

## Memorandum 2019-55

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

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In May, the Commission<sup>1</sup> approved a tentative recommendation regarding the revocable transfer on death deed (“RTODD”).<sup>2</sup> It was circulated for public comment, with a deadline of August 15, 2019.

In September, the Commission considered public comment on the tentative recommendation. In response to that input, the Commission made a number of changes to its tentative recommendation and directed the staff to prepare a draft of a final recommendation that would implement the Commission’s decisions. That draft is attached to this memorandum, for the Commission’s review.

Although the attached draft is intended as a draft of a final recommendation, the Commission expressly decided that it would consider further comment on the changes that it approved at the September meeting. **Interested persons and groups are invited to provide comment on those matters.**

While there is still an opportunity to comment and influence the final recommendation, the public should recall that the statutory deadline for submission of a final report is January 1, 2020. Consequently, the Commission will need to approve a final recommendation at its upcoming meeting.

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

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

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

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

## NEW MATERIAL

The Commission approved a number of changes to its tentative recommendation.<sup>3</sup> Those changes are listed below, along with citations to the relevant code sections and pages in the narrative part of the attached draft:

- The execution formalities for an RTODD should be changed to require witnessing (paralleling the witnessing requirements for wills) and dispense with the existing notarization requirement. See pp. 4-5, 9-10; proposed Sections 5615, 5624, 5642, 5644.<sup>4</sup>
- The proposed requirement that a beneficiary give notice to heirs as part of the process for effecting a transfer of title on the transferor's death should be revised to also require publication of notice. See pp. 4, 10; proposed Section 5681(a)(2).
- A provision should be added making a beneficiary personally liable to an heir for actual damages caused by an intentional or grossly negligent failure to comply with the notice requirement. See p. 10; proposed Section 5681(g).
- The law should prescribe the contents of the notice and the associated affidavit. See proposed Sections 5681(b), 5682(c)(1).
- The law should be revised to make clear that a use restriction on property transferred by RTODD does not affect a beneficiary's ability to convey or encumber that property. See p. 15; proposed Section 5652(b).
- The Comment to Section 5672 should expressly note the time period for enforcement of the beneficiary's liability for the deceased transferor's unsecured debts. *This was not implemented, for reasons explained below.*
- The law should expressly state that a beneficiary's personal liability for a deceased transferor's debts includes the transferor's funeral expenses and expenses of last illness and wage claims. See p. 24; proposed Section 5618.
- Language should be added to the RTODD statute to make clear that an error or ambiguity in describing property or naming a beneficiary does not invalidate the RTODD if a court can determine the transferor's intention. See pp. 5, 18; proposed Section 5659.
- Language should be added to the RTODD statute to make clear that the general law on judicial construction of deeds applies to an RTODD. See pp. 5, 18; proposed Section 5659.

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3. Minutes (Sept. 2019), pp. 10-11. Decisions to preserve a particular part of the tentative recommendation without change have not been listed here.

4. Section 5600(d) was also added, to provide in part that the new witnessing requirement has no retroactive application to RTODDs signed before the presumed effective date of the new law.

- The law should not require that a form revocation be recorded before the transferor’s death. See p. 21; proposed Section 5632.
- The existing sunset date should be extended to January 1, 2031. See pp. 3, 28-29; proposed Section 5600.
- The Commission should be required to conduct a second follow-up study, with the same scope as the current study. See pp. 28-29; proposed Section 5605.

## IMPLEMENTATION ISSUES

In drafting language to implement the decisions listed above, the staff made a few choices that are worth noting. They are described and explained briefly below.

### **Retroactivity**

Probate Code Section 3 establishes general rules for determining whether a change to the code has retroactive application. It was drafted by the Commission when the Commission recommended a complete recodification of the Probate Code.

Under Section 3, new law is generally given retroactive effect.<sup>5</sup> However, there are express exceptions for already filed papers,<sup>6</sup> already issued orders,<sup>7</sup> and already taken actions.<sup>8</sup> There is also a general exception that bars retroactive application of new law where a court determines that such application “would substantially interfere with the effective conduct of ... proceedings or the rights of the parties or other interested persons in connection with an event that occurred or circumstance that existed before the operative date....”<sup>9</sup>

The staff evaluated whether the application of Section 3 to the proposed law would cause any problems.

While the staff believes that Section 3 would likely produce the right legal outcomes, reliance on Section 3 alone could cause practical problems (i.e., confusion and dispute). To avoid those problems, the staff recommends that the proposed law expressly preclude its retroactive application.

That would deprive already-executed RTODDs of some of the benefits of the proposed law, but would eliminate the uncertainty that would result if the

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5. Section 3(c). If the new law does not apply, the former law applies. Section 3(g).

6. Section 3(d).

7. Section 3(e).

8. Section 3(f).

9. Section 3(h).

application of the proposed law would need to be determined through litigation, on a case-by-case basis.

Specifically, the staff recommends that the proposed law include a provision along the lines of proposed Section 5600(d), which would provide:

(d) The revisions made by the act that added this subdivision do not apply to a revocable transfer on death deed or revocation form that was signed before January 1, 2021.

### **Is that acceptable?**

### **Section Numbering**

The proposed law would repeal existing Section 5676 (property restitution to the transferor's estate) and replace it with a different rule on a beneficiary's liability to the transferor's estate. In the tentative recommendation, the new provision would be added as a new Section 5676.

The staff now believes that reusing the same section number would be needlessly complicating. Going forward, every reference to Section 5676 would need to distinguish between the former section and the new section.

To avoid that problem, the attached draft would assign the new provision a previously unused section number (Section 5677). **Is that acceptable?**

### **Notice Requirement and Multiple Beneficiaries**

The proposed law would require that a beneficiary of an RTODD serve notice on heirs and publish notice after the transferor dies, as part of the process of effecting the transfer of title. The Commission decided to make some changes to the proposed notice provision. In drafting the implementing language, the staff realized that the statute needs to address the possibility that an RTODD can name more than one beneficiary (in which case they will take title as joint owners).

In that situation, should every beneficiary be required to serve and publish notice individually? The staff saw no benefit to such redundancy. Proposed Section 5681(f) would provide that only one of the beneficiaries would need to serve and publish the notice. **Is that acceptable?**

Proposed Section 5681(g)(1) would make a beneficiary liable to a deceased transferor's heirs for damage caused by an intentional or grossly negligent failure to comply with the notice requirements. Should that liability apply to all beneficiaries? In general, that seems unproblematic. All beneficiaries would have

a shared duty to serve and publish notice. If they all were to collectively breach that duty, intentionally or through gross negligence, then it seems reasonable that they should all bear the consequences of that breach. However, there may be an exception worth addressing in the proposed law. Specifically, the staff added proposed Section 5681(g)(2) to provide:

A beneficiary is not liable under this subdivision if that beneficiary reasonably relied, in good faith, on another beneficiary's statement that the other beneficiary would satisfy the requirements of this section.

That language might be unnecessary, because in the situation described above, it is highly unlikely that the "innocent" beneficiary would be found to have breached the notice requirement intentionally or through gross negligence. Still, this specific situation is readily foreseeable, and it might be helpful to address it in the statute, rather than requiring that the parties find their way to an answer every time it arises. **Should the provision be included in the proposed law?**

### **Conflicting Instruments**

Section 5660 establishes rules for resolving a conflict between an RTODD and another instrument that purports to dispose of the same property on the transferor's death. Under existing law, those rules depend in part on whether the other instrument is "revocable."

The Commission received a technical objection to that existing language, which noted that the conflict rules could only be applied *after a transferor had died* and, *at that time*, all revocable instruments would necessarily become irrevocable. Thus, technically, there could be no revocable instruments when the conflict provision operates.

To avoid that problem, the tentative recommendation would have replaced references to an instrument being "revocable" with references to an instrument being "revocable during the transferor's life."

However, the staff now believes that the language should be refined further. In the attached draft, Section 5660 would instead refer to instruments that "were revocable just prior to the transferor's death." That more precise language would avoid any ambiguity about how the rules would apply to an instrument that was revocable at one point during the transferor's life, but became irrevocable later, while the transferor was still alive. **Is the proposed change acceptable?**

## Comment to Section 5672

Existing Section 5672 provides as follows:

Each beneficiary is personally liable to the extent provided in Section 5674 for the unsecured debts of the transferor. Any such debt may be enforced against the beneficiary in the same manner as it could have been enforced against the transferor if the transferor had not died. In any action based on the debt, the beneficiary may assert any defense, cross-complaint, or setoff that would have been available to the transferor if the transferor had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

In public comment on the tentative recommendation, the Commission was asked to consider whether a beneficiary of an RTODD should be required to give notice to a deceased transferor's creditors, as is required in probate. In analyzing that comment, the staff noted that the very short limitation period for creditor claims in probate would not apply to the liability established in Section 5672. Instead, Section 5672 could be enforced for the same one-year period that applies generally to an action brought against a deceased person. The Commission decided against requiring notice to creditors, but decided that the Comment to Section 5672 should be revised to cross-refer to the provision that establishes the one-year limitation period.

Unfortunately, when that possibility was being discussed, the staff overlooked the fact that the last sentence of Section 5672 already contains a cross-reference to that limitation provision, Code of Civil Procedure Section 366.2.

Given the existence of that statutory reference to Section 366.2, the staff does not believe that there is any need to add the same cross-reference in the Comment of Section 5672. **Is that acceptable?**

### APPROVAL OF RECOMMENDATION

After the Commission has considered the issues discussed above and any new public comment, it needs to approve a final recommendation.

If the Commission wishes to make changes to the attached draft, it should do so with enough precision to guide the staff in drafting implementing language. As noted above, the recommendation is due to the Legislature in January. Unless

the Commission decides to squeeze in another meeting before the end of the year, it will need to approve the final recommendation in November.

In the past, when time was of the essence in approving a final recommendation, the Commission has granted discretion to the staff to prepare draft language to implement its final decisions, subject to the review and approval of the Chair.

**The Commission now needs to decide whether to approve the draft recommendation as a final recommendation, with or without changes, for submission to the Legislature and Governor.**

**If the Commission decides to make further changes, it needs to decide whether to schedule another meeting before January for approval of a revised draft recommendation, or instead grant discretion to the staff to prepare implementing language with the approval of the chair.**

Respectfully submitted,

Brian Hebert  
Executive Director





#L-3032.1

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**STAFF DRAFT**

RECOMMENDATION

Revocable Transfer on Death Deed: Follow-Up Study

November 2019

California Law Revision Commission  
c/o UC Davis School of Law  
Davis, CA 95616  
<commission@clrc.ca.gov>



## SUMMARY OF RECOMMENDATION

In 2015, legislation was enacted to authorize the use of a revocable transfer on death deed to transfer real property on death, without probate (Probate Code Sections 5600-5696). That statute will be repealed by its own terms on January 1, 2021, unless that date is extended or repealed.

The same legislation directed the Law Revision Commission to study the effect of the revocable transfer on death deed and make recommendations for the reform of the law based on its findings.

Earlier in this study, the Commission identified an urgent problem with the operation of the statute and recommended a narrow legislative fix. Implementing legislation was enacted in 2018 (Chapter 65 of the Statutes of 2018).

This recommendation proposes a number of further improvements to existing law.

The recommendation also recommends that the existing “sunset” provision (which would repeal the revocable transfer on death deed statute by operation of law on January 1, 2021) be revised to extend the repeal date to January 1, 2031. In addition, the Commission recommends that it be required to complete a second follow-up study, with the same scope as the current study, to be completed by January 1, 2030.

This tentative recommendation was prepared pursuant to Chapter 179 of the Statutes of 2016 and Section 21 of Chapter 293 of the Statutes of 2015.



## REVOCABLE TRANSFER ON DEATH DEED: FOLLOW-UP STUDY

1 In 2015, legislation was enacted to authorize the use of a revocable transfer on  
2 death deed (“RTODD”) to transfer real property on death, without probate.<sup>1</sup> By its  
3 terms, that statute will be repealed on January 1, 2021, unless that “sunset” date is  
4 extended or repealed before the sunset provision operates.

5 The legislation also directed the Law Revision Commission to study the  
6 RTODD statute and address all of the following matters:

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

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

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

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

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

17 (6) Whether it is feasible and appropriate to expand the revocable transfer on  
18 death deed to include the following:

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

20 (B) Transfers to a trust or other legal entity.<sup>2</sup>

21 This recommendation presents the Commission’s preliminary findings on those  
22 issues, along with proposed legislation to improve the effectiveness of the  
23 RTODD statute.<sup>3</sup>

24 The Commission also recommends that the sunset date be extended to January  
25 1, 2031, and that the Commission be required to conduct a second follow-up study  
26 by January 1, 2030.

## 27 OVERVIEW OF FINDINGS AND RECOMMENDATIONS

28 The legislation that directed the Commission to conduct this study posed a series  
29 of questions.<sup>4</sup> Those questions, and the Commission’s answers to them, are  
30 summarized briefly below and explained in greater detail in the later sections of  
31 this report.

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1. Prob. Code § 5600-5690; 2015 Cal. Stat. ch. 293.

2. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

3. For a list of the most significant of the proposed reforms, see pages 3-4 *infra*.

4. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

1 **Is the RTODD working effectively?**

2 Early in this study, the Commission learned of a problem involving the  
3 execution of the RTODD. There was uncertainty about whether the law required  
4 recordation of the “Common Questions” part of the statutory form. The  
5 Commission recommended legislation to make clear that recordation of that  
6 document is not required.<sup>5</sup> That legislation was enacted in 2018.<sup>6</sup>

7 The Commission later learned that some title insurers view Probate Code  
8 Section 5676 as creating a cloud on title. Under that section, an RTODD  
9 beneficiary might be required to return RTODD property to the deceased  
10 transferor’s estate to pay the transferor’s unsecured debts. Reportedly, some title  
11 insurers have decided that they will not issue policies during the three-year period  
12 in which such restitution may be required. To address that problem, the  
13 Commission recommends that Section 5676 be repealed and replaced with other  
14 mechanisms for enforcing a beneficiary’s liability for a deceased transferor’s  
15 debts. The proposed mechanisms would impose personal liability on a beneficiary,  
16 without affecting title to the transferred real property.

17 The Commission found no other problems with the operation of the RTODD  
18 statute.

19 **Should the RTODD be continued?**

20 The RTODD statute took effect on January 1, 2016.<sup>7</sup> At the time that this study  
21 was concluded, the use of an RTODD had only been authorized for approximately  
22 four years. That is not a sufficient period of time to fully evaluate the practical  
23 effects of an instrument that operates on death. While there has been some  
24 experience with the *execution* of RTODDs, there has not been enough time for  
25 issues regarding their *operation* to have surfaced. The Commission found no  
26 California appellate decisions addressing the RTODD statute.

