continue in effect after the existing law is repealed by its own terms on January 1, 2021.⁹⁵

TEXCOM also has doubts about the overall benefit of the RTODD:

TEXCOM continues to have reservations regarding the RTODD statutes and their efficacy, and believes that the potential issues raised by RTODDs outweigh the benefits.⁹⁶

94. See Exhibit pp. 1-2 (emphasis in original).

95. See Exhibit p. 5.

96. See Exhibit p. 9.

CJA writes that it “remains concerned about the appropriateness of this type of deed” because any improper use of an RTODD might not be discovered for many years and not until after the transferor’s death (when the transferor would no longer be available to testify as to the transferor’s intentions).⁹⁷

CJA then makes an interesting observation, noting that it “may still be premature to decide whether to make this law permanent. Consideration might be given to recommending a further sunset date.”⁹⁸

CJA notes that the Commission found no California appellate law involving RTODDs and that this is unsurprising because of the likely “time lag”⁹⁹ between the 2015 enactment of the RTODD statute, the use of an RTODD, the operation of an RTODD on the transferor’s death, and any litigation concerning the RTODD’s validity or effect.

TEXCOM made a similar point: “We do not believe that RTODDs have existed in California long enough to fully evaluate the consequences (specifically, issues arising post-death).”¹⁰⁰

The staff made the same observation in the first memorandum in this study:

The staff foresees considerable difficulty in acquiring the information required to reliably answer the empirical questions posed in this study. The main problem is one of timing. The new law sets a four-year deadline for completion of the study. That may not be enough time for problems with the RTODD to arise and become publicly known.

...

It is unlikely that a person will execute an RTODD, die, and have an interested person file a contest, which is then fully litigated and appealed, *all within a span of four years*. The staff will look for such cases, but it is improbable that any will be found.¹⁰¹

All of that underscores an important point that should be kept in mind. *The decision regarding the sunset provision need not be a binary choice between repeal of the statute and its unlimited continuation.* There is a third possibility — extend the sunset date. That would allow more time to accumulate real-world experience with the RTODD before making a final decision about its overall benefit. As noted by both CJA and TEXCOM, the short time since enactment of the 2015

97. See Exhibit p. 6.

98. *Id.*

99. *Id.*

100. See Exhibit p. 9.

101. Memorandum 2015-53, p. 3 (emphasis in original).

statute has not provided much of an opportunity for the ripening of any post-death problems related to the RTODD.

If the Commission were to recommend an extension of the sunset date, it should probably also recommend that the Commission conduct a second follow-up study, with a due date prior to the new sunset date.

The Commission would also need to decide how long of an extension to recommend. To be meaningful, the staff recommends a period of at least five years. However, that period might also be too short for problems to fully mature. A 10-year extension would be more likely to provide a sufficient time for meaningful evaluation.

How would the Commission like to address the sunset provision:

- Repeal the sunset provision, providing for unlimited continuation of the statute?
- Revise the sunset provision to extend the repeal date? If so, by what time period? Should the Commission be required to conduct a second follow-up study?
- Allow the sunset provision to operate, repealing the RTODD statute by operation of law on January 1, 2021?

CONCLUSION

The Commission needs to decide all of the following questions before the staff can prepare a draft final recommendation:

- Should the RTODD statute be revised to require witnessing, similar to the witnessing requirements that apply to wills? If so, should the notary acknowledgement requirement be deleted?
- Should the proposed rule requiring a beneficiary to give notice to a transferor's heirs be retained in the proposed law? If so, should there be a sanction for failure to provide the required notice (similar to Section 16061.9(b))? Should the content of the notice and related affidavit be mandated by statute?
- Should the grounds for contesting the validity of a revocation be specified and narrowed?
- Should the proposed law require any kind of notice to creditors?
- Should a beneficiary be liable for the decedent's funeral expenses, expenses of last illness, and wage claims?
- Should a beneficiary be liable for a share of the general costs of administering the decedent's estate? For a family allowance?

