

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Revocable Transfer on Death Deed: Follow-Up Study

May 2019

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN August 15, 2019.

The Commission will often substantially revise a proposal in response to comment it receives. Thus, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

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SUMMARY OF TENTATIVE 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 That statute will be repealed by its own terms on January 1, 2021, unless that date is extended or repealed.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 tentative recommendation proposes a number of further improvements to existing law. The Commission requests public comment on each of those proposed reforms.

The tentative recommendation also requests general comment on the threshold question of whether the revocable transfer on death deed statute should continue in effect beyond January 1, 2021. The Commission has not yet taken a position on that question.

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.¹ By its
3 terms, that statute will repeal on January 1, 2021, unless the sunset date is
4 extended or repealed before it 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.²

21 This tentative recommendation presents the Commission’s preliminary findings
22 on those issues, along with proposed legislation to improve the effectiveness of the
23 RTODD statute.³ The Commission requests public comment on the legislation
24 proposed in this tentative recommendation.

25 The Commission has not yet reached any conclusion about whether the RTODD
26 statute should continue in effect after January 1, 2021. The Commission
27 specifically requests comment on that important issue.

28 OVERVIEW OF STUDY

29 As a first step in this study, the Commission contacted the major stakeholder
30 groups that are likely to have had practical experience with the effect of RTODDs
31 in California. The Commission included groups that are involved in the

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

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

3. 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, on an urgency basis, in 2018. See *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm’n Reports 1 (2018); 2018 Cal. Stat. ch. 65.

1 administration of estates⁴ and real property transfers,⁵ as well as groups that focus
2 on prosecuting financial crimes⁶ and protecting seniors.⁷ All of those groups were
3 notified of the Commission’s study and requested to gather information about
4 practical experience under the law and share it with the Commission. Materials
5 relating to the study were also distributed to the Commission’s existing mailing
6 list for persons interested in the Commission’s work on estate planning matters
7 generally.⁸

8 As a next step, the Commission reviewed the appellate case law in those states
9 that have authorized the use of RTODDs for the longest time.⁹ The goal of that
10 review was to look for evidence of problems with the use of RTODDs in those
11 states, which might also pose problems in California.

12 Finally, the Commission reviewed input from interested groups and individuals.
13 The Commission greatly appreciates that input, which helped the Commission to
14 identify and develop a number of reforms that would improve the operation of the
15 RTODD statute.

16 SUMMARY OF FINDINGS AND RECOMMENDATIONS

17 As discussed above, the legislation that directed the Commission to conduct this
18 study posed a series of questions.¹⁰ Those questions, and the Commission’s
19 preliminary answers, are summarized briefly below and explained in greater detail
20 in the later sections of this report.

21 **Is the RTODD working effectively?**

22 Early in this study, the Commission learned of a problem that was interfering
23 with the operation of the RTODD. There was uncertainty about whether the law
24 required recordation of the “Common Questions” part of the statutory form. This
25 was leading some title insurers to decline to issue policies where that document
26 had not been recorded. The Commission recommended legislation to make clear

4. These included the California State Bar, California Lawyers Association, the Conference of California Bar Associations, the California Judges Association, the Administrative Office of the Courts, and the California State Association of Public Administrators, Public Guardians, and Public Conservators.

5. These included the California Land Title Association, the California Escrow Association, and the County Records Association of California.

6. These included the California District Attorneys Association, the Los Angeles County District Attorney’s Office, the California Police Chiefs Association, the California State Sheriff’s Association, and the California Attorney General’s Bureau of Medi-Cal Fraud and Elder Abuse.

7. These included the Congress of California Seniors, the California Alliance for Retired Americans, and Bet Tzedek.

8. At this time, the mailing list includes 240 groups and individuals.

9. The Commission did not find any California appellate decisions discussing the RTODD statute.

10. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

1 that recordation of that document is not required.¹¹ That legislation was enacted in
2 2018.¹²

3 The Commission later learned that some title insurers view Probate Code
4 Section 5676 as creating a cloud on title. Under that section, an RTODD
5 beneficiary might be required to return RTODD property to the decedent's estate
6 to pay the decedent's unsecured debts. Reportedly, some title insurers have
7 declined to issue policies during the three-year period in which such restitution
8 may be required. To cure that problem, the Commission recommends that Section
9 5676 be repealed and replaced with other mechanisms for enforcing a
10 beneficiary's liability for a deceased transferor's debts. The proposed mechanisms
11 would not directly burden the transferred real property and so would not create
12 any cloud on title.

13 The Commission found no other problems with the effective operation of the
14 RTODD.

15 **Should the RTODD be continued?**

16 The Commission is reserving judgment on this question until after it has
17 received public comment on this tentative recommendation.

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

19 The Commission does not believe that an RTODD is any more prone to misuse
20 or misunderstanding than any other instrument that can be used to transfer title to
21 property. To the contrary, the RTODD is probably less prone to misunderstanding
22 than other common property transfer instruments (e.g., a grant deed) because the
23 statutory form is accompanied by an extensive "Common Questions" guidance
24 document. In addition, the RTODD is limited by the mandatory statutory form to
25 one simple application: the transfer of an owner's entire interest in specified
26 property to named beneficiaries in equal shares. The form does not permit
27 contingencies or alternative beneficiaries. This enforced simplicity should help to
28 avoid ambiguities and mistakes that can arise when laypeople draft their own
29 instruments.

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

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

- 34 • Clarify the types of property that can be transferred by RTODD.
35 • Clarify how to name a trust as beneficiary.

11. See *Revocable Transfer on Death Deed: Recordation*, *supra* note 3.

12. 2018 Cal. Stat. ch. 65.

- 1 • Resolve a technical problem that could arise when naming a public entity as
2 beneficiary.
- 3 • Clarify the execution formalities for an RTODD.
- 4 • Make a technical, terminological correction in the provision that determines
5 the effect of conflicting instruments.
- 6 • Extend the time to record and thereby preserve the effect of third party
7 interests in property transferred by an RTODD.
- 8 • Add guidance to the “Common Questions” document to address the effect of
9 an RTODD on a mobilehome.
- 10 • Repeal the provision that governs return of property to the transferor’s estate
11 for use in paying the transferor’s unsecured debts; replace that provision
12 with alternative provisions for payment of the beneficiary’s share of those
13 debts.
- 14 • Make technical improvements to the provision that determines the scope of
15 a beneficiary’s personal liability for the transferor’s unsecured debts.
- 16 • Make clear that the beneficiary of a revoked RTODD has standing to contest
17 the validity of the revocation, but only after the transferor’s death.

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

20 The Commission’s research suggests that an RTODD is no more prone to
21 financial abuse than any other instrument that can be used to transfer title to real
22 property.

23 Nonetheless, the Commission recommends two changes that would help to
24 protect against financial abuse:

25 *Notice to transferor’s heirs.* Borrowing a procedure from trust law, the
26 Commission recommends that a beneficiary of an RTODD be required to give
27 notice to the transferor’s heirs when the transferor has died. In addition, before
28 acquiring title to property transferred by RTODD, the beneficiary would need to
29 record an affidavit affirming that the required notice was given. This will alert
30 those who have an interest in the decedent’s estate that the RTODD exists and is
31 operating. If the RTODD was the product of fraud or undue influence, heirs will
32 have a timely opportunity to bring a contest.