27 While the Commission did not find evidence of unresolved problems with the  
28 RTODD statute, it is possible that such problems exist but have not yet been  
29 discovered.

30 For that reason, the Commission recommends that the date for repeal of the  
31 statute be extended by another ten years, with the Commission directed to conduct  
32 a second-follow up study before the end of that period. A 10-year extension is  
33 likely to provide enough time for undiscovered problems to become known.

34 **Is the RTODD subject to misuse or misunderstanding?**

35 The Commission does not believe that an RTODD is any more prone to misuse  
36 or misunderstanding than any other instrument that can be used to transfer title to

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5. See *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm’n Reports 1 (2018).

6. 2018 Cal. Stat. ch. 65.

7. See 2015 Cal. Stat. ch. 293.

1 property. To the contrary, the RTODD is probably less prone to misunderstanding  
2 than other common property transfer instruments (e.g., a grant deed) because the  
3 statutory form is accompanied by an extensive “Common Questions” guidance  
4 document. In addition, the RTODD is limited by the mandatory statutory form to  
5 one simple application: the transfer of an owner’s entire interest in specified  
6 property, to named beneficiaries, in equal shares. The form does not permit  
7 contingencies, alternative beneficiaries, or unequal beneficiary shares. This  
8 enforced simplicity should help to avoid ambiguities and mistakes that could arise  
9 if laypeople were able to draft more complicated instruments.

10 **What changes should be made to the RTODD or the law associated with the deed to**  
11 **improve its effectiveness and to avoid misuse or misunderstanding?**

12 The proposed law includes a number of recommended reforms to improve the  
13 effectiveness of the RTODD and avoid misuse and misunderstanding:

- 14 • Require that an RTODD be witnessed, under rules similar to those that  
15 govern wills, instead of requiring acknowledgement before a notary.
- 16 • Require that an RTODD beneficiary give notice to the transferor’s heirs  
17 when the transferor dies.
- 18 • Make clear that a beneficiary’s personal liability for a deceased transferor’s  
19 unsecured debts includes liability for the transferor’s funeral expenses,  
20 expenses of last illness, and wage claims.
- 21 • Replace existing Section 5676, which authorizes the return of transferred  
22 property to a deceased transferor’s estate for use in paying unsecured debts,  
23 with a provision that instead makes the beneficiary personally liable to the  
24 estate for a calculated share of those debts (based on the existing rules of  
25 abatement).
- 26 • Extend the time to record and thereby preserve the effect of third party  
27 interests in property transferred by an RTODD.
- 28 • Make clear that an error or ambiguity in an RTODD does not invalidate the  
29 RTODD, if a court can determine the transferor’s intent by applying the  
30 general law on judicial construction of deeds.
- 31 • Expressly allow a court to apply *cy pres* principles to reform a charitable  
32 RTODD that would otherwise fail because the named beneficiary disclaims  
33 the gift or does not exist at the time that the RTODD operates.
- 34 • Make clear that an enforceable restriction on the use of property transferred  
35 by RTODD does not impair the transfer of title; the beneficiary takes title  
36 subject to the restriction.
- 37 • Make clear that the beneficiary of a revoked RTODD has standing to contest  
38 the validity of the revocation, but only after the transferor’s death.
- 39 • Add guidance to the “Common Questions” document to address the effect of  
40 an RTODD on a mobilehome.
- 41 • Make a variety of technical and minor substantive changes to improve the  
42 clarity and operation of the law.

1 **Has the RTODD been used to perpetrate financial abuse on property owners and, if so, how**  
2 **should the law associated with the deed be changed to minimize this abuse?**

3 While any financial instrument can be misused, the Commission did not find  
4 evidence that an RTODD is any more prone to financial abuse than any other kind  
5 of instrument that can be used to transfer title to real property.

6 Nonetheless, the Commission recommends three changes that would help to  
7 protect against financial abuse:

8 *Witnessing.* The Commission recommends requiring that an RTODD be  
9 witnessed, as part of the mandatory execution formalities. The proposed  
10 witnessing requirement would parallel the law that governs the execution of wills.  
11 Specifically:

- 12 (1) The deed would need to be signed by two witnesses who were both present  
13 when the RTODD was signed or acknowledged by the transferor.<sup>8</sup>
- 14 (2) If a beneficiary of an RTODD also signs as a witness, the RTODD would be  
15 presumed to be the product of fraud or undue influence.<sup>9</sup>
- 16 (3) The witness of an RTODD could provide evidence in an action to contest  
17 the validity of the RTODD.<sup>10</sup>

18 *Notice to transferor's heirs.* Borrowing a procedure from trust law, the  
19 Commission recommends that a beneficiary of an RTODD be required to give  
20 notice to the transferor's heirs when the transferor has died. In addition, the  
21 proposed law would require that notice be published in a news publication of  
22 general circulation in the county where the property is located. Finally, before  
23 acquiring title to property transferred by RTODD, the beneficiary would need to  
24 record an affidavit affirming that the required notices had been given. These  
25 notices would alert those who have an interest in the decedent's estate that the  
26 RTODD exists and is operating. If there is reason to believe that the RTODD was  
27 the product of fraud or undue influence, those interested persons would have a  
28 timely opportunity to bring a contest.

29 *Clarify standing of beneficiary to contest revocation of RTODD.* If an RTODD  
30 is revoked under existing law, the beneficiary could be the only person interested  
31 in contesting the revocation, but might not have standing to do so. As a result,  
32 there might be no effective way to prove that the revocation was procured through  
33 fraud or undue influence. To eliminate this problem, the statute should be revised  
34 to make clear that the beneficiary of a revoked RTODD can contest the validity of  
35 the revocation.

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8. See Prob. Code § 6110.

9. See Prob. Code § 6112.

10. See Evid. Code § 870.



1 **Is it feasible and appropriate to expand the RTODD to include the transfer of stock**  
2 **cooperatives or other common interest developments?**

3 The Commission recommends that stock cooperatives be excluded from the  
4 effect of an RTODD. Ownership of an interest in a stock cooperative is evidenced  
5 by a share of corporate stock, not a deed. For that reason, the RTODD would not  
6 be an appropriate instrument to convey ownership of an interest in a stock  
7 cooperative.

8 Other types of common interest developments (community apartment projects,  
9 condominium projects, planned developments) do not have the same problem.  
10 Ownership of interests in those developments are evidenced by and can be  
11 conveyed by deed.

12 The Commission recommends that those other types of common interest  
13 developments be subject to transfer by RTODD.

14 **Is it feasible and appropriate to expand the RTODD to include transfers to a trust or other**  
15 **legal entity?**

16 The Commission found good reasons to allow the use of an RTODD to transfer  
17 property to a trust. The only significant disadvantage is the possibility that the  
18 transferor will not name the trust with sufficient clarity and certainty, especially if  
19 the transferor is a layperson. The Commission recommends that the following  
20 changes be made to existing law:

- 21 (1) The law should permit a transferor to name a trust as a beneficiary of an  
22 RTODD.
- 23 (2) The statutory form and “Common Questions” document should be revised  
24 to provide guidance on how to identify a trust when naming a beneficiary.
- 25 (3) The law should make clear that an error or ambiguity in naming a  
26 beneficiary does not invalidate an RTODD if the transferor’s intentions can  
27 be determined by a court.

28 The Commission also recommends that the law be revised to expressly permit  
29 the RTODD to name other legal entities as beneficiaries. This would facilitate  
30 charitable giving to public entities and nonprofits. To further facilitate charitable  
31 giving, the proposed law would make the following changes to existing law:

- 32 (1) Authorize a court to apply the doctrine of *cy pres* if an RTODD that would  
33 transfer property for a charitable purpose fails because the gift was  
34 disclaimed or the beneficiary no longer exists.
- 35 (2) Make technical adjustments to an existing provision that governs  
36 recordation of a deed that transfers property to a public entity.

1 EXPERIENCE IN OTHER STATES

2 The Commission reviewed the appellate case law in the nine states that had  
3 authorized the use of an RTODD<sup>11</sup> for at least 10 years.<sup>12</sup> Those states are listed  
4 below (with the dates of authorization noted in parentheses):

- 5 Missouri (1989)<sup>13</sup>
- 6 Kansas (1997)<sup>14</sup>
- 7 Ohio (2000)<sup>15</sup>
- 8 Arizona (2001)<sup>16</sup>
- 9 New Mexico (2001)<sup>17</sup>
- 10 Nevada (2003)<sup>18</sup>
- 11 Colorado (2004)<sup>19</sup>
- 12 Arkansas (2005)<sup>20</sup>
- 13 Wisconsin (2005)<sup>21</sup>

14 The Commission reviewed every case that mentioned a “transfer on death deed”  
15 or “beneficiary deed,” or that included a citation to one of the statutes that  
16 authorize and govern such deeds. There were well over a hundred such cases.

17 The results of the Commission’s research are summarized below, by subject  
18 matter.

19 **Financial Abuse**

20 The Commission found seventeen cases in which an RTODD was contested on  
21 grounds of fraud, undue influence, or transferor incapacity. The allegations were  
22 proven in only six of the cases.

23 The Commission did not find anything in those cases to suggest that an RTODD  
24 has any greater or special vulnerability to abuse, as compared to other instruments  
25 that can be used to transfer property on death.

26 The Commission did note one trend in the cases that it reviewed. Non-family  
27 caregivers were the perpetrators in half of the cases of confirmed financial abuse.

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11. Those states use their own terminology to describe a revocable transfer on death deed. This tentative recommendation uses “RTODD” as a convenient aggregate shorthand for referring to the similar instruments in the other states.

12. See generally CLRC Staff Memoranda 2016-36 and 2019-18.

13. Mo. Rev. Stat. § 461.025.

14. Kan. Stat. Ann. § 59-3501.

15. Ohio Rev. Code Ann. § 5302.22.

16. Ariz. Rev. Stat. § 33-405.

17. N.M. Stat. Ann. § 45-6-401.

18. Nev. Rev. Stat. § 111.109.

19. Colo. Rev. Stat. § 15-15-401.

20. Ark. Code Ann. § 18-12-608.

21. Wisc. Stat. § 705.15.

1 This supports the notion that elderly people are particularly vulnerable to financial  
2 abuse by their caregivers.

3 Existing California law already provides protection against such abuse. In  
4 addition to criminal penalties,<sup>22</sup> there is a statutory presumption that a gift to a  
5 non-family “care custodian” was the product of fraud or undue influence.<sup>23</sup> Unless  
6 the care custodian can rebut that presumption by clear and convincing evidence,  
7 the gift to the care custodian will fail. The California RTODD statute expressly  
8 provides that an RTODD can be contested under the existing statutory  
9 presumption of fraud or undue influence.<sup>24</sup>

10 In summary, while there are a handful of cases in other states in which the  
11 RTODD was used to perpetrate financial abuse, the Commission did not find any  
12 evidence to suggest that the instrument has any special vulnerability to such abuse.

### 13 **Mistake**

14 A number of the cases the Commission found involved a mistake by the  
15 transferor that affected the validity of an RTODD or its effect. The nature of those  
16 errors and the features of existing California law designed to minimize them are  
17 discussed below.

#### 18 *Complicated Instruments*

19 Some of the mistakes that occurred in other states were the result of errors in the  
20 drafting of complicated instruments. For example, in one case the transferor tried  
21 to make the operation of the RTODD contingent on the beneficiary paying all  
22 property taxes during the transferor’s life. Such a condition was not permissible  
23 under the authorizing statute.<sup>25</sup>

24 Such errors should not be possible in California, because California’s statute  
25 does not permit user-drafted instruments. An RTODD must be executed using a  
26 fixed statutory form.<sup>26</sup>

27 Furthermore, California’s RTODD form only provides for a single, simple type  
28 of transfer — the RTODD conveys a single owner’s entire interest in described  
29 property on the owner’s death, to be divided equally between named beneficiaries.

30 There is no option for execution by joint owners,<sup>27</sup> no option for any limitation  
31 on the interest conveyed (e.g., the reservation of a life estate),<sup>28</sup> no option for

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22. See Penal Code § 368(e).

23. Prob. Code § 21380(a)(3).

24. Prob. Code § 5690(a)(1).

25. *Bolz v. Hatfield*, 42 S.W.3d 566 (Missouri 2001).

26. Prob. Code § 5642.

27. Prob. Code § 5652.

28. *Id.*

1 unequal beneficiary shares,<sup>29</sup> and no option for *per stirpes* distribution of a  
2 deceased beneficiary's share.

3 That enforced simplicity should prevent errors that could arise if laypeople were  
4 permitted to draft their own instruments.

### 5 *Misunderstanding*

6 The case law also included errors that arose from simple misunderstanding of  
7 the process used to execute an RTODD or the legal effect of an RTODD. These  
8 cases involved execution errors, misdescribed property, and use of the wrong type  
9 of form.<sup>30</sup> Those kinds of errors can arise in any context and cannot be entirely  
10 avoided.

11 However, the California RTODD statute is designed to minimize the problem.  
12 As noted above, California law requires the use of a statutory form, which permits  
13 only a single, simple type of property transfer on death. Furthermore, the form  
14 itself provides instructions and there is an extensive "Common Questions"  
15 document that provides guidance on the legal effect of an RTODD and the  
16 procedure for executing or revoking one.<sup>31</sup>

### 17 **Creditor Liability**

18 Some of the cases from other states involved uncertainty about the liability of an  
19 RTODD beneficiary for the debts of the transferor.<sup>32</sup>

20 That kind of problem should not arise in California. This state's RTODD statute  
21 provides detailed and comprehensive rules on a beneficiary's liability for the  
22 decedent's debts.<sup>33</sup>

### 23 **Conclusion**

24 The case law from other RTODD states confirms that an RTODD, like any other  
25 kind of instrument that transfers real property, can be used to perpetrate financial  
26 abuse. However, the Commission did not find any evidence to suggest that an  
27 RTODD is more susceptible to such abuse than any other instrument that transfers  
28 real property.

29 The case law also confirmed that those who execute RTODDs sometimes make  
30 mistakes. Again, the Commission did not find any evidence that an RTODD is any  
31 more likely to produce mistakes than any other kind of legal instrument. To the  
32 contrary, the California statute includes features that should significantly minimize  
33 the risk of error (i.e., the mandatory use of a statutory form with instructions;

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29. Prob. Code § 5652(a)(3).

30. See generally, CLRC Staff Memoranda 2016-36, pp. 5-8.

31. Prob. Code § 5642(b).

32. See generally, CLRC Staff Memoranda 2016-36, pp. 8-9.

33. See Prob. Code §§ 5670-5676.

1 restriction to a single, simple type of transfer; and the inclusion of an extensive  
2 “Common Questions” guidance document).

