Study L-3032 March 29, 2006

Memorandum 2006-16

Beneficiary Deeds (Discussion of Issues)

INTRODUCTION

This memorandum continues the Law Revision Commission's review of issues involved in possible beneficiary deed legislation. Our objective is to review and address all issues before evaluating the device for possible adoption in California. Our report on the matter is due to the Legislature by January 1, 2007.

This memorandum provides draft language to implement Commission policy decisions made at the February 2006 meeting concerning operational issues. The memorandum also presents for Commission consideration all other policy issues identified by the staff — including rights of the transferor, rights of the beneficiary, rights of family members, rights of creditors, rights of a BFP, tax matters, and Medi-Cal matters — along with draft language addressed to each issue. The memorandum concludes with the staff's preliminary evaluation of the beneficiary deed device, and the staff's recommendation that the Commission should proceed to a tentative recommendation for the purpose of obtaining public comment on the matter.

Each draft statutory provision proposed in this memorandum is set out independently for purposes of illustrating the particular issue under discussion. When we assemble the pieces into a complete draft tentative recommendation, the provisions will be organized, integrated, and in some instances combined, with each other, and gaps will be filled.

We have received the following communications concerning this study, which are attached as an Exhibit to this memorandum.

- Petition of 111 Signatories re Revocable Transfer on Death Beneficiary Deeds (undated) 9

We have not attached copies of communications we have previously received concerning this topic, attached to earlier memoranda, even though we may refer to or quote from them in this memorandum.

This memorandum refers throughout to the law of the eight other jurisdictions that have enacted beneficiary deed legislation. It is noteworthy that the Missouri statute, which has been in effect the longest, is also a comprehensive statute dealing in a unified manner with all forms of nonprobate transfer, not just a real property transfer. So when this memorandum refers to the Missouri approach to a particular issue, that actually represents the Missouri approach to a nonprobate transfer generally, not restricted to a beneficiary deed.

OUTLINE

GENERAL MATTERS

Terminology

An issue that we have deferred decision on is a terminological one — should we use "beneficiary deed" terminology or "transfer on death deed" terminology. There is a split among jurisdictions that have enacted legislation on the matter. We have used "beneficiary deed" terminology until now simply because that is the phrase that is used in the legislation assigning this topic to the Law Revision Commission.

Much of this memorandum is addressed to the question of what rights are retained by the transferor and what rights are transferred to the beneficiary by a beneficiary deed that does not become effective and is revocable until the transferor's death.

The staff believes that some of the confusion that exists about the legal effect of a beneficiary deed stems from the very name "beneficiary deed". It seems to

imply that the named beneficiary has some interest in the property as a result of recordation of the deed, whereas the thrust of this memorandum is to make clear that no such interest is created.

> What makes the deed most useful as an estate planning and/or probate avoidance technique is that the grantee-beneficiary has no vested interest in the property until the actual death of the current owner. The current owner is free to change the grantee-beneficiary at any time simply by executing a new deed (a beneficiary deed, quit claim deed, warranty deed or any other form of deed) and recording that new deed. Because the grantee-beneficiary does not have any current interest in the property, the current owner does not need the consent, signature, or cooperation of the grantee-beneficiary to revoke the beneficiary deed or execute a new deed.

Kirtland and Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law 118, 119 (March 2005).

David Mandel of Senior Legal Hotline has also suggested that the term "beneficiary deed" is somewhat misleading, and that "transfer on death deed" would be better terminology. "Transfer on death" is conceptually closer and more suggestive of the legal effect of the instrument than "beneficiary deed". **The staff thinks some of the confusion occasionally experienced concerning the effect of the deed would be dispelled by use of transfer on death terminology**, regardless of the awkwardness of the phrase. We will try that out in the remainder of this memorandum, using the shorthand "TOD deed" on occasion.

> **"Transfer on death deed" defined**
>
> (a) As used in this part, "transfer on death deed" means an instrument that makes a donative transfer of real property to a beneficiary effective on the death of the transferor.
>
> (b) A transfer on death deed may also be known as a "TOD deed".
>
> **Comment.** This part uses TOD deed terminology, rather than the "beneficiary deed" terminology used in some jurisdictions that have enacted comparable legislation.
>
> This part is supplemented by other definitions. See, e.g., Prob. Code §§ 24 ("beneficiary" defined), 45 ("instrument" defined), 56 ("person" defined), 68 ("real property" defined), 81 ("transferor" defined).
>
> A TOD deed of real property transfers ownership of the property to the beneficiary on the death of the transferor. See Section [to be provided]. The property passes to the beneficiary by

operation of law, without the need for a court order of distribution in probate. See Section [to be provided].

For a TOD deed statutory form see Section [to be provided]. For construction of a TOD deed see Part 1 (commencing with Section 21101) of Division 11 (rules for interpretation of instruments).

☞ **Staff Note.** Issues concerning the types of property interest subject to transfer, multiple beneficiaries, class gifts, execution formalities, rights during the transferor's lifetime, and the like are addressed below.