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

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

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

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

22 The Commission also recommends that the law be revised to expressly permit
23 the RTODD to name other legal entities as beneficiaries. This would facilitate
24 charitable giving to public entities and nonprofits. The proposed law would make
25 two related reforms, which would: (1) allow a court to apply the doctrine of *cy*
26 *pres* if an RTODD transferring property for a charitable purpose fails because the
27 gift is disclaimed or the beneficiary no longer exists, and (2) make technical
28 adjustments to an existing provision that governs recordation of a deed that
29 transfers property to a public entity.

30 **EXPERIENCE IN OTHER STATES**

31 The Commission reviewed the appellate case law in the nine states that had
32 authorized the use of an RTODD¹³ for at least 10 years.¹⁴ Those states are listed
33 below (with the dates of authorization noted in parentheses):

34 Missouri (1989)¹⁵

13. 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.

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

15. Mo. Rev. Stat. § 461.025.

- 1 Kansas (1997)¹⁶
- 2 Ohio (2000)¹⁷
- 3 Arizona (2001)¹⁸
- 4 New Mexico (2001)¹⁹
- 5 Nevada (2003)²⁰
- 6 Colorado (2004)²¹
- 7 Arkansas (2005)²²
- 8 Wisconsin (2005)²³

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

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

14 **Financial Abuse**

15 The Commission found 17 cases in which an RTODD was contested on grounds
16 of fraud, undue influence, or transferor incapacity. The allegations were proven in
17 only 6 of the cases.

18 The facts in those cases did not identify or suggest that an RTODD has any
19 greater or special vulnerability to abuse, as compared to other instruments that can
20 be used to transfer property on death.

21 An RTODD operates outside of court review and can be executed without the
22 involvement of counsel. Those circumstances might increase the risk of abuse.
23 However, the same is true of other instruments that can be used to transfer title to
24 real property (e.g., an intervivos trust or grant deed). The Commission found
25 nothing to suggest that an RTODD was more likely to be the instrument of
26 financial abuse than those other common instruments.

27 The Commission did find one interesting trend in the cases that it reviewed.
28 Non-family caregivers were the perpetrators in half of the cases of confirmed
29 financial abuse. This supports the notion that elderly people are particularly
30 vulnerable to financial abuse by their caregivers.

31 Existing California law already provides protection against such abuse. In
32 addition to criminal penalties,²⁴ there is a statutory presumption that a gift to a

16. Kan. Stat. Ann. § 59-3501.

17. Ohio Rev. Code Ann. § 5302.22.

18. Ariz. Rev. Stat. § 33-405.

19. N.M. Stat. Ann. § 45-6-401.

20. Nev. Rev. Stat. § 111.109.

21. Colo. Rev. Stat. § 15-15-401.

22. Ark. Code Ann. § 18-12-608.

23. Wisc. Stat. § 705.15.

24. See Penal Code § 368(e).

1 non-family caregiver was the product of fraud or undue influence.²⁵ Unless the
2 caregiver can rebut that presumption by clear and convincing evidence, the gift to
3 the caregiver will fail. The California RTODD statute expressly provides that a
4 beneficiary of an RTODD can be challenged under the existing presumption of
5 fraud or undue influence.²⁶

6 The California RTODD statute also provides a general remedy that can be used
7 to invalidate an RTODD that was the product of fraud, undue influence, or
8 mistake.²⁷

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

12 **Mistake**

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

17 *Complicated Instruments*

18 Some of the mistakes that occurred in other states were the result of errors in the
19 drafting of complicated instruments. For example, in one case the transferor tried
20 to make the operation of the RTODD contingent on the beneficiary paying all
21 property taxes during the transferor's life. Such a condition was not permissible
22 under the authorizing statute.²⁸

23 Such errors should not be possible in California, because California's statute
24 does not permit user-drafted instruments. An RTODD must be executed using a
25 fixed statutory form.²⁹

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

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

25. Prob. Code § 21380(a)(3).

26. Prob. Code § 5690(a)(1).

27. Prob. Code §§ 5690(a)(2), 5696(a).

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

29. Prob. Code § 5642.

30. Prob. Code § 5652.

31. *Id.*

1 unequal beneficiary shares,³² 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.³³ Those kinds of errors can arise in any context and cannot be entirely
10 eliminated.

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.³⁴

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.³⁵

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.³⁶

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;

32. Prob. Code § 5652(a)(3).

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

34. Prob. Code § 5642(b).

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

36. 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 does not also exist when
5 other kinds of instruments are used to transfer real property outside of probate and
6 without the assistance of counsel.

7 PREVENTION OF FRAUD AND UNDUE INFLUENCE

8 Fraud and undue influence are always a concern when a person, especially a
9 senior or other vulnerable person, executes an instrument to transfer property on
10 death. The risk of fraud or undue influence may be heightened when the
11 instrument is not subject to scrutiny in probate administration (as is the case with
12 an RTODD or a trust).

13 The Commission recommends two statutory reforms that would help to reduce
14 the risk of fraud or undue influence when an RTODD is used.

15 **Notice to Heirs**

16 Under the Trust Law, when a trust becomes irrevocable because of the death of
17 the trustor, the trustee must, among other things, provide written notice to the
18 trustor’s heirs.³⁷ This alerts the heirs that the trust exists and will operate to
19 dispose of the deceased trustor’s property. If it appears that the trust is the product
20 of fraud or undue influence, the heirs will have a timely opportunity to bring a
21 contest.

22 The Commission recommends that the same approach be applied to RTODDs.
23 In order to take title to property transferred by RTODD, the beneficiary should be
24 required to give notice to the deceased transferor’s heirs.³⁸ The beneficiary should
25 also be required to record an affidavit affirming that the required notice has been
26 given. Until the affidavit is recorded, the law would not protect the interest of a
27 bona fide purchaser or encumbrancer of the property³⁹ and the time limit for filing
28 a fully effective contest would not commence.⁴⁰ These requirements would ensure
29 that persons who have an interest in the deceased transferor’s estate have a
30 meaningful and timely opportunity to assess the validity of the RTODD and, if
31 necessary, bring an action to contest it.

37. Prob. Code § 16061.7(a)(1).

38. See proposed Prob. Code § 5680(e) *infra*.

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

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

1 **Standing to Contest Revocation**

2 Under the existing RTODD statute, it is not clear that the beneficiary of an
3 RTODD has standing to contest a revocation of the RTODD.⁴¹

4 During the transferor’s life, a beneficiary should not have standing to bring such
5 a contest, because the beneficiary’s interest in the RTODD is a mere expectancy.
6 Appropriately, the existing statute provides that an RTODD can only be contested
7 after the transferor’s death.⁴²

8 On the transferor’s death, however, the RTODD will have operated. If the
9 revocation was invalid (perhaps because it was the product of fraud or undue
10 influence, or the transferor lacked the requisite capacity), the beneficiary could
11 allege an actual and concrete injury of sufficient magnitude to justify bringing a
12 contest.⁴³ If the beneficiary does not have standing to contest the revocation, it is
13 not clear who would. If such contests cannot be brought, there will be no
14 accountability for misconduct that results in an improper revocation.

15 For those reasons, the Commission believes that a beneficiary should have
16 standing to contest a revocation of an RTODD, after the death of the transferor.
17 The proposed law would add language to expressly establish such standing.⁴⁴

18 It is not clear that a successful contest of a revocation should always result in
19 revival of the revoked RTODD. Where an RTODD is revoked by execution of a
20 new RTODD, the transferor’s intentions may be better effected by a more nuanced
21 result. For that reason, the proposed law would grant a court discretion to fashion
22 an appropriate remedy, consistent with the best understanding of the transferor’s
23 intentions, when the revocation of an RTODD is successfully contested.⁴⁵

24 **PROPERTY THAT CAN BE TRANSFERRED BY RTODD**

25 In assigning this study, the Legislature specifically directed the Commission to
26 consider

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

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

42. Prob. Code § 5692(a).

43. 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).