3 In short, the Commission’s review of the appellate cases of other RTODD states  
4 did not reveal any problem with the use of RTODDs that is unique to the RTODD  
5 or that is more likely to arise when an RTODD is used.

## 6 PREVENTION OF FRAUD AND UNDUE INFLUENCE

7 The Commission recommends three reforms that should help to reduce the risk  
8 of fraud or undue influence when an RTODD is used.

### 9 **Witnessing**

10 Although an RTODD operates as a will substitute, existing law does not require  
11 that an RTODD be witnessed. Instead, an RTODD is authenticated in the same  
12 way as other deeds, by acknowledgement before a notary.<sup>34</sup>

13 While acknowledgement before a notary is helpful, it is not as protective as  
14 witnessing. The role of the notary is merely to confirm the identity of the person  
15 who executes an RTODD.

16 Requiring that an RTODD be witnessed in the same way as a will would provide  
17 the following additional protections against fraud and undue influence:

- 18 • Two different witnesses would be required to be present when a transferor  
19 signs an RTODD.<sup>35</sup> These witnesses could object and refuse to sign if the  
20 transferor appears to lack capacity or be under undue pressure. This should  
21 help to uncover and deter abuse of the RTODD.
- 22 • If one of the witnesses is a beneficiary, the RTODD would be presumed to  
23 be the product of fraud or undue influence.<sup>36</sup>
- 24 • The witnesses would be competent to provide opinion testimony in any  
25 subsequent contest of the RTODD.<sup>37</sup> This is important because a contest  
26 cannot be brought until after the transferor’s death.<sup>38</sup> At that time, the  
27 transferor would not be available to testify as to his or her own intentions,  
28 capacity, or freedom from undue influence. The witnesses could testify on  
29 those matters, having observed the transferor’s condition when the RTODD  
30 was signed.

31 The protections afforded by witnessing are not perfect. A bad actor could use  
32 accomplices as witnesses in order to avoid genuine scrutiny. Nonetheless, the  
33 protections provided by witnessing would usually be greater than those provided  
34 by acknowledgement before a notary. The Commission therefore recommends

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34. Prob. Code § 5624.

35. See Prob. Code § 6110; proposed revision of Prob. Code § 5624 *infra*.

36. See Prob. Code § 6112; proposed Prob. Code § 5625 *infra*.

37. See Evid. Code § 870.

38. Prob. Code § 5692(a).

1 that, going forward, the law require that an RTODD be witnessed, rather than  
2 notarized.

3 **Notice to Heirs**

4 Under the Trust Law, when a trust becomes irrevocable because of the death of  
5 the trustor, the trustee must, among other things, provide written notice to the  
6 trustor's heirs.<sup>39</sup> This alerts the heirs that the trust exists and will operate to  
7 dispose of the deceased trustor's property. If it appears that the trust is the product  
8 of fraud or undue influence, the heirs will have a timely opportunity to bring a  
9 contest.

10 The Commission recommends that the same general approach be applied to  
11 RTODDs. In order to take title to property transferred by RTODD, the beneficiary  
12 should be required to give notice to the deceased transferor's heirs.<sup>40</sup> Notice would  
13 also need to be published in a newspaper of general circulation.<sup>41</sup> Finally, the  
14 beneficiary should also be required to record an affidavit affirming that the  
15 required notice has been given.<sup>42</sup> Until the affidavit is recorded, the law would not  
16 protect the interest of a bona fide purchaser or encumbrancer of the property<sup>43</sup> and  
17 the time limit for filing a fully effective contest would not commence.<sup>44</sup> A  
18 beneficiary who fails to comply with the notice requirements, either intentionally  
19 or as a result of gross negligence, would be liable to heirs for any damages that  
20 result from the failure.<sup>45</sup>

21 Those requirements would alert those who have an interest in the deceased  
22 transferor's estate that the RTODD exists and is about to operate. This would give  
23 those persons a meaningful and timely opportunity to assess the validity of the  
24 RTODD and, if necessary, bring an action to contest it. If a contest is promptly  
25 filed, the contestant could also record a *lis pendens* to protect against a quick  
26 transfer of the property to a bona fide purchaser.<sup>46</sup>

27 **Standing to Contest Revocation**

28 Under the existing RTODD statute, it is not clear that the beneficiary of an  
29 RTODD has standing to contest a revocation of the RTODD.<sup>47</sup>

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39. Prob. Code § 16061.7(a)(1).

40. See proposed Prob. Code § 5681(a)(1) *infra*.

41. See proposed Prob. Code § 5681(a)(2) *infra*.

42. See proposed Prob. Code § 5682(c) *infra*.

43. *Id.*

44. See proposed Prob. Code § 5694 *infra*.

45. See proposed Prob. Code § 5681(g) *infra*.

46. Sections 5690(c), 5694.

47. See generally First Supplement to CLRC Staff Memorandum 2019-17.

1 During the transferor’s life, a beneficiary should not have standing to bring such  
2 a contest, because the beneficiary’s interest in the RTODD is a mere expectancy.  
3 Appropriately, the existing statute provides that an RTODD can only be contested  
4 after the transferor’s death.<sup>48</sup>

5 On the transferor’s death, however, the RTODD will operate and any revocation  
6 of that RTODD will take effect. If the revocation was invalid (perhaps because it  
7 was the product of fraud or undue influence, or the transferor lacked the requisite  
8 capacity), the beneficiary could allege an actual and concrete injury of sufficient  
9 magnitude to justify bringing a contest.<sup>49</sup> If the beneficiary does not have standing  
10 to contest the revocation, it is not clear who would. If such contests cannot be  
11 brought, there will be no accountability for misconduct that results in an improper  
12 revocation.

13 For those reasons, the Commission believes that a beneficiary should have  
14 standing to contest a revocation of an RTODD, after the death of the transferor.  
15 The proposed law would add language to expressly establish such standing.<sup>50</sup>

16 It is not clear that a successful contest of a revocation should always result in  
17 revival of the revoked RTODD. Where an RTODD is revoked by execution of a  
18 new RTODD, the transferor’s intentions may be better effected by a more nuanced  
19 result. For that reason, the proposed law would grant a court discretion to fashion  
20 an appropriate remedy, consistent with the best understanding of the transferor’s  
21 intentions, when the revocation of an RTODD is successfully contested.<sup>51</sup>

## 22 PROPERTY THAT CAN BE TRANSFERRED BY RTODD

23 In assigning this study, the Legislature specifically directed the Commission to  
24 consider

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

27 (A) The transfer of stock cooperatives or other common interest  
28 developments.<sup>52</sup>

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48. Prob. Code § 5692(a).

49. See 1A Cal. Jur. 3d *Actions* § 40 (“To have standing, a party must be beneficially interested in the controversy, and must have some special interest to be served or some particular right to be preserved or protected, and this interest must be concrete and actual, not conjectural or hypothetical. The issue of whether a party has standing focuses on the plaintiff, not the issues he or she seeks to have determined. As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator.”) (footnotes omitted).

50. See proposed Prob. Code § 5690(a)(3) *infra*.

51. *Id.*

52. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

1 That question arises because the existing RTODD statute limits the kinds of real  
2 property that can be transferred by RTODD. It does so by providing a special  
3 limited definition of the term “real property.”

4 “Real property” means any of the following:

5 (a) Real property improved with not less than one nor more than four residential  
6 dwelling units.

7 (b) A condominium unit, including the limited common elements allocated to  
8 the exclusive use thereof that form an integral part of the condominium unit.

9 (c) A single tract of agricultural real estate consisting of 40 acres or less that is  
10 improved with a single-family residence.<sup>53</sup>

11 The limitations imposed by that definition and the Commission’s recommended  
12 adjustments to them are discussed below.

### 13 **Residential Property Limitation Generally**

14 The general purpose of the definition of “real property” appears to be to  
15 preclude the use of an RTODD to transfer commercial property.

16 The Commission did not recommend that limitation. Nor did the Commission  
17 find any legislative history that explains the policy served by the limitation. The  
18 limitation may have been based on an assumption that the transfer of commercial  
19 real property would typically be more complicated, and therefore more likely to  
20 result in errors, than a transfer of residential real property.

21 The Commission does not recommend any change to the existing rule that an  
22 RTODD cannot be used to transfer commercial real property. Such a rule may be  
23 beneficial in reducing the complexity and risk of error involved in executing an  
24 RTODD. Furthermore, the Commission generally defers to clear legislative policy  
25 choices, especially when they are recent.

26 However, the Commission found two technical problems with the expression of  
27 the residential property limitation. Those problems are discussed below.

#### 28 *Commercial Condominiums*

29 Existing law includes a condominium unit in the definition of real property, but  
30 does not expressly preclude the use of an RTODD to transfer a commercial or  
31 industrial condominium unit. This appears to have been a drafting oversight, rather  
32 than a policy choice. For that reason, the Commission recommends that existing  
33 law be revised to provide that an RTODD can only be used to transfer a residential  
34 condominium unit.<sup>54</sup>

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53. Prob. Code § 5610.

54. See proposed Prob. Code § 5610(a)(2) *infra*.



1     *Timing*

2     Under existing law, it is not clear when the limitation established by the special  
3 definition of real property is to be evaluated: When the RTODD is executed or  
4 when it operates on the transferor’s death? The use of property can change over  
5 time, so the timing could make a difference.

6     As noted above, the residential property limitation was likely intended to reduce  
7 the risk of execution errors, on the assumption that a transfer of business property  
8 is typically more complicated than a transfer of residential property. If that is  
9 correct, then the residential property limitation should be evaluated at the time of  
10 execution of the RTODD. That is when any execution errors would occur and the  
11 simplification created by the residential property limitation would have a  
12 beneficial effect.

13     The Commission did not find any policy rationale for imposing the residential  
14 property limitation at the time of the transferor’s death.

15     For those reasons, the Commission recommends that the law be revised to make  
16 clear that the residential property limitation should be evaluated as of the time of  
17 execution of the RTODD.<sup>55</sup>

18     **Common Interest Developments**

19     A common interest development is a real property development where  
20 ownership of a separate interest (a lot, unit, or apartment) is coupled with a shared  
21 interest in common area property.<sup>56</sup> There are four kinds of common interest  
22 developments, each with different distinguishing features: a community apartment  
23 project, a condominium project, a planned development, and a stock cooperative.<sup>57</sup>

24     The existing definition of “real property” includes only a condominium unit.<sup>58</sup>  
25 The Commission was directed to consider whether the other types of common  
26 interest development should also be included.

27     *Stock Cooperatives*

28     A stock cooperative is a kind of common interest development where the  
29 entirety of the development is owned by a corporation formed for that purpose.<sup>59</sup>  
30 The owners of separate interests hold shares in the corporation, which entitle them  
31 to the exclusive right to occupy a specified apartment. Owners do not hold title to  
32 any part of the development.<sup>60</sup>

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55. See proposed Prob. Code § 5610(c) *infra*.

56. See Civ. Code §§ 4095 (“common area”), 4100 (“common interest development”), 4185 (“separate interest”).

57. See Civ. Code §§ 4105 (community apartment project), 4125 (condominium project), 4175 (planned development), 4190 (stock cooperative).

58. Prob. Code § 5610(b).

59. Civ. Code § 4190.

60. *Id.*

1 As a result, ownership of a separate interest in a stock cooperative is not  
2 evidenced or conveyed by deed. Instead, it is conveyed by the sale of a share of  
3 stock. For that reason, a deed would not be an appropriate instrument to use to  
4 transfer ownership of a separate interest in a stock cooperative. A deed conveys  
5 title to real property, not the ownership of a share of stock.

6 To avoid any confusion or legal problems that would result from the mismatch  
7 between the use of a deed and the form of ownership in a stock cooperative, the  
8 Commission recommends that stock cooperatives continue to be excluded from  
9 the definition of “real property” that is used in the RTODD statute.

10 That approach would deny owners in stock cooperatives the benefits of using an  
11 RTODD. However, it is possible that a share of ownership in a stock cooperative  
12 could be transferred on death, outside of probate, under the existing Uniform TOD  
13 Security Registration Act.<sup>61</sup> The Commission plans to conduct a separate study of  
14 that possibility, under its general authority to study the Probate Code.<sup>62</sup>

#### 15 *Community Apartment Projects and Planned Developments*

16 The Commission did not find any good policy reason to exclude community  
17 apartment projects or planned developments from the definition of “real property.”  
18 They are similar to condominiums in that all of those types of property are made  
19 up of separate interests (with appurtenant interests in common area) that can be  
20 transferred by deed. There do not appear to be any distinctions between those  
21 types of property that would present an obstacle to transfer by RTODD. The  
22 proposed legislation would revise the definition of “real property” to include  
23 community apartment projects and planned developments.<sup>63</sup>

#### 24 *Irregular Language*

25 The language used in the existing RTODD statute to refer to a condominium  
26 unit is not consistent with the language used in common interest development law.  
27 This irregularity could cause confusion. The proposed law would revise the law to  
28 use established terminology to refer to common interest developments.<sup>64</sup>

#### 29 *Occupancy Restrictions*

30 In some common interest developments, the owners of separate interests are not  
31 entirely free to choose who will occupy the property. For example, the governing  
32 documents of the development may require that the board approve new occupants  
33 or impose an enforceable age restriction.

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61. Prob. Code §§ 5500-5512.

62. 2018 Cal. Stat. res. ch. 158.

63. See proposed Prob. Code § 5610(a)(2) *infra*.

64. See proposed Prob. Code § 5610(a)(2), (b)(1) *infra*.

1 The Commission considered whether that possibility should preclude the use of  
2 an RTODD to transfer title in such a common interest development. The  
3 Commission concluded that it should not, for three reasons:

- 4 (1) The issue is not limited to common interest developments. Any subdivision  
5 can have enforceable covenants that restrict occupation (e.g., an age  
6 restriction).
- 7 (2) The issue is not limited to property transferred by RTODD. It would also  
8 apply to property transferred by will, trust, or an inter vivos conveyance.
- 9 (3) A use restriction that is of record at the time of the transferor’s death would  
10 continue to be enforceable against the property after it is transferred by  
11 RTODD. Importantly, however, the use restriction would not be a bar to the  
12 operation of the RTODD. A beneficiary who receives use-restricted  
13 property would be subject to the restriction but would hold title (which  
14 could then be sold, leased, or encumbered). The proposed law would add  
15 language to expressly state that principle.<sup>65</sup>

#### 16 **Agricultural Land**

17 Existing law only permits the use of an RTODD to transfer agricultural land if  
18 that land consists of “a single tract of agricultural real estate consisting of 40 acres  
19 or less that is improved with a single-family residence”<sup>66</sup> The term “agricultural  
20 real estate” is not defined. Nor is there any other use of that term in the codes. This  
21 reliance on an undefined term could cause confusion.