- Should the RTODD be made applicable to property in a planned development or community apartment project?
- Should language be added to the RTODD statute to make clear that a beneficiary who receives use-restricted property is not barred from selling or encumbering the property?
- Should the RTODD statute permit a trust to be named as beneficiary?
- Should language be added to the RTODD statute to make clear that (1) an error or ambiguity in an RTODD does not invalidate the RTODD if a court can determine the transferor's intention, and (2) the general law on judicial construction and reformation of deeds applies to an RTODD?
- Should the RTODD statute be revised to eliminate the requirement that a revocation form be recorded before the transferor's death?
- Finally, should the RTODD statute be allowed to sunset? If not, should the sunset date be deleted or extended? If extended, by what time period? Should the Commission conduct a second follow-up study?

Once the Commission has decided those matters, the staff will prepare a draft final recommendation that implements the Commission's decisions. That draft will be presented for Commission consideration at its November meeting. That will be the last chance that the Commission has to approve a final recommendation before its statutory deadline of January 1, 2020, so it will be important that the Commission achieve a quorum in November. If any Commissioner foresees the possibility of being unable to attend in November, that should be raised at the September meeting, so that the Commission can consider its alternatives.

Respectfully submitted,

Brian Hebert
Executive Director



August 15, 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: Tentative Recommendation
(Revocable Transfer on Death Deed: Follow-Up Study, May 2019)

Dear Mr. Hebert:

On behalf of the California Land Title Association ("CLTA"), I'm writing in response to the California Law Revision Commission's ("CLRC") solicitation of public comment on its tentative recommendation relating to revocable transfer on death deeds ("RTODDs"), dated May 2019. CLTA's member companies possess substantial experience in dealing with matters of trusts and estates as they relate to real property and are well-positioned to provide a "real-world" perspective on non-probate transfers such as those attempted via the use of RTODDs.

In examining the CLRC's tentative recommendation, which focused on a number of aspects related to RTODDs as discussed at length below, we disagree with a number of the CLRC's findings, especially those relating to the suggested expansion of the RTODDs for other forms of transfer, such as those involving trusts or other legal entities.

Contrary to the CLRC's determinations, CLTA continues to be significantly concerned that RTODDs are, and will remain, prime candidates for misuse, misunderstanding, and abuse, and that their expansion to transfers involving trusts or other legal entities is ill-advised and will cause more harm than good to California consumers.

Therefore, we do not believe that the RTODD statute should continue in effect after the existing law is repealed by its own terms on January 1, 2021.

We remain concerned that RTODDs are and will continue to be prime candidates for misuse, misunderstanding, and abuse:

For many years, CLTA has consistently viewed the implementation of RTODDs in California with concern given that there is not always a simple fix for the transfer of real property. While we understand the desired goal of a cost-effective, uncomplicated mechanism of property transfer, we maintain that RTODDs, as enacted and proposed to be amended, would continue to pose substantial risks for transferors and beneficiaries, as they could:

- a) Potentially encourage the exploitation of at-risk and unsophisticated individuals (primarily seniors and ESL consumers) through fraud and abuse;

- b) Result in unmarketable titles to real property and create curative work to remove the clouds on title of real property attempted to be transferred via RTODD;
- c) Trigger lengthy litigation required to determine the validity of RTODDs, often in a probate court arena;
- d) Require that real property using RTODDs be forced into costly and time-consuming probate actions to resolve estate and title issues – an ironic result given that RTODDs were pitched as being a bullet-proof alternative to traditional estate planning, and;
- e) Often result in the unexpected and unwelcome liability on beneficiaries of the property conveyed by the RTODD because debts owed to creditors and the decedent's estate were missed through the simple execution of the RTODD.

The above-mentioned risks mostly arise from the use of RTODDs by consumers *without benefit of counsel*.