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

45. *Id.*

1 (A) The transfer of stock cooperatives or other common interest
2 developments.⁴⁶

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

6 “Real property” means any of the following:

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

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

11 (c) A single tract of agricultural real estate consisting of 40 acres or less that is
12 improved with a single-family residence.⁴⁷

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

15 **Residential Property Limitation Generally**

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

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

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

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

30 *Commercial Condominiums*

31 Existing law includes a condominium unit in the definition of real property, but
32 does not expressly preclude the use of an RTODD to transfer a commercial or
33 industrial condominium unit. This appears to have been a drafting oversight, rather
34 than a policy choice. For that reason, the Commission recommends that existing
35 law be revised to provide that an RTODD can only be used to transfer a residential
36 condominium unit.⁴⁸

46. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

47. Prob. Code § 5610.

48. 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.⁴⁹

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.⁵⁰ 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.⁵¹

24 The existing definition of “real property” includes only a condominium unit.⁵²
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.⁵³
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.⁵⁴

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

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

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

52. Prob. Code § 5610(b).

53. Civ. Code § 4190.

54. *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.⁵⁵ The Commission plans to conduct a separate study of
14 that possibility, under its general authority to study the Probate Code.⁵⁶

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.⁵⁷

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 terms of art to refer to common interest developments.⁵⁸

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. The governing documents of
32 the development may require that the board approve new occupants or impose an
33 enforceable age restriction.

55. Prob. Code §§ 5500-5512.

56. 2018 Cal. Stat. res. ch. 158.

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

58. 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 intervivos conveyance.
- 9 (3) It seems unlikely that such restrictions would affect the ability to transfer
10 title. For example, when a senior living in an age-restricted community dies,
11 someone is going to inherit the property. In many cases the recipient will not
12 meet the age restriction for occupation. Presumably, if title is transferred to
13 a person who is not eligible to occupy the property, the new owner could
14 sell or lease the property to someone who is eligible to occupy. This would
15 allow the new owner to realize the value of the property, notwithstanding
16 the restriction on occupation.

17 The Commission intends to conduct a separate study of this issue, as it applies to
18 all at-death transfers of real property.

19 **Agricultural Land**

20 Existing law only permits the use of an RTODD to transfer agricultural land if
21 that land consists of “a single tract of agricultural real estate consisting of 40 acres
22 or less that is improved with a single-family residence”⁵⁹ The term “agricultural
23 real estate” is not defined. Nor is there any other use of that term in the California
24 Codes. This reliance on an undefined term could cause confusion.

25 *Definition by Reference to Use Restrictions*

26 The proposed law would define the term as “land that is limited to agricultural
27 use by law or by any recorded agreement or title restriction.”⁶⁰ Importantly, that
28 language would depend on use restrictions that are part of the public record. No
29 off-record information would bear on whether a tract is “agricultural.”

30 *Number of Dwelling Units*

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

35 The latter interpretation seems more likely. Under existing Probate Code Section
36 5610(a), the definition of “real property” includes real property that is “improved

59. Prob. Code § 5610(c).

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

1 with not less than one nor more than four residential dwelling units.”⁶¹ The
2 Legislature thus chose to allow use of the RTODD to transfer as many as four
3 dwelling units on a single parcel of land. There is no clear reason why the same
4 rule should not also apply to agricultural land.

5 The proposed law would revise existing law to provide that “real property”
6 includes agricultural land that is improved with one to four dwelling units.⁶²

7 **Coordination of Provisions**

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

12 The proposed legislation would revise the structure of Section 5610 to eliminate
13 any conflict between its different provisions.⁶³

14 PERMISSIBLE BENEFICIARIES

15 The Commission was also specifically directed to consider

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

18 ...

19 (B) Transfers to a trust or other legal entity.⁶⁴

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

23 **Existing Law**

24 The RTODD statute’s definition of “beneficiary” simply refers to a “person.”⁶⁵
25 The Probate Code’s general definition of “person” includes legal entities.⁶⁶ Read
26 together, those provisions would seem to affirm that a legal entity can be the
27 beneficiary of an RTODD.

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

61. Prob. Code § 5610(a).

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

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

64. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

65. Prob. Code § 5608.

66. Prob. Code § 56.

1 Print the FULL NAME(S) of the person(s) who will receive the property on
2 your death (DO NOT use general terms like “my children”) and state the
3 RELATIONSHIP that each named person has to you (spouse, son, daughter,
4 friend, etc.)...⁶⁷

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

6 HOW DO I NAME BENEFICIARIES? You MUST name your beneficiaries
7 individually, using each beneficiary’s FULL name. You MAY NOT use general
8 terms to describe beneficiaries, such as “my children.” For each beneficiary that
9 you name, you should briefly state that person’s relationship to you (for example,
10 my spouse, my son, my daughter, my friend, etc.).⁶⁸

11 The reference to the beneficiary’s “full name” and the examples of the types of
12 relationships that must be stated (“spouse, son, daughter, friend, etc.”) suggest that
13 the beneficiary must be a natural person. There was enough uncertainty on this
14 point that the Legislature added the issue to the Commission’s study.⁶⁹

15 **Trust as Beneficiary**

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

- 19 • A person may wish to transfer property to an irrevocable special needs trust
20 on their death, while maintaining ownership and control of the property
21 during life.⁷⁰
- 22 • Some lenders require that property be transferred out of an inter vivos
23 revocable trust when the property is refinanced. If the owner forgets to
24 convey the property back into the trust after the refinance is completed,
25 there could be problems with the operation of the trust on death. The use of
26 an RTODD to transfer property into the trust on death provides a backstop
27 to avoid such problems. Even if the owner forgets to reconvey the property
28 to the trust, the RTODD would effect the transfer on the owner’s death.⁷¹

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

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

67. Prob. Code § 5642(a).

68. Prob. Code § 5642(b).

69. 2016 Cal. Stat. ch. 179.

70. See letter from Angela Petrusa, attached to CLRC Staff Memorandum 2019-4, Exhibit p. 11.

71. See letters from Nina Whitehurst, attached to CLRC Staff Memorandum 2019-4, Exhibit p. 24.

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.⁷²

11 **Charitable Gifts to Legal Entities**

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

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

20 *Gift to Government*

21 Under existing Government Code Section 27281, “[d]eeds or grants conveying
22 any interest in or easement upon real estate to a political corporation or
23 governmental agency for public purposes shall not be accepted for recordation
24 without the consent of the grantee....” The consent of the grantee must be
25 evidenced by the grantee’s “certificate or resolution of acceptance attached to or
26 printed on the deed or grant.”⁷³

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

29 However, that rule is not needed when recording an RTODD, because
30 recordation alone does not effect a transfer of title.⁷⁴ The RTODD does not operate
31 until the transferor’s death. Even then, the public entity named as beneficiary can
32 disclaim the gift if it is not wanted.⁷⁵

33 The proposed legislation would make existing Section 27281 inapplicable to an
34 RTODD.⁷⁶ This would allow an RTODD that names a government entity as

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

73. Gov’t Code § 27281.

74. See Prob. Code § 5650(c).

75. Prob. Code § 5652(a)(1).

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

1 beneficiary to be recorded without the prior assent of that entity. To preserve the
2 beneficial effect of Section 27281, the proposed law would add language
3 providing that an RTODD that names a government entity as beneficiary does not
4 operate unless and until that entity records a certificate or resolution of
5 acceptance.⁷⁷

6 *Cy Pres*

7 There are certain risks associated with naming a nonprofit entity as beneficiary
8 of an RTODD. The entity's articles, bylaws, or other governing policy might
9 preclude acceptance of the gift; the entity might choose to disclaim the gift; or the
10 entity might not exist when the RTODD operates (because it dissolved or was
11 merged into another entity prior to the transferor's death). In those situations, the
12 gift will fail.