#### 22 *Definition by Reference to Use Restrictions*

23 The proposed law would define the term as “land that is limited to agricultural  
24 use by law or by any recorded agreement or title restriction.”<sup>67</sup> Importantly, that  
25 language would depend on use restrictions that are part of the public record. No  
26 off-record information would bear on whether a tract is “agricultural.”

#### 27 *Number of Dwelling Units*

28 The meaning of the reference to property that is “improved by a single-family  
29 residence” is not entirely clear. It could mean property that is improved with only  
30 one single-family residence. Or it could mean property that is improved with at  
31 least one single-family residence.

32 The latter interpretation seems more likely. Under existing Probate Code Section  
33 5610(a), the definition of “real property” includes real property that is “improved  
34 with not less than one nor more than four residential dwelling units.”<sup>68</sup> The  
35 Legislature thus chose to allow use of the RTODD to transfer as many as four

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65. See proposed Prob. Code § 5652(b) *infra*.

66. Prob. Code § 5610(c).

67. See proposed Prob. Code § 5610(b)(2) *infra*.

68. Prob. Code § 5610(a).

1 dwelling units on a single parcel of land. There is no clear reason why the same  
2 rule should not also apply to agricultural land.

3 The proposed law would revise existing law to provide that “real property”  
4 includes agricultural land that is improved with one to four dwelling units.<sup>69</sup>

5 **Coordination of Provisions**

6 As currently drafted, Probate Code Section 5610(a) defines real property as  
7 “[r]eal property improved with not less than one nor more than four residential  
8 dwelling units.” That broadly stated rule could be read as swallowing the narrower  
9 rules in subdivisions (b) and (c).

10 The proposed legislation would revise the structure of Section 5610 to eliminate  
11 any conflict between its different provisions.<sup>70</sup>

12 **PERMISSIBLE BENEFICIARIES**

13 The Commission was also specifically directed to consider

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

16 ...

17 (B) Transfers to a trust or other legal entity.<sup>71</sup>

18 That question arises because language used in the existing RTODD form,  
19 including the “Common Questions” guidance document, could be read as limiting  
20 beneficiaries to natural persons.

21 **Existing Law**

22 The RTODD statute’s definition of “beneficiary” simply refers to a “person.”<sup>72</sup>  
23 The Probate Code’s general definition of “person” includes legal entities.<sup>73</sup> Read  
24 together, those provisions would seem to affirm that a legal entity can be the  
25 beneficiary of an RTODD.

26 However, that reading was cast into doubt when the Legislature made the  
27 statutory form mandatory and added the “Common Questions” page to the form.  
28 The statutory form instructs that a beneficiary is to be named in the following  
29 manner:

30 Print the FULL NAME(S) of the person(s) who will receive the property on  
31 your death (DO NOT use general terms like “my children”) and state the

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69. See proposed Prob. Code § 5610(a)(1), (b)(2) *infra*.

70. See proposed Prob. Code § 5610 *infra*.

71. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

72. Prob. Code § 5608.

73. Prob. Code § 56.

1 RELATIONSHIP that each named person has to you (spouse, son, daughter,  
2 friend, etc.)...<sup>74</sup>

3 That instruction is reaffirmed in the “Common Questions” page:

4 HOW DO I NAME BENEFICIARIES? You MUST name your beneficiaries  
5 individually, using each beneficiary’s FULL name. You MAY NOT use general  
6 terms to describe beneficiaries, such as “my children.” For each beneficiary that  
7 you name, you should briefly state that person’s relationship to you (for example,  
8 my spouse, my son, my daughter, my friend, etc.).<sup>75</sup>

9 The reference to the beneficiary’s “full name” and the examples of the types of  
10 relationships that must be stated (“spouse, son, daughter, friend, etc.”) suggest that  
11 the beneficiary must be a natural person. There was enough uncertainty on this  
12 point that the Legislature added the issue to the Commission’s study.<sup>76</sup>

### 13 **Trust as Beneficiary**

14 The Commission received input from estate planning attorneys who have  
15 encountered situations where it would be helpful to use an RTODD to transfer  
16 property to a trust. For example:

- 17 • A person may wish to transfer property to an irrevocable special needs trust  
18 on their death, while maintaining ownership and control of the property  
19 during life.<sup>77</sup>
- 20 • Some lenders require that property be transferred out of an inter vivos  
21 revocable trust when the property is refinanced. If the owner forgets to  
22 convey the property back into the trust after the refinance is completed,  
23 there could be problems with the operation of the trust on death. The use of  
24 an RTODD to transfer property into the trust on death provides a backstop  
25 to avoid such problems. Even if the owner forgets to reconvey the property  
26 to the trust, the RTODD would effect the transfer on the owner’s death.<sup>78</sup>

27 The only apparent reason to prevent the use of an RTODD to transfer property  
28 to a trust is that it would complicate the execution of an RTODD in a way that  
29 could make mistakes more likely.

30 The most likely error would be imprecision in naming the trust. For example,  
31 the transferor might name the trust without any other identifying information. That  
32 could result in ambiguity where the trust has a very common name (e.g., “Jones

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74. Prob. Code § 5642(a).

75. Prob. Code § 5642(b).

76. 2016 Cal. Stat. ch. 179.

77. See Letter from Angela Petruska (July 20, 2019) (attached to CLRC Staff Memorandum 2019-4, Exhibit p. 11).

78. See Email from Nina Whitehurst to Commissioners (Dec. 4, 2018) (attached to CLRC Staff Memorandum 2019-4, Exhibit p. 24); Email from Nina Whitehurst to Commissioners (Dec. 17, 2018) (attached to CLRC Staff Memorandum 2019-4, Exhibit p. 26).

1 Family Trust”). Or the transferor might name the trustee of the trust without  
2 making clear that the person is being named in that person’s capacity as trustee.

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

8 The Commission recommends that the law be revised to expressly allow a trust  
9 to be named as the beneficiary of an RTODD and to add advisory language along  
10 the lines described above.<sup>79</sup>

11 The Commission also recommends that the law expressly state that an error or  
12 ambiguity in describing property or naming the beneficiary does not invalidate the  
13 RTODD, if a court can determine the transferor’s intent.<sup>80</sup> The law should also  
14 expressly affirm that general law governing the judicial construction of deeds  
15 applies to an RTODD.<sup>81</sup> This would make clear that a court should attempt to save  
16 an erroneous or ambiguous RTODD if possible and may use extrinsic evidence to  
17 do so.<sup>82</sup>

18 Reliance on the courts to construe and effectuate a problematic RTODD would  
19 not be ideal. The beneficiary would incur the cost, delay, and inconvenience  
20 associated with civil litigation. Those are burdens that the transferor had tried to  
21 avoid by using a nonprobate transfer. However, in most cases it would be better  
22 for the beneficiary to bear those burdens than to have the RTODD invalidated. If  
23 the RTODD fails, the property at issue would be governed by the transferor’s will  
24 or the rules of intestate succession and could wind up being transferred to  
25 someone other than the intended beneficiary.

#### 26 **Charitable Gifts to Legal Entities**

27 The Commission recommends that the RTODD statute be revised to permit and  
28 facilitate the use of an RTODD to transfer real property to a public entity or  
29 private nonprofit entity. Some people will wish to make a charitable donation of  
30 their home to such entities. This seems especially likely for those who have no  
31 surviving family or close friends.

32 The only apparent reasons against allowing such use of an RTODD are  
33 technical. Those technical issues and the Commission’s recommended solutions to  
34 them are discussed below.

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79. See proposed revision of Prob. Code § 5642 *infra*.

80. See proposed Prob. Code § 5659 *infra*.

81. *Id.*

82. Miller & Starr, California Real Estate, *Deeds and Descriptions* § 8.26, at 66-67 (2015) (footnotes omitted).

1     *Gift to Government*

2     Under existing Government Code Section 27281, “[d]eeds or grants conveying  
3 any interest in or easement upon real estate to a political corporation or  
4 governmental agency for public purposes shall not be accepted for recordation  
5 without the consent of the grantee....” The consent of the grantee must be  
6 evidenced by the grantee’s “certificate or resolution of acceptance attached to or  
7 printed on the deed or grant.”<sup>83</sup>

8     In general, that rule makes sense as a way of ensuring that government entities  
9 are not saddled with undesirable properties, without their knowledge or consent.

10    However, that rule is not needed when recording an RTODD, because  
11 recordation alone does not effect a transfer of title.<sup>84</sup> The RTODD does not operate  
12 until the transferor’s death. Even then, the public entity named as beneficiary can  
13 disclaim the gift if it is not wanted.<sup>85</sup>

14    The proposed legislation would make existing Section 27281 inapplicable to an  
15 RTODD.<sup>86</sup> This would allow an RTODD that names a government entity as  
16 beneficiary to be recorded without the prior assent of that entity. To preserve the  
17 beneficial effect of Section 27281, the proposed law would add language  
18 providing that an RTODD that names a government entity as beneficiary does not  
19 operate unless and until that entity records a certificate or resolution of  
20 acceptance.<sup>87</sup>

21    *Cy Pres*

22    There are certain risks associated with naming a nonprofit entity as beneficiary  
23 of an RTODD. The entity’s articles, bylaws, or other governing policy might  
24 preclude acceptance of the gift; the entity might choose to disclaim the gift; or the  
25 entity might not exist when the RTODD operates (because it dissolved or was  
26 merged into another entity prior to the transferor’s death). In those situations, the  
27 gift will fail.

28    If such a problem were to arise under a will or trust, a court could apply the  
29 equitable doctrine of *cy pres* in an attempt to effect the transferor’s intentions to  
30 the greatest extent possible.<sup>88</sup>

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83. Gov’t Code § 27281.

84. See Prob. Code § 5650(c).

85. Prob. Code § 5652(a)(1).

86. See proposed revision of Gov’t Code § 27281 *infra*.

87. *Id.*

88. See Prob. Code § 11603(c). See also 13 B. Witkin, Summary of California Law *Trusts* § 339, at 916 (11th ed. 2017) (“Where the settlor with a general charitable intent gives property in trust for a specific purpose, and for some reason that purpose cannot be carried out, a court of equity will, under the rule of *cy pres*, direct the disposition of the property to some related charitable purpose, in order to carry out the settlor’s intention as nearly as possible.”).

1 The Commission recommends that the same remedy be available if a charitable  
2 gift made by RTODD fails.<sup>89</sup>

### 3 EXECUTION

4 While the execution of an RTODD should be relatively straightforward, there  
5 will always be some risk of error. A failure to properly execute an RTODD could  
6 be an obstacle to obtaining title insurance if the property is later sold or  
7 encumbered by the beneficiary. In the best case, this would require legal action to  
8 confirm the beneficiary's ownership. In the worst case, a court might hold that the  
9 error was so severe as to invalidate the RTODD.

10 In addition to requiring witnessing rather than acknowledgement before a  
11 notary, the Commission recommends three minor changes to the RTODD statute  
12 to reduce the risk of execution error.

- 13 • The law should make clear that there are no requirements as to the manner  
14 in which an RTODD is dated, or by whom.<sup>90</sup>
- 15 • Sometimes a beneficiary with a disability is unable to sign an estate  
16 planning document and needs to have another person sign instead. Under  
17 existing law, that practice is generally permitted.<sup>91</sup> However, if the person  
18 who signs a document on behalf of another has a beneficial interest in the  
19 document, there is a possibility that the document will be deemed invalid.<sup>92</sup>  
20 In the RTODD context, the risk of invalidation could be reduced by adding  
21 cautionary language to the "Common Questions" guidance document. The  
22 new language would encourage a transferor to consult an attorney if there is  
23 a need to have another person sign for the transferor."<sup>93</sup>
- 24 • The existing requirement that a transferor state the relationship between the  
25 transferor and each beneficiary who is a natural person would be made  
26 permissive.<sup>94</sup> It would still be encouraged, to provide greater certainty, but  
27 would not be required. This would eliminate a purely technical requirement  
28 that might be overlooked.

### 29 REVOCATION

30 Under existing law, there are two ways in which a transferor can revoke an  
31 RTODD: (1) execute and record a new RTODD,<sup>95</sup> and (2) execute and record a  
32 statutory form revocation.

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89. See proposed Prob. Code § 5658 *infra*.

90. See proposed revision of Prob. Code § 5624 *infra*.

91. See Estate of Stephens, 28 Cal. 4th 665 (2002).

92. *Id.*

93. See proposed revision of Prob. Code § 5642 *infra*.

94. See proposed revision of Prob. Code § 5644 *infra*.

95. Prob. Code § 5628(a).



1 The timing rules for recordation of those two types of revoking instruments are  
2 not consistent. A new RTODD must be recorded within 60 days of execution,  
3 which can include recordation after the transferor’s death.<sup>96</sup> However, the law also  
4 provides that “[a]n instrument revoking a revocable transfer on death deed shall be  
5 executed and recorded before the transferor’s death...”<sup>97</sup> It is not clear which rule  
6 would apply if a transferor records a new RTODD that would revoke an earlier  
7 one.

8 The Commission sees no good policy reason for different timing rules for the  
9 execution and revocation of an RTODD. It recommends that the inconsistency be  
10 resolved by deleting the requirement that a revoking instrument be recorded before  
11 the transferor’s death.<sup>98</sup> This would be consistent with the Legislature’s policy  
12 when it enacted the RTODD statute.<sup>99</sup>

### 13 CONFLICTING INSTRUMENTS

14 Existing Probate Code Section 5660 addresses the effect of an RTODD when  
15 another instrument purports to transfer the same property on the transferor’s death.  
16 Under that provision, the result depends in part on whether the other instrument is  
17 “revocable.”

18 The use of the term “revocable” in that context is imprecise. Because Section  
19 5660 would only be applied after the transferor has died, it is not technically  
20 correct to refer to any at-death transfer instrument executed by the deceased  
21 transferor as “revocable.” On the death of the transferor, such instruments become  
22 irrevocable.

23 The proposed law would revise Section 5660 to address that technical issue.<sup>100</sup>

### 24 EFFECT OF RTODD ON UNRECORDED INTERESTS

25 Under existing law, an RTODD transfers property “subject to any limitation on  
26 the transferor’s interest that is of record at the transferor’s death...”<sup>101</sup>

27 Conversely, property transferred by RTODD is not subject to limitations on the  
28 transferor’s interest that are unrecorded at the time of the transferor’s death. For  
29 example, property transferred by RTODD would not be subject to a mechanics  
30 lien claim or lease if those interests were not recorded when the transferor died.

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96. Prob. Code § 5626(a).