The transfer and vesting of title has many legal consequences and filling out and executing the RTODD forms, which appear “simple” on their face, can often lull a consumer into filling out and recording the RTODD without fully understanding the consequences of their use. Such misunderstandings can often result in undesirable consequences for the intended beneficiaries and surviving family members. Furthermore, the lack of an unbiased “check”, in the form of probate administration, on the validity of the instruments heightens concerns with respect to fraud and undue influence.

Allowing for the transfer of certain types of community interest developments via RTODD could lead to title conflicts or disputes:

In its recommendation, the CLRC found that there are no good policy reasons to “exclude community apartment projects or planned developments” from transfer via RTODD. As we have pointed out in numerous letters and formal comments, we believe this determination ignores the fact that some contractual or legal restrictions and requirements—such as low-income requirements established at the local level—could lead to title problems or disputes that are best addressed through use of legal counsel and consideration of all issues flowing from the transfer of such properties.

The transfer of these types of property via RTODD is more problematic than conveyance via will or trust, wherein if a co-op board were to disapprove the beneficiary the estate or trustee would simply have to sell the property.

Assuming that RTODDs are intended to avoid conflicts and provide consumers benefits not provided for under current law, we strongly disagree with the CLRC's determination that RTODDs be expanded to permit the transfer of ownership interests in community apartment projects or planned developments.

Allowing a trust to be named as beneficiary of a RTODD works counter to the original intent of RTODDs:

When the RTODD law was originally pitched to the State Legislature, it was described as a cheap, simple, easy-to-understand, and quick method of transferring real property that did not require involvement of an attorney. In fact, during public testimony the RTODD was marketed as an *alternative* to the formation of a trust.

We believe the proposal related to using the RTODD as a conduit for putting real property into a preexisting trust is (a) antithetical to the original stated purpose of RTODDs as an alternative to using trusts, (b) will create ambiguities, not clarity as to the intent of the grantor using the RTODD, and (c) may require the use of the probate court to resolve problems, once again.

The CLRC already has stated in its own analysis why the expansion of RTODDs to trusts is a very bad idea for California consumers:

On page 16 of the CLRC's tentative recommendation, regarding potential risks of expanding the RTODDs, the following is stated:

The only apparent reason to prevent the use of an RTODD to transfer property to a trust is that it would *complicate* the execution of an RTODD in a way that could *make mistakes more likely*." (Emphasis added)

Why would the CLRC and State Legislature want to (a) complicate the execution of RTODDs, and (b) make mistakes more likely if people use them for conveying into trusts?

This statement clearly falls into the category of faint praise and offers poor justification for expansion of the RTODD to trusts. Take for instance that, when considered in the form of a rhetorical question, the statement would read:

Is it a good idea to expand RTODDs to transfer property to a trust so that it complicates the execution of the RTODD in a way that would make mistakes more likely?

CLTA thinks the answer is clearly "no."

If a trust already exists, why not continue to use it for dealing with newly required real property?

The CLRC recommendation to expand the use of the RTODD to conveying real property into a trust assumes that a preexisting trust is already in place. If a trust was already in place, however, there would be no need to use a RTODD to convey property into it, as *the grantor has already taken the time, effort and expense to contact an attorney to form a trust for the disposition of his or her real and personal property*.

In our example below, let's assume Susan Smith is the settlor/creator of the "Smith Family Trust" where she has named herself as trustee and her surviving family as beneficiaries.

When Susan first created the trust, any real property she wanted to be a part of the trust would be placed into the trust and the title to the real property would be vested in the name of the trust. To not do this would be illogical when Susan took the time, effort, and expense to create a trust.

Since the preexisting trust is already in existence, if Susan has acquired real property post-creation of the trust, why wouldn't she now simply add the real property to the preexisting trust? To do so is simpler than using a RTODD. All she needs to do is record a new grant deed that conveys the real property from herself to the trust by vesting title as "Susan Smith, trustor of the Smith Family Trust".

Using a RTODD later seems to NOT simplify, but over-complicate the process through the creation of an additional layer.