13 If such a problem were to arise under a will or trust, a court could apply the
14 equitable doctrine of *cy pres* in an attempt to effect the transferor's intentions to
15 the greatest extent possible.⁷⁸

16 The Commission recommends that the same remedy be available if a charitable
17 gift made by RTODD fails.⁷⁹

18 EXECUTION FORMALITIES

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

25 The Commission recommends minor changes to the RTODD statute to reduce
26 the risk of execution error. Specifically, the law would be revised to make two
27 points clearer:

- 28 (1) There are no requirements as to how an RTODD is dated, or by whom.
29 (2) Consistent with general law on acknowledgement, an RTODD does not
30 need to be signed in the presence of a notary public.⁸⁰

77. *Id.*

78. 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.").

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

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

1 The proposed law would also include an official Comment noting that any
2 inconsistency between the statutory form and general law on acknowledgment
3 does not affect the validity of the statutory form.⁸¹

4 Finally, the proposed law would add language to the “Common Questions”
5 guidance document, cautioning of a potential risk that exists if a beneficiary with a
6 disability has another person sign the RTODD for the beneficiary.⁸² Under existing
7 law, that practice is generally permitted.⁸³ However, if the person who signs a
8 document on behalf of another has a beneficial interest in the document, there is a
9 possibility that the document will be deemed invalid.⁸⁴ The advisory language
10 suggests that a transferor consult an attorney in that situation.

11 CONFLICTING INSTRUMENTS

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

16 The use of the term “revocable” in that context is imprecise. Because Section
17 5660 would only be applied after the transferor has died, it is not technically
18 correct to refer to any at-death transfer instrument executed by the deceased
19 transferor as “revocable.” On the death of the transferor, such instruments become
20 irrevocable.

21 The proposed law would revise Section 5660 to address that technical issue.⁸⁵

22 EFFECT OF RTODD ON UNRECORDED INTERESTS

23 Under existing law, an RTODD transfers property “subject to any limitation on
24 the transferor’s interest that is of record at the transferor’s death...”⁸⁶

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

29 That rule could have unfortunate results, because it effectively cuts off the
30 enforceability of unrecorded interests on the transferor’s death. However, the rule
31 is necessary in order to ensure that an RTODD transfers marketable title. It
32 guarantees that every enforceable claim against the property will be evidenced in

81. See Comment accompanying proposed revision of Prob. Code § 5624 *infra*.

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

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

84. *Id.*

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

86. Prob. Code § 5652(b).

1 the title records. If unrecorded interests could be enforced against property
2 transferred by RTODD, an RTODD beneficiary would have difficulty obtaining
3 title insurance. Legal action to establish title might be required before the
4 beneficiary could sell or encumber the property.

5 Colorado strikes a slightly different balance in addressing that issue. It provides
6 that property transferred by an RTODD is subject to any limitation that is recorded
7 at the time of the transferor's death or in the four months after the transferor's
8 death.⁸⁷ Under that approach, a person who has an unrecorded interest in property
9 transferred by RTODD has four months in which to record it, thereby preserving
10 the ability to enforce the interest against the property.

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

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

21 That is because the existing statute provides a 120-day period during which a *lis*
22 *pendens* can be filed as evidence of a pending contest. If the *lis pendens* is
23 recorded within 120 days after the transferor's death and the contest is eventually
24 successful, the court may void the transfer, without any protection for a bona fide
25 purchaser or encumbrancer.⁸⁸ This means that there is a 120-day period during
26 which a beneficiary's title to property transferred by RTODD is vulnerable to
27 complete invalidation. It is only after that 120-day period has run, without the
28 recording of a *lis pendens*, that a purchaser or encumbrancer can be confident that
29 the beneficiary has good title.

30 Because California RTODD beneficiaries are already subject to a 120-day
31 period of impaired marketability, enactment of the Colorado rule in California
32 would not create a significant new burden. This means that there is no clear
33 justification for cutting off the enforceability of unrecorded interests on the
34 transferor's death. The Colorado approach would give those who hold unrecorded
35 interests 120 days to record them, thereby preserving their effect. The Commission
36 recommends that the law be revised to adopt that approach.⁸⁹

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

88. Prob. Code § 5694.

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

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MOBILEHOMES

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

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

As a general matter, personal property is not appurtenant to real property, even if it is physically attached to the real property. An item of personal property “may be conveyed, encumbered, or leased separate from the real property.”⁹⁰

However, if the item attached to real property is a “fixture,” then it is treated as an appurtenance of the real property. “On a conveyance of the real property, the fixtures are transferred to the grantee even though not expressly mentioned in the contract or deed.”⁹¹

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

There is existing statutory law that determines whether a mobilehome is personal property or a fixture.⁹² To be considered a fixture under that law, the mobilehome must be attached to a specified type of foundation and certain procedural steps must be followed (including recordation of a specified declaration by the regulating governmental entity).

The Commission concluded that existing law regarding the effect of a transfer of real property on a mobilehome is sufficiently clear to avoid any legal problems. However, the law is somewhat obscure and technical; a person executing an RTODD without advice of counsel could be unclear on the governing law and its effect.

To help mitigate that problem, the proposed law would add guidance on the matter in the “Common Questions” part of the statutory form.⁹³

CREDITOR CLAIMS

The existing RTODD statute provides that a beneficiary is personally liable for the unsecured debts of the transferor, up to the value of the property received at the time of the transferor’s death.⁹⁴

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

91. *Id.* at 170.

92. Health & Safety Code § 18551.

93. See proposed revision of Section 5642(b) (“Will an RTODD affect my mobilehome?”) *infra*.

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

1 In addition to that personal liability, there is a period of three years after the
2 transferor's death during which the transferor's personal representative can require
3 that the beneficiary return the property to the transferor's estate for use in paying
4 creditors.⁹⁵

5 Those liability rules were modeled after long-standing law that establishes a
6 beneficiary's liability for a decedent's debt when taking property under certain
7 statutory procedures that permit the disposition of a decedent's estate outside of
8 probate.⁹⁶

9 Most of the input that the Commission received from estate planning attorneys
10 focused on the creditor liability provisions.⁹⁷ The Commission examined those
11 provisions closely and recommends a number of reforms to improve their
12 operation and fairness.⁹⁸ The proposed reforms are discussed below.

13 **Scope of Liability**

14 Under existing law, an RTODD beneficiary is personally liable for the
15 transferor's unsecured debts up to the full value of the property received. In many
16 cases, that liability will be much greater than it would have been if the property
17 had instead passed to the beneficiary through probate.

18 In probate, not all gifts are treated equally with respect to their liability for
19 payment of the decedent's debts.⁹⁹ Unless the decedent's will specifies otherwise,
20 a "general gift"¹⁰⁰ will be liable for debts (will "abate") before a specific gift.¹⁰¹
21 Within those categories, a gift to a non-relative will abate before a gift to a
22 relative.¹⁰² Finally, gifts that are in the same abatement class will abate pro rata.¹⁰³

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

95. Prob. Code § 5676.

96. 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).