97. Prob. Code § 5632(a).

98. See proposed revision of Prob. Code § 5632 *infra*.

99. The Commission’s original recommendation was that the law require all instruments to be recorded before a transferor’s death. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 149, 163 (2006). The Legislature chose instead to allow the recordation of an RTODD after the transferor’s death.

100. See proposed revision of Prob. Code § 5660 *infra*.

101. Prob. Code § 5652(b).

1 That rule could have unfortunate results, because it effectively cuts off the  
2 enforceability of unrecorded interests on the transferor's death. However, the rule  
3 was thought to be necessary in order to ensure that an RTODD transfers  
4 marketable title. The rule guarantees that every enforceable claim against  
5 transferred property will be evidenced in the title records at the time of the  
6 transferor's death. If unrecorded interests could be enforced against property  
7 transferred by RTODD, an RTODD beneficiary would have difficulty obtaining  
8 title insurance. Legal action to establish title might be required before the  
9 beneficiary could sell or encumber the property.

10 Colorado strikes a slightly different balance in addressing that issue. It provides  
11 that property transferred by an RTODD is subject to any limitation that is recorded  
12 at the time of the transferor's death or in the four months after the transferor's  
13 death.<sup>102</sup> Under that approach, a person who has an unrecorded interest in property  
14 transferred by RTODD has four months in which to record it, thereby preserving  
15 the ability to enforce the interest against the property.

16 The disadvantage of the Colorado approach is that it creates a four-month period  
17 of uncertainty. At any point during that period, an interest in the property could be  
18 recorded, establishing a new limitation on the beneficiary's title. Until that four-  
19 month period has ended, title insurers will not be able to rely on title records as  
20 evidence of the scope of any claims against the property. This would likely make  
21 it difficult to obtain title insurance, impairing the marketability of the property  
22 during the four-month period after the transferor's death.

23 That should not be a significant problem in California, because California's  
24 RTODD statute already creates a roughly four-month period of impaired  
25 marketability after the transferor's death.

26 That is because the existing statute provides a 120-day period during which a *lis*  
27 *pendens* can be filed as evidence of a pending contest. If the *lis pendens* is  
28 recorded within 120 days after the transferor's death and the contest is eventually  
29 successful, the court may void the transfer, without any protection for a bona fide  
30 purchaser or encumbrancer.<sup>103</sup> This means that there is a 120-day period during  
31 which a beneficiary's title to property transferred by RTODD is vulnerable to  
32 complete invalidation. It is only after that 120-day period has run, without the  
33 recording of a *lis pendens*, that a purchaser or encumbrancer can be confident that  
34 the beneficiary has good title.

35 Because California RTODD beneficiaries are already subject to a 120-day  
36 period of impaired marketability, enactment of the Colorado rule in California  
37 would not create a significant new burden. This means that there is no clear  
38 justification for cutting off the enforceability of unrecorded interests on the  
39 transferor's death. The Colorado approach would give those who hold unrecorded

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102. Colo. Rev. Stat. § 15-15-407(2)-(3).

103. Prob. Code § 5694.

1 interests 120 days to record them, thereby preserving their effect. The Commission  
2 recommends that the law be revised to adopt that approach.<sup>104</sup>

3 MOBILEHOMES

4 The Commission sees potential for misunderstanding and mistake with regard to  
5 the effect of an RTODD on a mobilehome.

6 The effect of an RTODD on a mobilehome depends on whether the mobilehome  
7 is personal property or a fixture.

8 As a general matter, personal property is not appurtenant to real property, even  
9 if it is physically attached to the real property. An item of personal property “may  
10 be conveyed, encumbered, or leased separate from the real property.”<sup>105</sup>

11 However, if the item attached to real property is a “fixture,” then it is treated as  
12 an appurtenance of the real property. “On a conveyance of the real property, the  
13 fixtures are transferred to the grantee even though not expressly mentioned in the  
14 contract or deed.”<sup>106</sup>

15 Thus, a mobilehome that is personal property will not be transferred by an  
16 RTODD that conveys the real property on which the mobilehome is located. A  
17 mobilehome that is a fixture will be transferred along with the real property to  
18 which it is affixed.

19 There is existing statutory law that determines whether a mobilehome is  
20 personal property or a fixture.<sup>107</sup> To be considered a fixture under that law, the  
21 mobilehome must be attached to a specified type of foundation and certain  
22 procedural steps must be followed (including recordation of a specified declaration  
23 by the regulating governmental entity).

24 The Commission concluded that existing law regarding the effect of a transfer of  
25 real property on a mobilehome is sufficiently certain. However, that law is  
26 somewhat obscure and technical; a person executing an RTODD without advice of  
27 counsel could be unclear on the governing law and its effect.

28 To help mitigate that problem, the proposed law would add guidance on the  
29 matter in the “Common Questions” part of the statutory form.<sup>108</sup>

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104. See proposed revision of Prob. Code § 5652(b) *infra*.

105. Miller & Starr, California Real Estate, *Transferable Property Interests; Fixtures* § 9:41, at 170-71 (4th ed. 2015) (citations omitted).

106. *Id.* at 170.

107. Health & Safety Code § 18551.

108. See proposed revision of Prob. Code § 5642(b) (“Will an RTODD affect my mobilehome?”) *infra*.

1 CREDITORS

2 The existing RTODD statute provides that a beneficiary is personally liable for  
3 the unsecured debts of the transferor, up to the value of the property received at  
4 the time of the transferor’s death.<sup>109</sup>

5 In addition to that personal liability, there is a period of three years after the  
6 transferor’s death during which the transferor’s personal representative can require  
7 that the beneficiary return the property to the transferor’s estate for use in paying  
8 creditors.<sup>110</sup>

9 Those liability rules were modeled after long-standing law that establishes a  
10 beneficiary’s liability for a decedent’s debt when taking property under certain  
11 statutory procedures that permit the disposition of a decedent’s estate outside of  
12 probate.<sup>111</sup>

13 The Commission recommends several improvements to the rules that govern a  
14 beneficiary’s liability for a transferor’s obligations. Those improvements are  
15 described below.

16 **Types of Obligations**

17 Under existing law, a beneficiary is liable for a transferor’s “unsecured debts.”<sup>112</sup>  
18 However, it is not entirely clear whether that liability extends to the transferor’s  
19 funeral expenses, expenses of last illness, and wage claims. Under existing law,  
20 those specific types of obligations are treated differently than the transferor’s  
21 “general debts.”<sup>113</sup>

22 The Commission found no good policy reason to exclude the listed obligations  
23 from the beneficiary’s liability for the deceased transferor’s debts. The  
24 Commission recommends revising the statute to make clear that a beneficiary’s  
25 liability includes funeral expenses, expenses of last illness, and wage claims.

26 However, the Commission does not recommend that a beneficiary be made  
27 liable for a share of the general costs of estate administration. One of the main  
28 purposes of using an RTODD is to spare the beneficiary the cost of probate.

29 **Maximum Liability**

30 Under existing law, an RTODD beneficiary is personally liable for the  
31 transferor’s unsecured debts up to the full value of the property received. In many

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109. Prob. Code §§ 5672, 5674. This rule is subject to some minor adjustments. See discussion of “Scope of Personal Liability” *infra*.

110. Prob. Code § 5676.

111. See Prob. Code §§ 13109-13111 (disposition of personal property of small value without administration), 13204-13206 (disposition of real property of small value without administration), and 13561-13562 (passage of property to surviving spouse without administration).

112. See Prob. Code § 5672.

113. See, e.g., Prob. Code § 11420.

1 cases, that liability will be greater than it would have been if the property had  
2 instead passed to the beneficiary through probate.

3 In probate, not all gifts are treated equally with respect to their liability for  
4 payment of the decedent's debts.<sup>114</sup> Unless the decedent's will specifies otherwise,  
5 a "general gift"<sup>115</sup> will be liable for debts (will "abate") before a "specific gift."<sup>116</sup>  
6 Within those categories, a gift to a non-relative will abate before a gift to a  
7 relative.<sup>117</sup> Finally, gifts that are in the same abatement class will abate pro rata.<sup>118</sup>

8 A transfer of a specified interest in real property is a specific gift. Thus, in  
9 probate, all general gifts would be used to pay creditor claims before a specific gift  
10 of real property would be reached. If the general gifts were sufficient to pay all  
11 creditor claims, the real property would have no liability at all.

12 By contrast, if a person takes property by RTODD, that person is personally  
13 liable up to the full value of the property, without regard for whether there are  
14 assets in the probate estate that would abate earlier.

15 The proposed law includes three reforms that would help an RTODD  
16 beneficiary to avoid disproportionate personal liability for the transferor's  
17 unsecured debts. They are described below.

#### 18 *Personal Liability to Estate*

19 The proposed law would provide a new rule for the liability of a beneficiary for  
20 a transferor's unsecured debts.<sup>119</sup> The new rule would only apply if the transferor's  
21 estate is being administered in probate.

22 Under the proposed rule, the RTODD beneficiary would be personally liable to  
23 the estate for a share of liability for the transferor's unsecured debts. The  
24 beneficiary's share of liability would be determined by applying the normal rules  
25 of abatement, as if the property transferred by RTODD had instead been a specific  
26 gift in the transferor's will.<sup>120</sup>

27 If the beneficiary had already paid any of the transferor's unsecured debts, the  
28 amount paid would be credited against the beneficiary's liability under the new  
29 rule.<sup>121</sup>

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114. Prob. Code § 21402 (order of abatement).

115. Prob. Code § 21117(b) ("A general gift is a transfer from the general assets of the transferor that does not give specific property.").

116. Prob. Code § 21117(a) ("A specific gift is a transfer of specifically identifiable property.").

117. Prob. Code § 21402.

118. Prob. Code § 21403(a).

119. See proposed Prob. Code § 5677 *infra*.

120. See proposed Prob. Code § 5677(b) *infra*.

121. See proposed Prob. Code § 5677(d) *infra*.

1 Payment of the amount owed to the estate under the new rule would fully satisfy  
2 the beneficiary's obligations for payment of the transferor's unsecured debts; the  
3 beneficiary would have no further personal liability to the transferor's creditors.<sup>122</sup>

4 The cost of implementing the new rule would be paid by the beneficiary.<sup>123</sup>

5 *Voluntary Return of Property to the Estate*

6 The proposed law would also create a simpler option for a beneficiary who  
7 wants to avoid disproportionate personal liability. The beneficiary could  
8 voluntarily return the RTODD property to the estate for administration.<sup>124</sup> Such  
9 property would be treated as if it were a specific devise to the beneficiary in the  
10 transferor's will. General abatement rules would then be applied to the decedent's  
11 entire estate, including the RTODD property. Any funds that remain as part of the  
12 RTODD beneficiary's gift would be distributed to the beneficiary under the usual  
13 probate process.

14 Although this option could subject the RTODD property to a share of the costs  
15 of administration and would delay receipt of the gift, it still might be preferable to  
16 a beneficiary who lacks sufficient funds to pay a share of the decedent's debts out  
17 of pocket and does not wish to go to the trouble to sell the property in order to pay  
18 that share.

19 *Scope of Personal Liability*

20 As discussed above, existing law provides that an RTODD beneficiary is  
21 personally liable for the transferor's unsecured debts up to the value of the  
22 property received at the time of the transferor's death (less any liens or  
23 encumbrances on the property at that time).<sup>125</sup> However, that liability can be  
24 increased in two ways:

- 25 (1) If the beneficiary derives income from the property, the liability includes the  
26 amount of the income.<sup>126</sup>
- 27 (2) If the property was sold by the beneficiary, the liability also includes interest  
28 on the proceeds of sale.<sup>127</sup>

29 The Commission recommends that those increases be eliminated.<sup>128</sup> The  
30 beneficiary's liability should be limited to the value of the property at the time of  
31 the transferor's death, because that would be the maximum extent of the

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122. See proposed revision of Prob. Code § 5674 *infra*.

123. See proposed Prob. Code § 5677(e) *infra*.

124. See proposed Prob. Code § 5678 *infra*.

125. Prob. Code § 5674(b)(1).

126. Prob. Code § 5674(b)(2).

127. Prob. Code § 5674(b)(3).

128. See proposed revision of Prob. Code § 5674 *infra*.

1 beneficiary's liability had the property been received through probate or by trust.  
2 There is no clear policy reason why a beneficiary's liability should be increased  
3 due to events that occur after disposition of the property.

4 **Elimination of Property Return Provision**

5 Under existing Probate Code Section 5676, a beneficiary is liable to the estate  
6 for restitution of the property transferred by RTODD, if that property is required  
7 for payment of a share of the decedent's debts. If any proceeds remain from the  
8 sale of the property after the payment of that share, they are returned to the  
9 beneficiary.<sup>129</sup> This "property return" liability can be enforced for up to three years  
10 after the transferor's death.

11 There are two problems with the operation of the property return provision:

- 12 (1) *Cloud on title.* The possibility that a beneficiary will be required to return  
13 RTODD property to the transferor's estate, for a period of up to three years,  
14 could create a cloud on title. The Commission has heard anecdotal reports  
15 that some California title insurers will not issue policies during this three-  
16 year period.
- 17 (2) *Undue disruption.* The existing property return provision does not expressly  
18 provide an option that would allow a beneficiary to pay the beneficiary's  
19 share of liability to the estate, in lieu of returning the real property to the  
20 estate for liquidation. If Section 5676 is read strictly, it could divest the  
21 beneficiary of ownership of real property that the beneficiary would rather  
22 retain, even in a situation where the beneficiary has sufficient funds  
23 available to pay the beneficiary's share of the estate's liability. That  
24 approach is unnecessarily inflexible and burdensome.

25 For those reasons, the Commission recommends that Section 5676 be repealed.

26 That reform should not cause any problems for creditors or the decedent's  
27 estate, because the law would still provide ample alternative means for an RTODD  
28 beneficiary to pay an appropriate share of decedent's unsecured debts. As  
29 discussed above, the beneficiary is personally liable to creditors for those debts, up  
30 to the value of the property received.<sup>130</sup> In addition, the proposed law would add  
31 an alternative rule that would apply if a probate is open: The beneficiary would be  
32 personally liable to the estate for the beneficiary's share of the transferor's  
33 unsecured debts.<sup>131</sup> In addition, an RTODD beneficiary would have the option of  
34 voluntarily returning the property to the estate for use in paying creditor claims.<sup>132</sup>

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129. Prob. Code § 5676(f).