Using the RTODD to add additional real property to the trust, especially close to the death of the settlor, may create questions as to intent when having the settlor simply record a new grant deed to vest title in the trust is absolutely unambiguous and consistent with the terms of the trust and something that he or she fully understands because the trust was already created by, and understood by, the same settlor.

The CLRC reasoning regarding behind using the RTODD for “special needs trusts” doesn’t hold water:

The terms of an “irrevocable special needs trust” can be written so that the settlor/grantor can use the real property for the length of his or her lifetime before it reverts to the special needs trust upon his or her death. It seems totally illogical for a special needs trust to be created in such a way that this condition is not addressed by the attorney/estate planner when the trust is created without it being malpractice on the part of the attorney creating such a trust.

Even if this condition is not addressed in a “special needs trust,” why not address the issue with the execution and recordation of a new grant deed on the real property that vests title in the irrevocable special needs trust as beneficiary right before death? If the settlor/grantee has the presence of mind to have an RTODD recorded right before he or she dies, why wouldn’t they have the presence of mind to record a new grant deed that vests title in the special needs trust with which they are familiar?

Again, this seems to add an unnecessary layer to the trust process, NOT a simplification of it.

If a person refinancing forgets to have the real property vested in the trust after the refinancing, why is a RTODD easier to remember than executing a new grant deed to accomplish the same task?

On page 16 of the CLRC’s tentative recommendation, in discussing the expansion of the RTODD to name trusts as beneficiaries, the argument made is that sometimes settlors who have created a trust involving real property will refinance the real property and often find the lender requires the loan to be in the name of the settlor. This is, in fact, true.

In order to make sure the real property remains clearly in the trust, the settlor must remember to subsequently record a grant deed that once again vests the real property in the trust. For example, to “Susan Smith, trustee, of the Smith Family Trust.”

However, why would it be easier for a settlor to remember to use a RTODD rather than a grant deed to make sure the vesting is corrected? If they can’t remember to execute and record a new grant deed, are they now somehow going to remember to use an RTODD? Is there something special about RTODDs that makes them easier to remember?

If a grantor/settlor on his or her death bed suddenly realizes that real property within their control must be added to their trust, there is already in place a document to quickly, easily, and cheaply accomplish this goal: the grant deed.

Conclusion:

CLTA agrees in principle with the CLRC's goal of a simplified estate planning process. However, despite efforts at reform, we continue to view the RTODD as a well-intended tool that nevertheless exposes transferors and beneficiaries to many unintended – and undesirable – consequences. Given that many individuals who utilize an RTODD are unlikely to be, or even assisted by, a capable estate attorney, we think it likely that an elevated risk of error is inherent to the process, notwithstanding the already discussed potential for fraud and abuse.

As evidenced by the CLRC's continued efforts to clarify these instruments, such as by adding more guidance to the "Common Questions" portion of the RTODD, it is becoming increasingly clear that RTODDs offer a method of transferring property that is neither simple or straightforward, and that their continued use puts consumers at risk. Therefore, we continue to assert that individuals would be better served by seeking the services of the state's many qualified estate attorneys whom understand the other, better options for estate planning.

For the aforementioned reasons, we do not believe that the RTODD statute should continue in effect after the existing law is repealed by its own terms on January 1, 2021.

Thank you for your consideration of CLTA's comment on this matter. If you have any questions, please feel free to contact me via e-mail at cp@clta.org or phone at (916) 444-2647.

Respectfully,

A handwritten signature in black ink, appearing to read 'Craig C. Page', with a stylized flourish at the end.

Craig C. Page
Executive Vice President
and Counsel



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NICOLE VIRGA BAUTISTA
EXECUTIVE DIRECTOR & CEO

September 3, 2019

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
Attn: Brian Hebert
Via email, bhebert@clrc.ca.gov

RE: Revocable Transfer on Death Deed: Follow-Up Study

To the California Law Revision Commission:

Thank you for the opportunity to provide comments on behalf of the California Judges Association (CJA). Below are the comments and suggestions of the CJA Probate Committee (“the Committee”) on the tentative recommendation.