97. See letter from Mark S. Poochigian, Trusts and Estates Section Executive Committee, State Bar of California, attached to CLRC Staff Memorandum 2019-4, Exhibit p. 1.

98. The Commission is conducting a separate study of the same issues in the existing statutory probate avoidance procedures. See generally CLRC Study L-4130.

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

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

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

102. Prob. Code § 21402.

103. Prob. Code § 21403(a).

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

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

7 *Personal Liability to Estate*

8 The proposed law would provide a new rule for the liability of a beneficiary for
9 a transferor's unsecured debts.¹⁰⁴ The new rule would only apply if the transferor's
10 estate is being administered.

11 Under the proposed rule, the RTODD beneficiary would be personally liable to
12 the estate for a share of liability for the transferor's unsecured debts. The
13 beneficiary's share of liability would be determined by applying the normal rules
14 of abatement, as if the property transferred by RTODD had instead been a specific
15 gift in the transferor's will.¹⁰⁵

16 If the beneficiary had already paid any of the transferor's unsecured debts, the
17 amount paid would be credited against the beneficiary's liability under the new
18 rule.¹⁰⁶

19 Payment of the amount owed to the estate under the new rule would fully satisfy
20 the beneficiary's obligations for payment of the transferor's unsecured debts; the
21 beneficiary would have no further personal liability to the transferor's creditors.¹⁰⁷

22 The cost of implementing the new rule would be paid by the beneficiary.¹⁰⁸

23 *Voluntary Return of Property to the Estate*

24 The proposed law would also create a simpler option for a beneficiary who
25 wants to avoid disproportionate personal liability. The beneficiary could
26 voluntarily return the RTODD property to the estate for administration.¹⁰⁹ Such
27 property would be treated as if it were a specific devise to the beneficiary in the
28 transferor's will. General abatement rules would then be applied to the decedent's
29 entire estate, including the RTODD property. Any funds that remain as part of the
30 RTODD beneficiary's gift would be distributed to the beneficiary under the usual
31 probate process.

32 Although this option could subject the RTODD property to a share of the costs
33 of administration and would delay receipt of the gift, it still might be preferable to

104. See proposed Prob. Code § 5676 *infra*.

105. See proposed Prob. Code § 5676(b) *infra*.

106. See proposed Prob. Code § 5676(d) *infra*.

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

108. See proposed Prob. Code § 5676(e) *infra*.

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

1 a beneficiary who lacks sufficient funds to pay a share of the decedent’s debts out
2 of pocket and does not wish to go to the trouble to sell the property in order to pay
3 that share.

4 *Scope of Personal Liability*

5 As discussed above, existing law provides that an RTODD beneficiary is
6 personally liable for the transferor’s unsecured debts up to the value of the
7 property received at the time of the transferor’s death (less any liens or
8 encumbrances on the property at that time).¹¹⁰ However, that liability can be
9 increased in two ways:

- 10 (1) If the beneficiary derives income from the property, the liability includes the
11 amount of the income.¹¹¹
12 (2) If the property was sold by the beneficiary, the liability also includes interest
13 on the proceeds of sale.¹¹²

14 The Commission recommends that those increases be eliminated.¹¹³ The
15 beneficiary’s liability should be limited to the value of the property at the time of
16 the transferor’s death, because that would be the maximum extent of the
17 beneficiary’s liability had the property been received through probate or by trust.
18 There is no clear policy reason why a beneficiary’s liability should be increased
19 due to events that occur after disposition of the property.

20 **Elimination of Property Return Provision**

21 Under existing Probate Code Section 5676, a beneficiary is liable to the estate
22 for restitution of the property transferred by RTODD, if that property is required
23 for payment of a share of the decedent’s debts. If any proceeds remain from the
24 sale of the property after the payment of that share, they are returned to the
25 beneficiary.¹¹⁴ This “property return” liability can be enforced for up to three years
26 after the transferor’s death.

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

- 28 (1) *Cloud on title.* The possibility that a beneficiary will be required to return
29 RTODD property to the transferor’s estate, for a period of up to three years,
30 could create a cloud on title. The Commission has heard anecdotal reports
31 that some title insurers will not issue policies during this three-year period.
32 (2) *Undue disruption.* The existing property return provision does not expressly
33 provide an option that would allow a beneficiary to pay the beneficiary’s
34 share of liability to the estate, in lieu of returning the real property to the

110. Prob. Code § 5674(b)(1).

111. Prob. Code § 5674(b)(2).

112. Prob. Code § 5674(b)(3).

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

114. Prob. Code § 5676(f).

1 estate for liquidation. If Section 5676 is read strictly, it could divest the
2 beneficiary of ownership of real property that the beneficiary would rather
3 retain, even in a situation where the beneficiary has sufficient funds
4 available to pay the beneficiary’s share of the estate’s liability. That
5 approach is unnecessarily inflexible and burdensome.

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

7 That reform should not cause any problems for creditors or the decedent’s
8 estate, because the law would still provide ample alternative means for an RTODD
9 beneficiary to pay an appropriate share of decedent’s unsecured debts. As
10 discussed above, the beneficiary is personally liable to creditors for those debts, up
11 to the value of the property received.¹¹⁵ In addition, the proposed law would add
12 an alternative rule that would apply if a probate is open: The beneficiary would be
13 personally liable to the estate for the beneficiary’s share of the transferor’s
14 unsecured debts.¹¹⁶ In addition, an RTODD beneficiary would have the option of
15 voluntarily returning the property to the estate for use in paying creditor claims.¹¹⁷

16 REPEAL OF THE RTODD STATUTE

17 The legislation that directed the Commission to conduct this study asked the
18 Commission to consider a threshold question: “Whether the revocable transfer on
19 death deed should be continued.”¹¹⁸

20 The Commission has not yet decided how to answer that question. The answer
21 will depend on whether the advantages of the RTODD outweigh its disadvantages.

22 The advantages of the RTODD statute seem self-evident. When properly
23 executed, an RTODD allows a property owner to transfer real property on death
24 outside of probate, without the need to pay for a trust. If a transferor understands
25 the effect of the RTODD and the procedure for executing one, the process is very
26 simple and inexpensive. On the transferor’s death, the process of transferring title
27 to the beneficiary is also quick, inexpensive, and straightforward. There is no need
28 for the involvement of attorneys or the courts. In addition, the Commission has
29 learned that some attorneys use the RTODD as a component of a professionally
30 prepared estate plan.

31 The principal alleged disadvantages are: (1) the risk that the RTODD will make
32 fraud more likely to occur, and (2) the risk that laypeople, acting without the
33 advice of counsel, will make mistakes that result in costly problems for
34 beneficiaries or entirely defeat their intentions.

35 In addition, the Commission has heard a number of concerns about practical
36 problems that could arise under the existing statute, mostly relating to execution,

115. Prob. Code § 5672.

116. See “Personal Liability to Estate” *supra*. See also proposed Prob. Code § 5676 *infra*.

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

118. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

1 revocation, marketability, and the creditor liability process. Those technical
2 problems are addressed by the reforms proposed in this tentative recommendation.

3 While the Commission takes the risk of fraud and mistake very seriously, its
4 research into the case law of other RTODD states did not uncover any reason to
5 believe that an RTODD is more vulnerable to abuse or error than other
6 instruments that can be used to transfer real property on death (including
7 instruments that can be executed by laypeople, without the advice of counsel, such
8 as self-drafted wills, trusts, or grant deeds). It thus seems questionable whether the
9 availability of the RTODD would make fraud or mistakes any more likely to
10 occur.