130. Prob. Code § 5672.

131. See "Personal Liability to Estate" *supra*. See also proposed Prob. Code § 5677 *infra*.

132. See proposed Prob. Code § 5678 *infra*.

## SUNSET DATE

1  
2 The legislation that directed the Commission to conduct this study asked the  
3 Commission to consider a threshold question: “Whether the revocable transfer on  
4 death deed should be continued.”<sup>133</sup>

5 The advantages of the RTODD statute seem self-evident. When properly  
6 executed, an RTODD allows a property owner to transfer real property on death  
7 outside of probate, without the need to pay for a trust. If a transferor understands  
8 the effect of the RTODD and the procedure for executing one, the process is very  
9 simple and inexpensive. On the transferor’s death, the process of transferring title  
10 to the beneficiary is also quick, inexpensive, and straightforward. There is  
11 generally no need for the involvement of attorneys or the courts. In addition, the  
12 Commission has learned that some attorneys use the RTODD as a component of a  
13 professionally prepared estate plan.

14 The main disadvantages of the RTODD are the risk of fraud, undue influence, or  
15 mistake. Those risks also exist in other estate planning contexts, but they warrant  
16 particular attention in this context because (1) an RTODD is intended to be a  
17 straightforward instrument that a layperson can execute without the advice of  
18 counsel, and (2) an RTODD is intended to operate without the involvement of the  
19 courts. Existing law already includes many protections designed to prevent such  
20 harm and the proposed law would add new protections. As yet, there does not  
21 appear to be any evidence that fraud, undue influence, and mistake are more  
22 common in the RTODD context than in other estate planning contexts.

23 Ultimately, the question of whether the RTODD statute should continue in effect  
24 depends on whether the disadvantages of the RTODD significantly outweigh its  
25 benefits.

26 The Commission has not found evidence of problems serious enough to justify  
27 repealing the RTODD statute at this time. All of the problems that were identified  
28 in this study would likely be mitigated or avoided through enactment of the  
29 proposed law.

30 However, as discussed earlier, the time provided for study of the effects of the  
31 RTODD statute has probably been too short for all potential problems to have  
32 surfaced. In particular, any problems with the operation of an RTODD on a  
33 transferor’s death and any subsequent contest litigation are unlikely to have  
34 manifested in just four years.

35 For those reasons, the Commission recommends that the sunset date for the  
36 RTODD be extended by another ten years (from 2021 to 2031).<sup>134</sup> In addition, the  
37 Law Revision Commission’s charge to evaluate the RTODD statute should also be  
38 extended, with a second follow-up report due in 2030.<sup>135</sup>

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133. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

134. See proposed revision of Prob. Code § 5600 *infra*.

135. See proposed Prob. Code § 5605 *infra*.



1     The proposed extension of the sunset date is likely to provide enough time to  
2 uncover problems with the RTODD that have not yet manifested (because most  
3 RTODDs have not yet operated). It would also provide time to evaluate the effect  
4 of the reforms proposed in this recommendation. Once that information is  
5 available, the Commission should be able to make a well-grounded  
6 recommendation on whether the statute should continue in effect permanently.

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## PROPOSED LEGISLATION

1 **Prob. Code § 5600 (amended). Application of part**

2 5600. (a) This part applies to a revocable transfer on death deed made by a  
3 transferor who dies on or after January 1, 2016, whether the deed was executed or  
4 recorded before, on, or after January 1, 2016.

5 (b) Nothing in this part invalidates an otherwise valid transfer under Section  
6 5602.

7 (c) This part shall remain in effect only until January 1, ~~2021~~ 2031, and as of  
8 that date is repealed, unless a later enacted statute, that is enacted before January  
9 1, ~~2021~~ 2031, deletes or extends that date. The repeal of this part pursuant to this  
10 subdivision shall not affect the validity or effect of a revocable transfer on death  
11 deed that is executed before January 1, ~~2021~~ 2031, and shall not affect the  
12 authority of the transferor to revoke a transfer on death deed by recording a signed  
13 ~~and notarized~~ instrument that is substantially in the form specified in Section  
14 5644.

15 (d) The revisions made by the act that added this subdivision do not apply to a  
16 revocable transfer on death deed or revocation form that was signed before  
17 January 1, 2021.

18 **Comment.** Subdivision (c) of Section 5600 is amended to extend the date for repeal of this part  
19 from January 1, 2021 to January 1, 2031. See also Section 5605 (California Law Revision  
20 Commission study).

21 **Prob. Code § 5605 (added). Reporting requirement**

22 5605. (a) The California Law Revision Commission shall study the effect of  
23 California's revocable transfer on death deed and make recommendations for  
24 improvement of this part. The commission shall report all of its findings and  
25 recommendations to the Legislature on or before January 1, 2030.

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

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

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

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

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

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

38 (6) Whether there should be any change to the types of property that can be  
39 transferred by revocable transfer on death deed.

1 (7) Whether there should be any change to the types of persons or entities that  
2 can be named as the beneficiary of a revocable transfer on death deed.

3 (c)(1) The report required by subdivision (a) shall comply with Section 9795 of  
4 the Government Code.

5 (2) Pursuant to Section 10231.5 of the Government Code, this section is  
6 repealed on January 1, 2034.

7 **Comment.** Section 5605 is drawn from Section 21 of Chapter 293 of the Statutes of 2015, as  
8 amended by Chapter 179 of the Statutes of 2016, except that the deadline for the new report is  
9 January 1, 2030. See also Section 5600(c) (part to be repealed by operation of law on January 1,  
10 2031).

11 **Prob. Code § 5608 (amended). “Beneficiary” defined**

12 SEC. \_\_\_\_ . Section 5608 of the Probate Code is amended to read:

13 5608. “Beneficiary” means a person named in a revocable transfer on death deed  
14 as transferee of the property. A natural person, trust, or legal entity may be named  
15 as a beneficiary.

16 **Comment.** Section 5608 is amended to provide that beneficiaries are not limited to natural  
17 persons and may include a trust or legal entity such as a nonprofit corporation or public entity.

18 **Prob. Code § 5610 (amended). “Real property” defined**

19 SEC. \_\_\_\_ . Section 5610 of the Probate Code is amended to read:

20 5610. ~~“Real property” means any of the following:~~

21 ~~(a) Real property improved with not less than one nor more than four residential~~  
22 ~~dwelling units.~~

23 ~~(b) A condominium unit, including the limited common elements allocated to~~  
24 ~~the exclusive use thereof that form an integral part of the condominium unit.~~

25 ~~(c) A single tract of agricultural real estate consisting of 40 acres or less that is~~  
26 ~~improved with a single family residence.~~

27 (a) Except as provided in subdivision (b), “real property” means either of the  
28 following:

29 (1) A parcel of land that is improved with one to four residential dwelling units.

30 (2) A residential separate interest and its appurtenant common area in a common  
31 interest development, regardless of the number of separate interests in the common  
32 interest development.

33 (b) “Real property” does not include either of the following:

34 (1) A separate interest in a stock cooperative.

35 (2) A parcel of agricultural land that is greater than 40 acres in size. For the  
36 purposes of this paragraph, “agricultural land” means land that is designated for  
37 agricultural use by law or by a document that is recorded in the county in which  
38 the land is located.

39 (c) The definition of “real property” shall be construed pursuant to the  
40 circumstances that existed on the execution date shown on the revocable transfer  
41 on death deed.

1 **Comment.** Section 5610 is amended to make its meaning clearer, eliminate inconsistencies,  
2 and make the following substantive changes:

3 (1) Expand the definition of “real property” to include two more types of common interest  
4 development (planned development and community apartment project), not just a condominium.  
5 See Civ. Code §§ 4100 (“common interest development”), 4185 (“separate interest”).

6 (2) Make clear that the definition only includes a residential interest in a common interest  
7 development.

8 (3) Expressly exclude stock cooperatives from the definition of “real property.” See Civ. Code  
9 § 4190 (“stock cooperative”).

10 (4) Eliminate the duplicative and ambiguous requirement that agricultural land must be  
11 improved with a “single family residence” to be included in the definition of “real property.”

12 (5) Define the term “agricultural land,” in terms that depend on information that can be  
13 obtained from public records. Laws that designate property for agricultural use might include a  
14 zoning ordinance or general plan. Other recorded documents that designate land for agricultural  
15 use might include a deed restriction, contract, or trust.

16 (6) Specify the time when the definition is applied. Under subdivision (c), a parcel of land that  
17 falls within the definition at the time that a revocable transfer on death deed is executed would be  
18 considered real property for the purposes of that deed, even if it no longer falls within the scope  
19 of the definition when the transferor dies.

20 **Prob. Code § 5615 (added). “Subscribing witness” defined**

21 SEC. \_\_\_\_\_. Section 5615 is added to the Probate Code, to read:

22 5615. “Subscribing witness” means a person who signs a revocable transfer on  
23 death deed as a witness, as provided in Section 5624.

24 **Comment.** Section 5615 is new. It is added for drafting convenience.

25 **Prob. Code § 5618 (added). “Unsecured debts” defined**

26 SEC. \_\_\_\_\_. Section 5618 is added to the Probate Code, to read:

27 5618. “Unsecured debts” includes, but is not limited to, a transferor’s funeral  
28 expenses, expenses of a transferor’s last illness, and wage claims.

29 **Comment.** Section 5618 is new. It is added to make clear that a beneficiary’s liability for a  
30 deceased transferor’s “unsecured debts” includes liability for funeral expenses, expenses of last  
31 illness, and wage claims. See also Sections 5672 (beneficiary liability to creditors), 5677  
32 (beneficiary liability to estate).

33 **Prob. Code § 5624 (amended). Execution**

34 SEC. \_\_\_\_\_. Section 5624 of the Probate Code is amended to read:

35 5624. (a) A revocable transfer on death deed is not effective unless the deed is  
36 signed by the transferor signs and dates the deed and acknowledges the deed  
37 before a notary public, dated, and signed by two persons who were present at the  
38 same time and who witnessed either the signing of the deed or the transferor’s  
39 acknowledgment of the deed and who understand that the instrument they sign is  
40 the testator’s deed.

41 **Comment.** Section 5624 is amended to require that a revocable transfer on death deed be  
42 signed by two witnesses and to eliminate the requirement that the deed be acknowledged before a  
43 notary. The witnessing requirement is drawn from Section 6110(c)(1).

44 See also Evid. Code § 870 (testimony of subscribing witness).

1 **Prob. Code § 5625 (added). Interested witnesses**

2 SEC. \_\_\_\_\_. Section 5625 is added to the Probate Code, to read:

3 5625. (a) Any person generally competent to be a witness may act as a witness  
4 to a revocable transfer on death deed.

5 (b) A revocable transfer on death deed is not invalid because it is signed by an  
6 interested witness.

7 (c) If a beneficiary of a revocable transfer on death deed is also a subscribing  
8 witness, there is a presumption that the witness procured the revocable transfer on  
9 death deed by duress, menace, fraud, or undue influence. This presumption is a  
10 presumption affecting the burden of proof. This presumption does not apply where  
11 the witness is named as beneficiary solely in a fiduciary capacity.

12 **Comment.** Section 5625 is drawn from Section 6112(a)-(c).

13 **Prob. Code § 5632 (amended). Revocation**

14 SEC. \_\_\_\_\_. Section 5632 of the Probate Code is amended to read:

15 5632 (a) An instrument revoking a revocable transfer on death deed shall be  
16 executed and recorded ~~before the transferor's death~~ in the same manner as  
17 execution and recordation of a revocable transfer on death deed.

18 (b) Joinder, consent, or agreement of, or notice to, the beneficiary is not required  
19 for revocation of a revocable transfer on death deed.

20 **Comment.** Section 5632 is amended to delete language requiring that an instrument revoking a  
21 revocable transfer on death deed be recorded before the transferor's death.

22 **Prob. Code § 5642 (amended). Statutory form deed**

23 SEC. \_\_\_\_\_. Section 5642 of the Probate Code is amended to read:

24 5642. A revocable transfer on death deed shall be substantially in the following  
25 form.

26 (a) The first page of the form shall be substantially the following:

27 ~~SIMPLE~~ REVOCABLE TRANSFER ON DEATH (TOD) DEED  
28 (California Probate Code Section 5642)  
29

30 Recording Requested By:  
31 When Recorded Mail This Deed To  
32 Name:  
33 Address:  
34 Assessor's Parcel Number:  
35 Space Above For Recorder's Use  
36

37 This document is exempt from documentary transfer tax under Rev. & Tax.  
38 Code § 11930. This document is exempt from preliminary change of ownership  
39 report under Rev. & Tax. Code § 480.3.  
40







1 COMMON QUESTIONS ABOUT THE USE OF THIS FORM

2 WHAT DOES THE TOD DEED DO? When you die, the identified property  
3 will transfer to your named beneficiary without probate. The TOD deed has no  
4 effect until you die. You can revoke it at any time.

5 CAN I USE THIS DEED TO TRANSFER ~~BUSINESS~~ NONRESIDENTIAL  
6 PROPERTY? This deed can only be used to transfer (1) a parcel of property that  
7 contains one to four residential dwelling units, (2) a condominium unit, or (3) a  
8 parcel of agricultural land of 40 acres or less, which contains a single family  
9 residence. No. This deed can only be used to transfer residential property. Also,  
10 the deed cannot be used to transfer a unit in a stock cooperative or a parcel of  
11 agricultural land that is over 40 acres in size.

12 CAN I USE THIS DEED TO TRANSFER A MOBILEHOME? The deed can  
13 only be used to transfer a mobilehome if it is a “fixture” or improvement under  
14 Health and Safety Code Section 18551. If you are unsure whether your  
15 mobilehome is a fixture, you may wish to consult an attorney. An error on this  
16 point could cause the transfer of your mobilehome to fail.

17 HOW DO I USE THE TOD DEED? Complete this form. Have it ~~notarized~~  
18 signed by two persons who are both present at the same time and who witness you  
19 signing or acknowledging the form. RECORD the form in the county where the  
20 property is located. The form MUST be recorded on or before 60 days after the  
21 date you sign it or the deed has no effect.

22 CAN A PERSON WHO SIGNS THE DEED AS A WITNESS ALSO BE A  
23 BENEFICIARY? Yes, but this can cause serious legal problems, including the  
24 possible invalidation of the deed. You should avoid using a beneficiary as a  
25 witness.

26 IF I AM UNABLE TO SIGN THE DEED, MAY I ASK SOMEONE ELSE TO  
27 SIGN MY NAME FOR ME? Yes. However, if the person who signs for you  
28 would benefit from the transfer of your property, there is a chance that the transfer  
29 under this deed will fail. You may wish to consult an attorney before taking that  
30 step.

31 IS THE “LEGAL DESCRIPTION” OF THE PROPERTY NECESSARY? Yes.

32 HOW DO I FIND THE “LEGAL DESCRIPTION” OF THE PROPERTY? This  
33 information may be on the deed you received when you became an owner of the  
34 property. This information may also be available in the office of the county  
35 recorder for the county where the property is located. If you are not absolutely  
36 sure, consult an attorney.