First, the Committee believes it may still be premature to decide whether to make this law permanent. Consideration might be given to recommending a further sunset date.

The Committee in preparing these comments contacted Judges at the Los Angeles Superior Court (LASC) Probate Division for their input. The LASC did not have any anecdotal information to share - either because they have not yet seen any of these deeds (still of fairly recent vintage) become the subject of disputes or because, perhaps, any such disputes have been filed in the Civil Division – where they may involve only deeds and not otherwise involve directly an estate or trust. Indeed, consistent therewith, it is significant that the report notes no appellate decisions in California on TOD deeds. There is likely a time lag in the public’s use of these deeds from implementation of the law in 2015. Further, people will not know about any issues until people who have used such a deed then later die. This may be not for many years.

Second, the Committee remains concerned about the appropriateness of this type of deed in the first place whereby any improper use of it may not be known by affected persons for many years and not until after the grantor passes. The grantor may not advise the grantee of having executed the deed.

Even if a grantor has given the grantee notice of having executed the deed, and the grantee in turn puts prospective heirs on notice - as the report recommends to avoid potential issues later - this would be ineffective before death if heirs then lacked standing to complain

Further, providing the notice will still likely raise the prospect of pre-death litigation over transfers not yet intended to be effective until death. Further, all heirs may not have been determined as of when the deed is executed or notice provided. People can change their minds about their testamentary wishes until death. If the litigation is not until after death of the grantor, the grantor will not then be available to testify relating to the circumstances surrounding execution of the deed. Unlike with a will, there will not have been the required witnesses present and other formalities to assure this is what the grantor truly intended. While people wish to avoid Probate, it is not clear that use of a TOD deed in lieu of a will ultimately will avoid costly court involvement. Litigation over a TOD deed may in fact be more expensive than Probate administration based on known rules and built in procedural safeguards.

Finally, here are some additional concerns:

1. Naming a trust as a beneficiary may not be the best idea. It is our understanding of current law that a deed that names a trust, but does not name a trustee, is invalid. How would this deed be different? What do title insurers say about that?
2. Requiring the recipient to give notice to heirs before the transfer may not be the best idea. How is the recipient supposed to know who and where the heirs are? Who will decide whether the notice is sufficient? The County Recorder?
3. Should standing be given to the recipient to challenge the revocation on any basis? Perhaps the standing should be limited only to asserted fraud or undue influence. Otherwise, it's not much of a revocable instrument.
4. The attempts to protect creditors are insufficient. In probate cases, creditors are entitled to actual notice if known, and to publication if unknown. Will they require publication? Creditors have a strict statute of limitations. How is that going to work?

These comments are intended to assist with the recommendation at this stage and are not representative of a position on the proposal. Thank you for the opportunity to provide these comments. We welcome any questions and further discussion.

Sincerely,



Erinn Ryberg, Legislative Director
California Judges Association

EMAIL FROM ANGELA PETRUSHA
(9/3/19)

Re: Question About Special Needs Trusts

In response to your inquiry, I can share the following thoughts:

The argument the title insurers make seems to be based on one of two assumptions: (1) the real property owner is also the creator/Grantor of the SNT and places real property into the SNT during his/her lifetime; or (2) there are two trusts, an inter vivos revocable trust and an SNT, with the revocable trust transferring to the SNT upon the Grantor's death. From a practical standpoint, assumption (1) is not always the case, and assumption (2) is not always financially possible or practical.

For example, sometimes (and I've seen this happen more than once) the parents of a child with disabilities are divorced, and one parent creates a SNT for the child's benefit. The other parent wants to direct that same child's inheritance into the existing SNT through his/her Will or Trust, rather than create (and incur the expense of creating) a separate SNT for the sole purpose of receiving the real property.