11 Because of the importance of the issue, the Commission is particularly interested
12 in receiving comments on this matter. Comments explaining why the existence of
13 the RTODD would, or would not, make estate planning fraud or mistakes more
14 severe or more likely to occur would be especially helpful.

15 **REQUEST FOR COMMENTS**

16 The Commission seeks public comment on its tentative recommendation.
17 Comments can be in any format and can be emailed to bhebert@clrc.ca.gov.
18 Comments supporting the proposed reforms are just as important as comments
19 suggesting changes to that approach or expressing other views. Comments from
20 knowledgeable persons are invaluable in the Commission's study process.

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PROPOSED LEGISLATION

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

2 SEC. ____ . Section 5608 of the Probate Code is amended to read:

3 5608. “Beneficiary” means a person named in a revocable transfer on death deed
4 as transferee of the property. A natural person, trust, or legal entity may be named
5 as a beneficiary.

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

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

9 SEC. ____ . Section 5610 of the Probate Code is amended to read:

10 5610. ~~“Real property” means any of the following:~~

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

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

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

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

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

20 (2) A residential separate interest and its appurtenant common area in a common
21 interest development, regardless of the number of separate interests in the common
22 interest development.

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

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

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

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

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

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

37 (2) Expressly exclude stock cooperatives from the definition of “real property.” See Civ. Code
38 § 4190 (“stock cooperative”).

39 (3) Eliminate the requirement that agricultural land must be improved with a “single family
40 residence” to be included in the definition of “real property.”

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

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

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

10 SEC. ____ . Section 5624 of the Probate Code is amended to read:

11 5624. A revocable transfer on death deed is not effective unless the deed is (a)
12 signed by the transferor ~~signs and dates the deed and acknowledges the deed,~~ (b)
13 dated, and (c) acknowledged before a notary public.

14 **Comment.** Section 5624 is amended to make two points clearer:

15 (1) There are no formal requirements regarding the manner in which a deed is dated. The date
16 of execution may be typed or hand-written, by any person.

17 (2) Only the acknowledgment must occur before a notary public. The deed may be signed and
18 dated prior to presenting it to a notary public for acknowledgment.

19 **Prob. Code § 5642 (amended). Statutory form**

20 SEC. ____ . Section 5642 of the Probate Code is amended to read:

21 5642. A revocable transfer on death deed shall be substantially in the following
22 form.

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

24 ~~SIMPLE~~ SIMPLE REVOCABLE TRANSFER ON DEATH (TOD) DEED
25 (California Probate Code Section 5642)

26
27 Recording Requested By:
28 When Recorded Mail This Deed To
29 Name:
30 Address:
31 Assessor’s Parcel Number:
32 Space Above For Recorder’s Use
33

34 This document is exempt from documentary transfer tax under Rev. & Tax.
35 Code § 11930. This document is exempt from preliminary change of ownership
36 report under Rev. & Tax. Code § 480.3.

37
38 **IMPORTANT NOTICE: THIS DEED MUST BE RECORDED ON OR**
39 **BEFORE 60 DAYS AFTER THE DATE IT IS SIGNED AND NOTARIZED**

1 Use this deed to transfer the residential property described below directly to
2 your named beneficiaries when you die. YOU SHOULD CAREFULLY READ
3 ALL OF THE INFORMATION ON THE OTHER PAGES OF THIS FORM. You
4 may wish to consult an attorney before using this deed. It may have results that
5 you do not want. Provide only the information asked for in the form. DO NOT
6 INSERT ANY OTHER INFORMATION OR INSTRUCTIONS. This form
7 MUST be RECORDED on or before 60 days after the date it is signed and
8 notarized or it will not be effective.

9
10 **PROPERTY DESCRIPTION**

11 Print the legal description of the residential property affected by this deed:
12
13

14 **BENEFICIARY(IES)**

15 ~~Print the FULL NAME(S) of the person(s) who will receive the property on~~
16 ~~your death (DO NOT use general terms like “my children”) and state the~~
17 ~~RELATIONSHIP that each named person has to you (spouse, son, daughter,~~
18 ~~friend, etc.):~~

19 Name the person(s) or entity(ies) who will receive the described property on
20 your death.

21 IF YOU ARE NAMING A PERSON, state the person’s FULL NAME (DO
22 NOT use general terms like “my children”). You may also wish to state the
23 RELATIONSHIP that the person has to you (spouse, son, daughter, friend, etc.),
24 but this is not required.

25 IF YOU ARE NAMING A TRUST, state the full name of the trust, the name of
26 the trustee(s), and the date shown on the signature page of the trust.

27 IF YOU ARE NAMING A PRIVATE OR PUBLIC ENTITY, state the name of
28 the entity as precisely as you can.
29
30
31

32 **TRANSFER ON DEATH**

34 I transfer all of my interest in the described property to the named
35 beneficiary(ies) on my death. I may revoke this deed. When recorded, this deed
36 revokes any TOD deed that I made before signing this deed.

37 Sign and print your name below (your name should exactly match the name
38 shown on your title documents):
39
40

41 Date

1
2 NOTE: This deed only transfers MY ownership share of the property. The deed
3 does NOT transfer the share of any co-owner of the property. Any co-owner who
4 wants to name a TOD beneficiary must execute and RECORD a SEPARATE
5 deed.

6
7 ACKNOWLEDGMENT OF NOTARY

8
9 A notary public or other officer completing this certificate verifies only the
10 identity of the individual who signed the document to which this certificate is
11 attached, and not the truthfulness, accuracy, or validity of that document.

12
13 State of California)
14 County of)

15
16
17
18 On _____ before me, (here insert name and title of
19 the officer), personally appeared _____, who proved to
20 me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are
21 subscribed to the within instrument and acknowledged to me that he/she/they
22 executed the same in his/her/their authorized capacity(ies), and that by
23 his/her/their signature(s) on the instrument the person(s), or the entity upon behalf
24 of which the person(s) acted, executed the instrument.

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

27 WITNESS my hand and official seal.

28 Signature _____ (Seal)

29 (b) Subsequent pages of a form executed under this section shall be in
30 substantially the following form:

31 COMMON QUESTIONS ABOUT THE USE OF THIS FORM

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

35 CAN I USE THIS DEED TO TRANSFER ~~BUSINESS~~ NONRESIDENTIAL
36 PROPERTY? ~~This deed can only be used to transfer (1) a parcel of property that~~

1 ~~contains one to four residential dwelling units, (2) a condominium unit, or (3) a~~
2 ~~parcel of agricultural land of 40 acres or less, which contains a single family~~
3 ~~residence. No. This deed can only be used to transfer residential property. Also,~~
4 ~~the deed cannot be used to transfer a unit in a stock cooperative or a parcel of~~
5 ~~agricultural land that is over 40 acres in size.~~

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

11 HOW DO I USE THE TOD DEED? Complete this form. Have it notarized.
12 RECORD the form in the county where the property is located. The form MUST
13 be recorded on or before 60 days after the date you sign it or the deed has no
14 effect.

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

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

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

26 HOW DO I “RECORD” THE FORM? Take the completed and notarized form
27 to the county recorder for the county in which the property is located. Follow the
28 instructions given by the county recorder to make the form part of the official
29 property records.

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

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

36 HOW DO I REVOKE THE TOD DEED? There are three ways to revoke a
37 recorded TOD deed: (1) Complete, have notarized, and RECORD a revocation
38 form. (2) Create, have notarized, and RECORD a new TOD deed. (3) Sell or give

1 away the property, or transfer it to a trust, before your death and RECORD the
2 deed. A TOD deed can only affect property that you own when you die. A TOD
3 deed cannot be revoked by will.