37 HOW DO I “RECORD” THE FORM? Take the completed ~~and notarized~~ form  
38 to the county recorder for the county in which the property is located. Follow the

1 instructions given by the county recorder to make the form part of the official  
2 property records.

3 **WHAT IF I SHARE OWNERSHIP OF THE PROPERTY?** This form only  
4 transfers YOUR share of the property. If a co-owner also wants to name a TOD  
5 beneficiary, that co-owner must complete and RECORD a separate form.

6 **CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND?** Yes. You may  
7 revoke the TOD deed at any time. No one, including your beneficiary, can prevent  
8 you from revoking the deed.

9 **HOW DO I REVOKE THE TOD DEED?** There are three ways to revoke a  
10 recorded TOD deed: (1) Complete, ~~have notarized~~, and RECORD a revocation  
11 form. (2) Create, ~~have notarized~~, and RECORD a new TOD deed. (3) Sell or give  
12 away the property, or transfer it to a trust, before your death and RECORD the  
13 deed. A TOD deed can only affect property that you own when you die. A TOD  
14 deed cannot be revoked by will.

15 **CAN I REVOKE A TOD DEED BY CREATING A NEW DOCUMENT  
16 THAT DISPOSES OF THE PROPERTY (FOR EXAMPLE, BY CREATING A  
17 NEW TOD DEED OR BY ASSIGNING THE PROPERTY TO A TRUST)?** Yes,  
18 but only if the new document is RECORDED. To avoid any doubt, you may wish  
19 to RECORD a TOD deed revocation form before creating the new instrument. A  
20 TOD deed cannot be revoked by will, or by purporting to leave the subject  
21 property to anyone via will.

22 **IF I SELL OR GIVE AWAY THE PROPERTY DESCRIBED IN A TOD  
23 DEED, WHAT HAPPENS WHEN I DIE?** If the deed or other document used to  
24 transfer your property is RECORDED before your death, the TOD deed will have  
25 no effect. If the transfer document is not RECORDED before your death, the TOD  
26 deed will take effect.

27 **I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD  
28 I DO?** Do NOT complete this form unless you freely choose to do so. If you are  
29 being pressured to dispose of your property in a way that you do not want, you  
30 may want to alert a family member, friend, the district attorney, or a senior service  
31 agency.

32 **DO I NEED TO TELL MY BENEFICIARY ABOUT THE TOD DEED?** No.  
33 But secrecy can cause later complications and might make it easier for others to  
34 commit fraud.

35 **WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE?** Your  
36 beneficiary must do all of the following: (1) RECORD evidence of your death  
37 (Prob. Code § 210), ~~and file~~ . (2) File a change in ownership notice (Rev. & Tax.  
38 Code § 480). (3) Provide notice to your heirs that includes a copy of this deed and

1 your death certificate (Prob. Code § 5681). Determining who is an “heir” can be  
2 complicated. Your beneficiary should consider seeking professional advice to  
3 make that determination. (4) Publish notice in a newspaper of general circulation  
4 in the county in which the property is located. (5) RECORD an affidavit affirming  
5 that notice was sent to your heirs and published (Prob. Code § 5682(c)). (5) If you  
6 received Medi-Cal benefits, your beneficiary must notify the State Department of  
7 Health Care Services of your death and provide a copy of your death certificate  
8 (Prob. Code § 215). Your beneficiary may wish to consult a professional for  
9 assistance with these requirements.

10 WHAT IF I NAME MORE THAN ONE BENEFICIARY? Your beneficiaries  
11 will become co-owners in equal shares as tenants in common. If you want a  
12 different result, you should not use this form.

13 HOW DO I NAME BENEFICIARIES? ~~You~~ (1) If the beneficiary is a person,  
14 you MUST name your beneficiaries individually, using each beneficiary’s state  
15 the person’s FULL name. You MAY NOT use general terms to describe  
16 beneficiaries, such as “my children.” For each beneficiary that you name, you  
17 ~~should~~ You may also briefly state that person’s relationship to you (for example,  
18 my spouse, my son, my daughter, my friend, etc.), but this is not required.

19 (2) If the beneficiary is a trust, you MUST name the trust, name the trustee(s),  
20 and state the date shown on the trust’s signature page.

21 (3) If the beneficiary is a public or private entity, name the entity as precisely as  
22 you can.

23 WHAT IF A BENEFICIARY DIES BEFORE I DO? If all beneficiaries die  
24 before you, the TOD deed has no effect. If a beneficiary dies before you, but other  
25 beneficiaries survive you, the share of the deceased beneficiary will be divided  
26 equally between the surviving beneficiaries. If that is not the result you want, you  
27 should not use the TOD deed.

28 WHAT IS THE EFFECT OF A TOD DEED ON PROPERTY THAT I OWN  
29 AS JOINT TENANCY OR COMMUNITY PROPERTY WITH RIGHT OF  
30 SURVIVORSHIP? If you are the first joint tenant or spouse to die, the deed is  
31 VOID and has no effect. The property transfers to your joint tenant or surviving  
32 spouse and not according to this deed. If you are the last joint tenant or spouse to  
33 die, the deed takes effect and controls the ownership of your property when you  
34 die. If you do not want these results, do not use this form. The deed does NOT  
35 transfer the share of a co-owner of the property. Any co-owner who wants to name  
36 a TOD beneficiary must complete and RECORD a SEPARATE deed.

37 CAN I ADD OTHER CONDITIONS ON THE FORM? No. If you do, your  
38 beneficiary may need to go to court to clear title.

39 IS PROPERTY TRANSFERRED BY THE TOD DEED SUBJECT TO MY  
40 DEBTS? Yes.

1 DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES?  
2 No.

3 HOW DOES THE TOD DEED AFFECT PROPERTY TAXES? The TOD deed  
4 has no effect on your property taxes until your death. At that time, property tax  
5 law applies as it would to any other change of ownership.

6 DOES THE TOD DEED AFFECT MY ELIGIBILITY FOR MEDI-CAL? No.

7 ~~AFTER MY DEATH, WILL MY HOME BE LIABLE FOR~~  
8 ~~REIMBURSEMENT OF THE STATE FOR MEDICAL EXPENDITURES?~~  
9 ~~Your home may be liable for reimbursement. If you have questions, you should~~  
10 ~~consult an attorney.~~

11 **Comment.** Section 5642 is amended to conform to other changes made to this part and to  
12 make related improvements.

13 **Prob. Code § 5644 (amended). Revocation form**

14 5644. A transferor may revoke a revocable transfer on death deed by an  
15 instrument in substantially the following form:

16

17

18

19

20

21 Recording Requested By:

22

23 When Recorded Mail This Deed To

24

Name:

25

Address:

26

Assessor's Parcel Number:

27

Space Above For Recorder's Use

28

29 This deed revocation is exempt from documentary transfer tax under Rev. & Tax.  
30 Code §11930. This deed revocation is exempt from preliminary change of  
31 ownership report under Rev. & Tax. Code § 480.3.

32

33

**IMPORTANT NOTICE: THIS FORM MUST BE  
RECORDED TO BE EFFECTIVE**

34

35 This revocation form **MUST** be **RECORDED** before your death or it will not be  
36 effective. This revocation form only affects a transfer on death deed that **YOU**

1 made. A transfer on death deed made by a co-owner of your property is not  
2 affected by this revocation form. A co-owner who wants to revoke a transfer on  
3 death deed that he/she made must complete and RECORD a SEPARATE  
4 revocation form.

5  
6 **PROPERTY DESCRIPTION**

7  
8 Print the legal description of the property affected by this revocation:

9  
10  
11  
12 **REVOCATION**

13  
14 I revoke any TOD deed to transfer the described property that I executed before  
15 executing this form.

16  
17 **SIGNATURE AND DATE**

18  
19  
20 Sign and print your name below (your name should exactly match the name  
21 shown on your title documents):

22  
23  
24 Date

25  
26  
27 **WITNESSES**

28  
29 To be valid, this form must be signed by two persons, both present at the same  
30 time, who witness your signing of the form or your acknowledgement that it is  
31 your form.

32  
33 Witness #1

Witness #2

34 Print and sign your name:

Print and sign your name:

35  
36  
37 -----

38  
39 ~~ACKNOWLEDGMENT OF NOTARY~~

~~A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.~~

~~State of California)  
County of \_\_\_\_\_)~~

~~On \_\_\_\_\_ before me, (here insert name and title of the officer), personally appeared \_\_\_\_\_, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.~~

~~I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.~~

~~WITNESS my hand and official seal.~~

~~Signature \_\_\_\_\_ (Seal)~~

~~**Comment.** Section 5644 is amended to conform to other changes made to this part and to make related improvements.~~

**Prob. Code § 5652 (amended). Effect of deed**

SEC. \_\_\_\_ . Section 5652 of the Probate Code is amended to read:

5652. (a) A revocable transfer on death deed transfers all of the transferor's interest in the property on the transferor's death according to the following rules:

(1) Subject to the beneficiary's right to disclaim the transfer, the interest in the property is transferred to the beneficiary in accordance with the deed.

(2) The interest of a beneficiary is contingent on the beneficiary surviving the transferor. Notwithstanding Section 21110, the interest of a beneficiary that fails to survive the transferor lapses.

(3) Except as provided in paragraph (4), if there is more than one beneficiary, they take the property as tenants in common, in equal shares.

(4) If there is more than one beneficiary, the share of a beneficiary that lapses or fails for any reason is transferred to the others in equal shares.

(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 or that is recorded no later than 120 days after the affidavit required by subdivision

(c) of Section 5682 is recorded, 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



1 holder of rights under that instrument may enforce those rights against the  
2 property notwithstanding its transfer by the revocable transfer on death deed. An  
3 enforceable restriction on the use of the transferred property does not affect the  
4 transfer of title to the property by a revocable transfer on death deed.

5 (c) A revocable transfer on death deed transfers the property without covenant or  
6 warranty of title.

7 **Comment.** Section 5652 is amended to achieve the following results:

8 (1) To provide that property transferred by revocable transfer on death deed is burdened by any  
9 limitation on the transferor's ownership that is recorded within 120 days of recordation of the  
10 affidavit required by Section 5682(c).

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

14 **Prob. Code § 5658 (added). *Cy pres***

15 SEC. \_\_\_\_\_. Section 5658 is added to the Probate Code, to read:

16 5658. A court in which the transferor's estate is being administered may, on the  
17 petition of the personal representative or interested person, or on its own motion,  
18 apply the doctrine of cy pres to reform a revocable transfer on death deed that was  
19 made by the transferor for a charitable purpose, in either of the following  
20 circumstances:

21 (a) The beneficiary does not accept the gift.

22 (b) The beneficiary is a legal entity that dissolved or was merged into another  
23 entity before the transferor's death.

24 **Comment.** Section 5658 is new.

25 **Prob. Code § 5659 (amended). Error or ambiguity**

26 SEC. \_\_\_\_\_. Section 5659 is added to the Probate Code, to read:

27 5659. An error or ambiguity in describing property or designating a beneficiary  
28 does not invalidate a revocable transfer on death deed if the transferor's intention  
29 can be determined by a court. The general law that governs judicial construction or  
30 reformation of an error or ambiguity in a deed applies to a revocable transfer on  
31 death deed.

32 **Comment.** Section 5659 is new. It makes clear that ambiguity or error in a revocable transfer  
33 on death deed does not invalidate the deed if the transferor's intention can be determined through  
34 judicial construction. See, e.g., Miller & Starr, California Real Estate, *Deeds and Descriptions*  
35 § 8.26 at 66-67 (2015) (footnotes omitted) ("An unintentional error in the name of the grantee  
36 does not prevent a transfer of the property to the intended party. ... The deed must describe the  
37 grantee with sufficient clarity and certainty that he or she can be identified, and extrinsic evidence  
38 is admissible to prove the identity of the parties mentioned in the deed, except when the identity  
39 is inherently uncertain and indeterminate by the terms of the document."); *Id.* § 861 at 171-73  
40 (emphasis in original) (footnotes omitted) ("A deed will be sustained if it is possible from the  
41 whole description to ascertain and identify the land conveyed with reasonable certainty. No  
42 particular form of description is required.... A conveyance is void when the description in the  
43 deed is omitted or is so vague as not to be capable of being made certain.... However, mere  
44 *ambiguity* or uncertainty will not defeat the effectiveness of the conveyance if it can be cured by  
45 extrinsic evidence.").

1 **Prob. Code § 5660 (amended). Conflicting instruments**

2 SEC. \_\_\_\_ . Section 5660 of the Probate Code is amended to read:

3 5660. If a revocable transfer on death deed recorded on or before 60 days after  
4 the date it was executed and another instrument both purport to dispose of the  
5 same property:

6 (a) If the other instrument is not recorded before the transferor's death, the  
7 revocable transfer on death deed is the operative instrument.

8 (b) If the other instrument is recorded before the transferor's death and ~~makes a~~  
9 ~~revocable disposition of the property~~ the provision of the other instrument that  
10 purports to transfer the property was revocable just prior to the transferor's death,  
11 the later executed of the revocable transfer on death deed or the other instrument is  
12 the operative instrument.

13 (c) If the other instrument is recorded before the transferor's death and ~~makes an~~  
14 ~~irrevocable disposition of the property~~ the provision of the other instrument that  
15 purports to transfer the property was not revocable just prior to the transferor's  
16 death, the other instrument and not the revocable transfer on death deed is the  
17 operative instrument.

18 **Comment.** Section 5660 is amended to make clear that subdivisions (b) and (c) depend on the  
19 revocability of a dispositive provision just prior to the transferor's death. The possibility that a  
20 provision may become irrevocable on the transferor's death is not relevant to the operation of the  
21 section.

22 **Prob. Code § 5674 (amended). Scope of personal liability**

23 SEC. \_\_\_\_ . Section 5674 of the Probate Code is amended to read:

24 (a) A beneficiary is not liable under Section 5672 if proceedings for the  
25 administration of the transferor's estate are commenced and the beneficiary  
26 satisfies the requirements of Section ~~5676~~ 5677 or 5678.

27 (b) The ~~aggregate of the~~ personal liability of a beneficiary under Section 5672  
28 shall not exceed ~~the sum of the following:~~

29 (1) ~~The~~ the fair market value at the time of the transferor's death of the property  
30 received by the beneficiary pursuant to the revocable transfer on death deed, less  
31 the amount of any liens and encumbrances on the property at that time.