Another example would be the person with a modest estate who creates a Will which includes provisions for an SNT to be established at his/her death for the benefit of a child, to protect the child's eligibility for public benefits. The person then wishes to transfer the residence to that SNT upon death and thus avoid probate. I say "modest estate" because so often the only asset that would trigger a probate is the person's residence, and the person otherwise doesn't have the means to establish and fund a revocable living trust.

If the title insurers were intending to suggest that one should set up an SNT and then place his/her own real property in the SNT while still alive, this is not something I've seen done and I would caution anyone about doing this, as it could trigger unexpected results.

I hope this helps. Let me know if you need any clarification on the above.

Best Regards,

Angela Petrusha, Attorney at Law
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September 4, 2019

VIA E-MAIL AND U.S. MAIL

California Law Revision Commission
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Davis, California 95616
E-mail: bhebert@clrc.ca.gov

Re: Tentative Recommendation - Revocable Transfer on Death Deed: Follow-Up Study

Dear Commissioners:

This letter contains comments on the tentative recommendation issued May 2019 regarding revocable transfer on death deeds (“RTODDs”) on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”).

First and foremost, TEXCOM is very appreciative of the effort that the Commission and its staff has put into the follow-up study.

The Commission has specifically requested comment on whether the RTODD statutes should continue after January 1, 2021. TEXCOM continues to have reservations regarding the RTODD statutes and their efficacy, and believes that the potential issues raised by RTODDs outweigh the benefits. We do not believe that RTODDs have existed in California long enough to fully evaluate the consequences (specifically, issues arising post-death).

Since their enactment, the RTODD statutes have evolved into a much more complicated process. The proposed amendments in the tentative recommendation appear to make the process more burdensome, with those burdens falling on the RTODD beneficiary. Beneficiaries may feel compelled to hire a lawyer to navigate and advise them, which undermines the stated purpose of making RTODDs a simple process. If RTODDs are going to provide a simple, cost-effective way to transfer real property, then they should be simple and cost effective from *both* the transferor’s side and the beneficiary’s side. If the Commission believes that there is a risk of fraud associated with RTODDs, then it should address that problem directly by building in safeguards at the time of the transfer, not by imposing more onerous requirements on beneficiaries.

In addition, TEXCOM has the following specific comments on the tentative recommendation:

1. Timing of Revocation of RTODD

TEXCOM has previously raised the issue that there is an inconsistency between Prob. Code § 5628 (which provides a subsequent RTODD revokes a prior RTODD and can be recorded after death) and Prob. Code § 5632 (which requires a revocation of an RTODD be recorded prior to transferor's death). We believe that this issue should be addressed and that the Commission should consider allowing the revocation of an RTODD to be recorded after the transferor's death.

2. Naming a Trust as a Beneficiary of an RTODD

TEXCOM continues to have significant concerns regarding allowing a transferor to name a trust as a beneficiary of an RTODD. Many on TEXCOM disagree with the tentative recommendation to expressly allow naming a trust as a beneficiary of an RTODD and believe that the statute should be amended to expressly disallow a transfer to a trust. Many of those concerns have been previously articulated to the Commission. Additional concerns are described below.

A. Mistakes in Naming, Subsequent Amendments or Revocation. Despite the proposed instructions, TEXCOM remains concerned that individuals may make mistakes in naming a trust as a beneficiary of an RTODD. It is not clear what the consequences of the mistake may be. Would the deed fail? In addition, trusts are often amendable and revocable. If an RTODD names a trust as beneficiary, would the property pass to the trust on the terms that existed on the date of the RTODD or as of the date of the transferor's death. What if the trust is revoked entirely? Will the deed fail?

B. Ambiguities Regarding Separate Property and Community Property. In addition, naming a trust as beneficiary of an RTODD may raise issues regarding the community property or separate property character of the real property transferred. For example, if a parent executes an RTODD in favor of their son and daughter-in-law's revocable living trust, when the property passes from the trust upon the death of the parent is it the separate property of the son or community property of both the son and daughter-in-law? If the parent had named the son as the beneficiary of the RTODD, the property would be his separate property. Transferors may not understand or appreciate the difference without consulting legal counsel.