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

11 IF I SELL OR GIVE AWAY THE PROPERTY DESCRIBED IN A TOD
12 DEED, WHAT HAPPENS WHEN I DIE? If the deed or other document used to
13 transfer your property is RECORDED before your death, the TOD deed will have
14 no effect. If the transfer document is not RECORDED before your death, the TOD
15 deed will take effect.

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

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

24 WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your
25 beneficiary must do all of the following: (1) RECORD evidence of your death
26 (Prob. Code § 210), ~~and file~~ . (2) File a change in ownership notice (Rev. & Tax.
27 Code § 480). (3) Provide notice to your heirs that includes a copy of this deed and
28 your death certificate (Prob. Code § 5680(e)). Determining who is an “heir” can be
29 complicated. Your beneficiary should consider seeking professional advice to
30 make that determination. (4) RECORD an affidavit affirming that notice was sent
31 to your heirs (Prob. Code § 5682(c)). (5) If you received Medi-Cal benefits, your
32 beneficiary must notify the State Department of Health Care Services of your
33 death and provide a copy of your death certificate (Prob. Code § 215).

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

37 HOW DO I NAME BENEFICIARIES? ~~You~~ (1) If the beneficiary is a person,
38 you MUST name your beneficiaries individually, using each beneficiary’s state
39 the person’s FULL name. You MAY NOT use general terms to describe

1 beneficiaries, such as “my children.” ~~For each beneficiary that you name, you~~
2 ~~should~~ You may also briefly state that person’s relationship to you (for example,
3 my spouse, my son, my daughter, my friend, etc.), but this is not required.

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

6 (3) If the beneficiary is a public or public entity, name the entity as precisely as
7 you can.

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

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

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

24 IS PROPERTY TRANSFERRED BY THE TOD DEED SUBJECT TO MY
25 DEBTS? Yes.

26 DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES?
27 No.

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

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

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

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

38 Any technical inconsistency between the statutory form provided in this section and the
39 requirements of Civil Code Section 1189 has no effect on the validity of a revocable transfer on

1 death deed that complies with the requirements of this section. The specific requirements of this
2 section control over the general requirements of Section 1189.

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

4 SEC. _____. Section 5652 of the Probate Code is amended to read:

5 5652. (a) A revocable transfer on death deed transfers all of the transferor's
6 interest in the property on the transferor's death according to the following rules:

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

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

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

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

16 (b) Property is transferred by a revocable transfer on death deed subject to any
17 limitation on the transferor's interest that is of record at the transferor's death or
18 that is recorded no later than 120 days after the affidavit required by subdivision
19 (c) of Section 5682 is recorded, including, but not limited to, a lien, encumbrance,
20 easement, lease, or other instrument affecting the transferor's interest, whether
21 recorded before or after recordation of the revocable transfer on death deed. The
22 holder of rights under that instrument may enforce those rights against the
23 property notwithstanding its transfer by the revocable transfer on death deed.

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

26 **Comment.** Section 5652 is amended to provide that property transferred by revocable transfer
27 on death deed is burdened by any limitation on the transferor's ownership that is recorded within
28 120 days of recordation of the affidavit required by Section 5682(c).

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

30 SEC. _____. Section 5658 is added to the Probate Code, to read:

31 5658. A court in which the transferor's estate is being administered may, on the
32 petition of the personal representative or interested person, or on its own motion,
33 apply the doctrine of *cy pres* to reform a revocable transfer on death deed that was
34 made by the transferor for a charitable purpose, in either of the following
35 circumstances:

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

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

39 **Comment.** Section 5658 is amended to grant judicial discretion to apply the doctrine of *cy pres*
40 to reform a revocable transfer on death deed made for charitable purposes, where the transfer fails
41 because the beneficiary does not accept it or does not exist at the time of the transferor's death.

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 during the transferor's life, the
11 later executed of the revocable transfer on death deed or the other instrument is the
12 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 during the transferor's life, the
16 other instrument and not the revocable transfer on death deed is the operative
17 instrument.

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

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

22 SEC. ____ . Section 5674 of the Probate Code is amended to read:

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

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

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

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

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

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

1 **Prob. Code § 5676 (repealed). Property return**

2 SEC. ____ . Section 5676 of the Probate Code is repealed.

3 ~~5676. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the~~
4 ~~administration of the transferor's estate are commenced, each beneficiary is liable~~
5 ~~for:~~

6 ~~(1) The restitution to the transferor's estate of the property the beneficiary~~
7 ~~received pursuant to the revocable transfer on death deed if the beneficiary still~~
8 ~~has the property, together with (A) the net income the beneficiary received from~~
9 ~~the property and (B) if the beneficiary encumbered the property after the~~
10 ~~transferor's death, the amount necessary to satisfy the balance of the encumbrance~~
11 ~~as of the date the property is restored to the estate.~~

12 ~~(2) The restitution to the transferor's estate of the fair market value of the~~
13 ~~property if the beneficiary no longer has the property, together with (A) the net~~
14 ~~income the beneficiary received from the property prior to disposing of it and (B)~~
15 ~~interest from the date of disposition at the rate payable on a money judgment on~~
16 ~~the fair market value of the property. For the purposes of this paragraph, the "fair~~
17 ~~market value of the property" is the fair market value, determined as of the time of~~
18 ~~the disposition of the property, of the property the beneficiary received pursuant to~~
19 ~~the revocable transfer on death deed, less the amount of any liens and~~
20 ~~encumbrances on the property at the time of the transferor's death.~~

21 ~~(b) Subject to subdivision (c), if proceedings for the administration of the~~
22 ~~transferor's estate are commenced and a beneficiary made a significant~~
23 ~~improvement to the property received by the beneficiary pursuant to the revocable~~
24 ~~transfer on death deed, the beneficiary is liable for whichever of the following the~~
25 ~~transferor's estate elects:~~

26 ~~(1) The restitution of the property, as improved, to the estate of the transferor~~
27 ~~upon the condition that the estate reimburse the beneficiary for (A) the amount by~~
28 ~~which the improvement increases the fair market value of the property restored,~~
29 ~~determined as of the time of restitution, and (B) the amount paid by the~~
30 ~~beneficiary for principal and interest on any liens or encumbrances that were on~~
31 ~~the property at the time of the transferor's death.~~

32 ~~(2) The restoration to the transferor's estate of the fair market value of the~~
33 ~~property, determined as of the time of the transferor's death, less the amount of~~
34 ~~any liens and encumbrances on the property at that time, together with interest on~~
35 ~~the net amount at the rate payable on a money judgment running from the time of~~
36 ~~the transferor's death.~~

37 ~~(c) The property and amount required to be restored to the estate under this~~
38 ~~section shall be reduced by any property or amount paid by the beneficiary to~~
39 ~~satisfy a liability under Section 5672.~~

40 ~~(d) An action to enforce the liability under this section may be brought only by~~
41 ~~the personal representative of the estate of the transferor. Whether or not the~~
42 ~~personal representative brings an action under this section, the personal~~
43 ~~representative may enforce the liability only to the extent of the beneficiary's~~

1 ~~liability under Section 5672. The reasonable cost of proceeding under this section~~
2 ~~shall be reimbursed as an extraordinary service under Sections 10801 and 10811.~~
3 ~~Action under this section is optional. A personal representative is never required to~~
4 ~~act under this section.~~

5 ~~(e) An action to enforce the liability under this section is forever barred three~~
6 ~~years after the transferor's death. The three year period specified in this~~
7 ~~subdivision is not tolled for any reason. Nothing in this subdivision affects the~~
8 ~~requirements of Section 215, any law that may toll the limitations period for the~~
9 ~~commencement of a Medi Cal estate recovery action, or the time for~~
10 ~~commencement of an action by the State Department of Health Care Services~~
11 ~~under Section 14009.5 of the Welfare and Institutions Code.~~

12 ~~(f) If property is restored to the transferor's estate under this section, that~~
13 ~~property shall be treated as a specific gift and any proceeds remaining from the~~
14 ~~sale of the property after the payment of claims shall be returned to the~~
15 ~~beneficiary.~~

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

18 **Note.** The Commission recommends existing Section 5676 be repealed and replaced with the
19 more flexible options provided in proposed Sections 5676 and 5678. The Commission
20 specifically invites comment on whether those changes would cause any problems.