32 (2) ~~The net income the beneficiary received from the property.~~

33 (3) ~~If the property has been disposed of, interest on the fair market value of the~~  
34 ~~property from the date of disposition at the rate payable on a money judgment. For~~  
35 ~~the purposes of this paragraph, "fair market value of the property" has the same~~  
36 ~~meaning as defined in paragraph (2) of subdivision (a) of Section 5676.~~

37 **Comment.** Section 5674 is amended to reflect the repeal of Section 5676 and the addition of  
38 Sections 5677 and 5678, and to remove net income and interest from the calculation of a  
39 beneficiary's total personal liability for a transferor's unsecured debts.

1 **Prob. Code § 5676 (repealed). Restitution liability**

2 SEC. \_\_\_\_\_. Section 5676 of the Probate Code is repealed.

3 **Comment.** Section 5676 is repealed. This repeal does not affect a beneficiary's right to  
4 voluntarily return property to the transferor's estate under Section 5678.

5 **Prob. Code § 5677 (added). Personal liability to estate**

6 SEC. \_\_\_\_\_. Section 5677 is added to the Probate Code, to read:

7 5677. (a) If proceedings for the administration of the transferor's estate are  
8 commenced, a beneficiary of a revocable transfer on death deed is personally  
9 liable to the estate for a share of the transferor's unsecured debts.

10 (b) In calculating the beneficiary's share of liability under subdivision (a), the  
11 abatement rules provided in Part 4 (commencing with Section 21400) of Division  
12 11 shall be applied, using all of the following assumptions:

13 (1) The property that was transferred to the beneficiary by revocable transfer on  
14 death deed shall be treated as if it were a specific gift made by the decedent's will.

15 (2) The value of the property received by the beneficiary pursuant to the  
16 revocable transfer on death deed shall be deemed to be the fair market value of the  
17 property at the time of the transferor's death, less the amount of any liens and  
18 encumbrances on the property at that time.

19 (3) Any unsecured debts of the transferor that were paid by the beneficiary  
20 pursuant to Section 5672 shall be treated as if they were claims made against the  
21 transferor's estate.

22 (c) The personal representative shall provide a written statement of liability to  
23 the beneficiary, which specifies the amount that must be paid to the estate.

24 (d) The beneficiary is personally liable to the estate for the amount specified in  
25 the statement of liability. Any amount that the beneficiary paid toward the  
26 unsecured debts of the transferor pursuant to Section 5672 shall be credited against  
27 the amount that the beneficiary owes the estate under this subdivision. If the  
28 amount that the beneficiary paid pursuant to Section 5672 exceeds the amount  
29 specified in the written statement of liability, the estate shall reimburse the  
30 difference to the beneficiary. For the purposes of Section 11420, this  
31 reimbursement shall be deemed an expense of administration.

32 (e) In the event that the beneficiary and the personal representative cannot agree  
33 on the reimbursement or liability due under this section, the beneficiary or  
34 personal representative may petition the court for an order determining the amount  
35 of the reimbursement or liability.

36 (f) The reasonable cost of proceeding under this section shall be reimbursed as  
37 an extraordinary service under Sections 10801 and 10811. The beneficiary is liable  
38 for the payment of that cost, which shall be separately identified in the statement  
39 of liability.

40 **Comment.** Section 5677 is new. It provides a process for the determination and satisfaction of  
41 a beneficiary's share of liability for the unsecured debts of the transferor. A beneficiary who pays  
42 the indicated amount to the estate has no personal liability under Section 5672. See Section  
43 5674(a).

1 **Prob. Code § 5678 (added). Voluntary return of property to estate**

2 SEC. \_\_\_\_ . Section 5678 is added to the Probate Code, to read:

3 5678. (a) If proceedings for the administration of the transferor’s estate are  
4 commenced, a beneficiary who receives property from the transferor under a  
5 revocable transfer on death deed may voluntarily return that property to the  
6 transferor’s estate for administration.

7 (b) Property returned to the transferor’s estate under this section shall be treated  
8 as if it had been specifically devised to the beneficiary by the transferor.

9 (c) If the beneficiary’s action or inaction increased the value of property  
10 returned to the estate or decreased the estate’s obligations, the estate shall  
11 reimburse the beneficiary by the same amount. Actions or inaction that increase  
12 the value of returned property or decrease the estate’s obligations include, but are  
13 not necessarily limited to, the following actions:

14 (1) A payment toward an unsecured debt of the decedent.

15 (2) A payment toward a debt secured against the returned property.

16 (3) A significant improvement of the returned property that increased the fair  
17 market value of the property.

18 (d) If the beneficiary’s action or inaction decreased the value of property  
19 returned to the estate or increased the estate’s obligations, the beneficiary is  
20 personally liable to the estate for that amount. Actions or inaction that decrease the  
21 value of the returned property or increase the estate’s obligations include, but are  
22 not necessarily limited to, the following actions or inaction:

23 (1) An action or inaction that resulted in a lien or encumbrance being recorded  
24 against the property.

25 (2) The receipt of income from the property, if that income would have accrued  
26 to the estate had the property not been transferred to the beneficiary.

27 (e) The personal representative shall provide the beneficiary a written statement  
28 of any reimbursement or liability under this section, along with a statement of the  
29 reasons for the reimbursement or liability. For the purposes of Section 11420, any  
30 reimbursement under this section shall be deemed an expense of administration.

31 (f) In the event that the beneficiary and the personal representative cannot agree  
32 on the reimbursement or liability due under this section, the beneficiary or  
33 personal representative may petition the court for an order determining the amount  
34 of the reimbursement or liability. In making a decision under this subdivision, the  
35 court should consider the surrounding circumstances, including whether the parties  
36 acted in good faith and whether a particular result would impose an unfair burden  
37 on the beneficiary or the estate.

38 **Comment.** Section 5678 is new. It provides the beneficiary of a revocable transfer on death  
39 deed the option of voluntarily returning property received under the deed to the transferor’s estate  
40 for administration. A beneficiary who returns property to the estate under this section has no  
41 personal liability under Section 5672. See Section 5674(a).

1 **Prob. Code § 5681 (added). Notice**

2 SEC. \_\_\_\_ . Section 5681 is added to the Probate Code, to read:

3 5681. (a) After the death of the transferor, the beneficiary of a revocable transfer  
4 on death deed shall do both of the following:

5 (1) Serve the notice described in subdivision (b) on the transferor’s heirs.

6 (2) Publish the statement described in paragraph (3) of subdivision (b) in a  
7 newspaper of general circulation in the county where the decedent’s property is  
8 located. If there is no such newspaper, notice shall be published in a newspaper of  
9 general circulation published in this state nearest to the county seat of the county  
10 in which the property is located. Three publications in a newspaper published once  
11 a week or more often, with at least five days intervening between the first and last  
12 publication dates, not counting the publication dates, are sufficient.

13 (b) The notice shall consist of all of the following:

14 (1) A copy of the revocable transfer on death deed.

15 (2) A copy of the transferor’s death certificate.

16 (3) A statement in substantially the following form:

17  
18 “REVOCABLE TRANSFER ON DEATH DEED

19  
20 A revocable transfer on death deed, created by [name of deceased transferor],  
21 affecting [description of property used on revocable transfer on death deed],  
22 named [name(s) of beneficiary(ies)] as the beneficiary(ies) of the deed. As a result  
23 of the death of [name of deceased transferor], the property will transfer.”  
24

25 (c) For the purposes of this section, if the beneficiary has actual knowledge of a  
26 final judicial determination of heirship for the deceased transferor, the beneficiary  
27 shall rely on that determination. Otherwise, the beneficiary shall have discretion to  
28 make a good faith determination, by any reasonable means, of the heirs of the  
29 transferor.

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

33 (e) The notice shall be served by any of the methods described in Section 1215  
34 to the last known address.

35 (f) If a revocable transfer on death deed names more than one beneficiary, only  
36 one of the beneficiaries is required to comply with this section.

37 (g)(1) A beneficiary is liable to an heir of the transferor for any damage caused  
38 by a failure to comply with this section that is intentional or grossly negligent.

39 (2) A beneficiary is not liable under this subdivision if that beneficiary  
40 reasonably relied, in good faith, on another beneficiary’s statement that the other  
41 beneficiary would satisfy the requirements of this section.

42 **Comment.** Section 5681 is new. It requires that a beneficiary of a revocable transfer on death  
43 deed publish and serve notice on heirs after the transferor has died. The notice requirement is

1 similar to Section 16061.7(b)(2). The publication requirement is similar to Section 8121(b).  
2 Subdivisions (c)-(e) are drawn from Section 16061.7(c)-(e).

3 **Prob. Code § 5682 (amended). Protection of third parties**

4 SEC. \_\_\_\_\_. Section 5682 of the Probate Code is amended to read:

5 5682. If ~~both~~ all of the following conditions are satisfied, a person dealing with a  
6 beneficiary of a revocable transfer on death deed of real property shall have the  
7 same rights and protections as the person would have if the beneficiary had been  
8 named as a distributee of the property in an order for distribution of the  
9 transferor's estate that had become final:

10 (a) The person acted in good faith and for a valuable consideration.

11 (b) An affidavit of death was recorded for the property under Chapter 2  
12 (commencing with Section 210) of Part 4 of Division 2.

13 (c)(1) An affidavit was recorded for the property, which contains a statement in  
14 substantially the following form: "I, [name of beneficiary], delivered and  
15 published the notice required by Probate Code Section 5681."

16 (2) If a revocable transfer on death deed names more than one beneficiary, only  
17 one beneficiary is required to comply with this subdivision.

18 **Comment.** Section 5682 is amended to condition the protections afforded by the section on  
19 recordation of an affidavit affirming compliance with the notice requirement in Section 5681.

20 **Prob. Code § 5690 (amended). Contest**

21 SEC. \_\_\_\_\_. Section 5690 of the Probate Code is amended to read:

22 5690. (a)(1) An action for the disqualification of a beneficiary under Part 3.7  
23 (commencing with Section 21360) of Division 11 may be brought to contest the  
24 validity of a transfer of property by a revocable transfer on death deed.

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

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

34 (b) The proper county for a contest proceeding is the proper county for  
35 proceedings concerning administration of the transferor's estate, whether or not  
36 proceedings concerning administration of the transferor's estate have been  
37 commenced at the time of the contest.

38 (c) On commencement of a contest proceeding, the contestant may record a lis  
39 pendens in the county in which the revocable transfer on death deed is recorded.

40 (d) In a contest proceeding, each subscribing witness of the revocable transfer  
41 on death deed shall be produced and examined. If no subscribing witness is

1 available as a witness within the meaning of Section 240 of the Evidence Code,  
2 the court may admit the evidence of other witnesses to prove the due execution of  
3 the deed.

4 **Comment.** Paragraph (3) is added to Section 5690(a) to make clear that the beneficiary of a  
5 revoked deed has standing to contest the purported revocation. Note, however, that such a contest  
6 cannot be filed until after the transferor's death. Section 5692(a). If the contest is successful, the  
7 court has discretion to fashion a remedy that would best effectuate the transferor's intentions.

8 Subdivision (d) is drawn from Section 8253. See also Section 5624 (execution of deed).

9 **Prob. Code § 5694 (amended). Available relief**

10 SEC. \_\_\_\_ . Section 5694 of the Probate Code is amended to read:

11 5694. If the court in a contest proceeding determines that a transfer of property  
12 by a revocable transfer on death deed is invalid, the court shall order the following  
13 relief:

14 (a) If the proceeding was commenced and a lis pendens was recorded ~~within~~ no  
15 later than 120 days after the ~~transferor's death~~ affidavit required by subdivision (c)  
16 of Section 5682 was recorded, the court shall void the deed and order transfer of  
17 the property to the person entitled to it.

18 (b) If the proceeding was not commenced and a lis pendens was not recorded  
19 within 120 days after the ~~transferor's death~~ affidavit required by subdivision (c) of  
20 Section 5682 was recorded, the court shall grant appropriate relief but the court  
21 order shall not affect the rights in the property of a purchaser or encumbrancer for  
22 value and in good faith acquired before commencement of the proceeding and  
23 recordation of a lis pendens.

24 **Comment.** Section 5694 is amended to change the date on which the specified 120-day period  
25 commences.

CONFORMING REVISION

1 **Gov't Code § 27281 (amended). Public entity acceptance of conveyance**

2 SEC. \_\_\_\_ . Section 27281 of the Government Code is amended to read:

3 27281. (a) Deeds or grants conveying any interest in or easement upon real  
4 estate to a political corporation or governmental agency for public purposes shall  
5 not be accepted for recordation without the consent of the grantee evidenced by its  
6 certificate or resolution of acceptance attached to or printed on the deed or grant.  
7 If a certificate of acceptance is used, it shall be in substantially the following form:

8 This is to certify that the interest in real property conveyed by the deed or grant  
9 dated \_\_\_\_\_ from \_\_\_\_\_ to \_\_\_\_\_ , a political corporation and/or  
10 governmental agency is hereby accepted by order of the  
11 \_\_\_\_\_ (legislative body) \_\_\_\_\_ on \_\_\_\_\_ (date) \_\_\_\_\_ ,  
12 (or by the undersigned officer or agent on behalf of  
13 the \_\_\_\_\_ (legislative body) \_\_\_\_\_  
14 pursuant to authority conferred by resolution of the  
15 \_\_\_\_\_ (legislative body) \_\_\_\_\_ adopted on \_\_\_\_\_ (date) \_\_\_\_\_ ,)  
16 and the grantee consents to recordation thereof by its duly authorized officer.  
17 Dated \_\_\_\_\_ By \_\_\_\_\_

18 (b) A political corporation or governmental agency, by a general resolution, may  
19 authorize one or more officers or agents to accept and consent to ~~such deeds or~~  
20 ~~grants~~ a deed or grant described in subdivision (a).

21 (c) In cases where the county tax collector files purchaser's deeds with respect  
22 to a sale for defaulted taxes, the information contained in those documents shall be  
23 deemed to constitute compliance with this section.

24 (d) The requirements of this section shall not apply to a deed of trust or other  
25 security or regulatory document recorded by or on behalf of a state agency  
26 pursuant to a program or activity of the agency authorized by statute or regulation.

27 (e) Subdivision (a) does not apply to a revocable transfer on death deed.

28 (f) A revocable transfer on death deed that names a political corporation or  
29 governmental agency as a beneficiary does not transfer title to that political  
30 corporation or governmental agency unless and until the political corporation or  
31 governmental agency records a resolution of acceptance or a certificate of consent  
32 in a form substantially similar to the form prescribed in subdivision (a).

33 **Comment.** Section 5610(e) is added to exempt a revocable transfer on death deed from  
34 subdivision (a). Such a deed can be recorded without the prior consent of a political corporation  
35 or governmental entity named as beneficiary. However, the deed will not operate to transfer title



- 1 to the political corporation or governmental entity until that entity records evidence of its consent
- 2 under subdivision (f).

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