C. Class Gifts and Contingent Beneficiaries. The RTODD statutes impose many limitations designed to minimize the risk of ambiguity or mistake (i.e., no class gifts, no unequal gifts, no conditional gifts, etc.). However, a transferor could easily circumvent those limitations by naming a trust that does all of those things as the beneficiary of an RTODD.

3. Notification by RTODD Beneficiary

The Commission proposes to add a notification requirement to the RTODD statutes. This would require a beneficiary of an RTODD to notify the transferor's heirs of the RTODD upon the death of the transferor – see proposed amendments to Prob. Code §§ 5680, 5682, and 5694. Specifically, the beneficiary is required to provide the heirs a copy of the RTODD and the transferor's death certificate. (see proposed Prob. Code § 5680(e)) This notice would be similar to the notice required by Probate Code 16061.7 in the context of a trust administration (commonly referred to as a “Notification by Trustee”).

On the one hand, requiring the notification will provide an opportunity to the transferor's heirs (which might not otherwise be aware of the RTODD) to contest the RTODD. On the other hand, the notification requirement adds more complexity to the RTODD process and place a significant burden on the RTODD beneficiary. Some TEXCOM members believe that the notice requirement is too burdensome. They note that a similar notice is not required for any other type of deed.

If a notice requirement is added, TEXCOM recommends that the form of the notice and the required affidavit be expressly set forth in the statutes, so the procedure is clear.

The notice requirement raises several other potential issues: 1) whether the beneficiary will be able to correctly identify the “heirs” of the transferor; and 2) what the consequences of a defective notice are; and 3) whether the beneficiary's notice to the heirs will adequately alert them of their right to contest the RTODD as well as the consequences of failing to timely contest the RTODD.

With respect to the first issue, the Commission's tentative recommendation includes a proposed amendment to the RTODD FAQ's which states that determining who is an “heir” can be complicated and recommends that the beneficiary consider seeking professional advice to make that determination. TEXCOM agrees with that proposed amendment.

With respect to the second issue, many on TEXCOM have raised concerns that a beneficiary may not correctly provide the required notice. For example, the beneficiary may omit an heir of the transferor from the notice or send the notice to the wrong address. The consequences of a defective notice regarding an RTODD are not clear. With respect to a Notification by Trustee, a trustee can be held personally liable for damages associated with the failure to provide notice or providing defective notice. (see Probate Code 16061.9) Perhaps similar consequences should exist for the beneficiary of an RTODD.

On the third issue, in order to ensure the notice to the heirs will adequately alert them of their right to contest the RTODD, as well as the consequences of failing to timely contest the RTODD, TEXCOM recommends that the statutes include a form for the notification. The notification should include language akin to Probate Code § 16061.7(g), such as information about the property (address, parcel number, etc.), the identity of the transferor, and the identity of the beneficiaries (with contact information). The notification

should also include a warning like the one set forth in § 16061.7(h), which would alert the heir of the consequences of failing to timely bring an action to contest the RTODD.

The tentative recommendation provides that the beneficiary must record an affidavit stating that the notice requirements have been met. Again, TEXCOM recommends that the form for the affidavit required to be filed following the death of the RTODD transferor also be set forth in the statutes. Including forms for the notice and affidavit in the statutes would simplify the process and reduce mistakes.

Lastly, there appears to be a typographical error in the RTODD FAQ's "HOW DO I NAME BENEFICIARIES." It provides, "If a beneficiary is a public or public entity, . . ." Presumably this was intended to be "public or private." (see the tentative recommendation at page 35, line 6)

Again, TEXCOM commends the work of the Commission and its staff on this follow-up study and the tentative recommendation.

Respectfully submitted,



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