21 **Prob. Code § 5676 (added). Personal liability to estate**

22 SEC. ____ . Section 5676 is added to the Probate Code, to read:

23 5676. (a) If proceedings for the administration of the transferor's estate are
24 commenced, a beneficiary of a revocable transfer on death deed is personally
25 liable to the estate for a share of the transferor's unsecured debts.

26 (b) In calculating the beneficiary's share of liability under subdivision (a), the
27 abatement rules provided in Part 4 (commencing with Section 21400) of Division
28 11 shall be applied, using all of the following assumptions:

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

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

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

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

40 (d) The beneficiary is personally liable to the estate for the amount specified in
41 the statement of liability. Any amount that the beneficiary paid toward the
42 unsecured debts of the transferor pursuant to Section 5672 shall be credited against

1 the amount that the beneficiary owes the estate under this subdivision. If the
2 amount that the beneficiary paid pursuant to Section 5672 exceeds the amount
3 specified in the written statement of liability, the estate shall reimburse the
4 difference to the beneficiary. For the purposes of Section 11420, this
5 reimbursement shall be deemed an expense of administration.

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

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

14 **Comment.** Section 5610 is new. It provides a process for the determination and satisfaction of
15 a beneficiary's share of liability for the unsecured debts of the transferor. A beneficiary who pays
16 the indicated amount to the estate has no personal liability under Section 5672. See Section
17 5674(a).

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

19 SEC. ____ . Section 5678 is added to the Probate Code, to read:

20 5678. (a) If proceedings for the administration of the transferor's estate are
21 commenced, a beneficiary who receives property from the transferor under a
22 revocable transfer on death deed may voluntarily return that property to the
23 transferor's estate for administration.

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

26 (c) If the beneficiary's action or inaction increased the value of property
27 returned to the estate or decreased the estate's obligations, the estate shall
28 reimburse the beneficiary by the same amount. Actions or inaction that increase
29 the value of returned property or decrease the estate's obligations include, but are
30 not necessarily limited to, the following actions:

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

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

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

35 (d) If the beneficiary's action or inaction decreased the value of property
36 returned to the estate or increased the estate's obligations, the beneficiary is
37 personally liable to the estate for that amount. Actions or inaction that decrease the
38 value of the returned property or increase the estate's obligations include, but are
39 not necessarily limited to, the following actions or inaction:

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

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

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

7 (f) In the event that the beneficiary and the personal representative cannot agree
8 on the reimbursement or liability due under this section, the beneficiary or
9 personal representative may petition the court for an order determining the amount
10 of the reimbursement or liability. In making a decision under this subdivision, the
11 court should consider the surrounding circumstances, including whether the parties
12 acted in good faith and whether a particular result would impose an unfair burden
13 on the beneficiary or the estate.

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

18 **Note.** The Commission requests comment on whether any existing law could be used to achieve
19 the results that would be achieved under proposed Section 5678.

20 **Prob. Code § 5680 (amended). Effectuation of transfer**

21 SEC. ____ . Section 5680 of the Probate Code is amended to read:

22 5680. (a) The beneficiary may establish the fact of the transferor's death under
23 the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of
24 Division 2. For the purpose of this subdivision, the beneficiary is a person
25 empowered by statute to act on behalf of the transferor or the transferor's estate
26 within the meaning of Section 103526 of the Health and Safety Code.

27 (b) For the purpose of filing the change in ownership statement required by
28 Section 480 of the Revenue and Taxation Code, the beneficiary is a transferee of
29 real property by reason of death.

30 (c) For the purpose of giving the notice to the Director of Health Care Services
31 provided for in Section 215, the beneficiary is a beneficiary of the transferor.

32 (d) The beneficiary is liable to the transferor's estate for prorated estate and
33 generation-skipping transfer taxes to the extent provided in Division 10
34 (commencing with Section 20100).

35 (e)(1) The beneficiary shall serve notice on the transferor's heirs.

36 (2) The notice shall consist of a copy of the revocable transfer on death deed and
37 a copy of the transferor's death certificate.

38 (3) The beneficiary shall, for purposes of this subdivision, rely on any final
39 judicial determination of heirship, known to the beneficiary, but the beneficiary
40 shall have discretion to make a good faith determination by any reasonable means
41 of the heirs of the transferor in the absence of a final judicial determination of
42 heirship known to the beneficiary.

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

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

6 **Comment.** Subdivision (e) is added to Section 5680 to require that a beneficiary of a revocable
7 transfer on death deed provide notice to heirs when the transferor has died.

8 Paragraphs (3) through (5) of subdivision (e) are drawn from Section 16061.7(c)-(e).

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

10 SEC. ____ . Section 5682 of the Probate Code is amended to read:

11 5682. If ~~both~~ all of the following conditions are satisfied, a person dealing with a
12 beneficiary of a revocable transfer on death deed of real property shall have the
13 same rights and protections as the person would have if the beneficiary had been
14 named as a distributee of the property in an order for distribution of the
15 transferor's estate that had become final:

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

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

19 (c) An affidavit affirming compliance with subdivision (e) of Section 5680 was
20 recorded for the property.

21 **Comment.** Section 5682 is amended to condition the protections afforded by the section on
22 recordation of an affidavit affirming compliance with the notice requirement in Section 5680(e).

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

24 SEC. ____ . Section 5690 of the Probate Code is amended to read:

25 5690. (a)(1) An action for the disqualification of a beneficiary under Part 3.7
26 (commencing with Section 21360) of Division 11 may be brought to contest the
27 validity of a transfer of property by a revocable transfer on death deed.

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

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

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

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

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

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

8 SEC. ____ . Section 5694 of the Probate Code is amended to read:

9 5694. If the court in a contest proceeding determines that a transfer of property
10 by a revocable transfer on death deed is invalid, the court shall order the following
11 relief:

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

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

22 **Comment.** Section 5694 is amended to change the date on which the specified 120-day period
23 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) Notwithstanding subdivision (a), a revocable transfer on death deed that
29 names a political corporation or governmental agency as a beneficiary does not
30 transfer title to that political corporation or governmental agency unless and until
31 the political corporation or governmental agency records a resolution of
32 acceptance or a certificate of consent in a form substantially similar to the form
33 prescribed in subdivision (a).

34 **Comment.** Section 5610(e) is added to exempt a revocable transfer on death deed from
35 subdivision (a). Such a deed can be recorded without the prior consent of a political corporation

1 or governmental entity named as beneficiary. However, the deed will not operate to transfer title
2 to the political corporation or governmental entity until that entity records evidence of its consent
3 under subdivision (f).