Domestic Partnership

The California Land Title Association has suggested it would be useful for the statute to address the interrelation of the TOD deed statute with domestic partnership laws. This is an important matter because it is possible the TOD deed would become a commonly used vehicle (preferable to joint tenancy) for use by domestic partners.

With respect to a registered domestic partnership, that should not be a problem. The statutes governing property rights of registered domestic partners make those rights equivalent to the rights of spouses. See, e.g., Fam. Code § 297.5. To the extent the statute would protect interests of a spouse, for example an omitted spouse or community property rights in a TOD transfer, the statute would protect the interests of a registered domestic partner. To the extent the statute would deal with the rights of a former spouse, for example an ex-spouse named as a beneficiary, the statute would deal with the rights of a former registered domestic partner.

With respect to an unregistered domestic partnership, the parties would be treated as any other unrelated individuals. The staff does not think we should craft the statute so as to create special provisions for domestic partners who have chosen not to register.

Perhaps **it would be useful to note in the Comment** to any section or commentary that refers to a spouse that the term includes a registered domestic partner. There are very few of those references in the staff drafts in this memorandum.

OPERATIONAL ISSUES

The Commission considered operational issues and made policy decisions concerning them at the February 2006 meeting. This portion of the memorandum follows up with draft statutory language to implement the decisions.

Capacity to Make Deed

The Commission deferred decision on whether the capacity to execute a TOD deed should be testamentary, as opposed to contractual. The Commission directed the staff to research the possible effect of Probate Code Section 812, relating to legal mental capacity, on this issue.

Section 812 provides a general standard for capacity to make a decision **other than** the capacity to give informed consent to a health care decision and testamentary capacity.

Under Section 812, a person lacks capacity to make a decision unless:

> [T]he person has the ability to communicate verbally, or by any other means, the decision, and to understand and appreciate, to the extent relevant, all of the following:
>
> (a) The rights, duties, and responsibilities created by, or affected by the decision.
>
> (b) The probable consequences for the decisionmaker and, where appropriate, the persons affected by the decision.
>
> (c) The significant risks, benefits, and reasonable alternatives involved in the decision.

This is basically a contractual capacity standard. It does not affect capacity to make a will.

The capacity required to make a will is set out at Probate Code Section 6100.5. Under Section 6100.5 a person lacks capacity to make a will in any of the following circumstances:

> (1) The individual does not have sufficient mental capacity to be able to (A) understand the nature of the testamentary act, (B) understand and recollect the nature and situation of the individual's property, or (C) remember and understand the individual's relations to living descendants, spouse, and parents, and those whose interests are affected by the will.
>
> (2) The individual suffers from a mental disorder with symptoms including delusions or hallucinations, which delusions or hallucinations result in the individual's devising property in a way which, except for the existence of the delusions or hallucinations, the individual would not have done.

Having reviewed the general capacity standard of Section 812, and having noted the express exception in Section 812 for testamentary capacity, **the staff believes that testamentary capacity is the correct standard for a TOD deed**. The TOD deed, like a will, is a donative transfer of property that takes effect on death and is revocable by the transferor until then.

The staff would make this explicit in the statute:

> **Capacity to make TOD deed**
>
> An owner of real property that has testamentary capacity may make a transfer on death deed of the property.
>
> **Comment.** This section makes clear that testamentary, rather than contractual, capacity is required for execution of a TOD deed. The standard of testamentary capacity is prescribed in Section 6100.5. This is an exception to the general rule of Section 812 (capacity to make a decision other than health care or testamentary capacity). This section is consistent with case law that to make a gift deed, the transferor need only have testamentary capacity, not contractual capacity. *Goldman v. Goldman*, 116 Cal. App. 2d 227, 253 P. 2d 474 (1953).

Execution of Deed

The Commission decided that a TOD deed should be signed, dated, and acknowledged by the transferor. The deed need not be witnessed in the manner of a will.

In the draft below, **the staff has added a provision authorizing execution by another person at the transferor's direction**, in contemplation of possible physical disability of the transferor. The deed would still need to be acknowledged by the transferor.

> **Execution of TOD deed**
>
> (a) The transferor shall sign and date a transfer on death deed and acknowledge the deed before a notary public.
>
> (b) A transfer on death deed may be signed and dated in the transferor's name by a person other than the transferor at the transferor's direction and in the transferor's presence but shall be acknowledged by the transferor.
>
> (c) A transfer on death deed is not invalid because it does not comply with the requirements for execution of a will.
>
> **Comment.** This prescribes execution requirements. A properly executed TOD deed is ineffective unless recorded before the transferor's death. See Section [to be provided].
>
> Subdivision (c) is a specific application of Section 5000(a) (provision for nonprobate transfer on death in written instrument).
>
> ☞ **Staff Note.** Statutory limitations on a transfer to the drafter of an instrument are discussed under "Who May Be a Beneficiary?" below.

Delivery and Acceptance

The Commission decided that delivery of the deed to the beneficiary during the transferor's lifetime should not be required, nor should acceptance by the beneficiary. Disclaimer procedures are discussed under "Disclaimer of Interest" below.

> **Delivery and acceptance of TOD deed**
>
> A transfer on death deed need not be delivered to the beneficiary, nor need the beneficiary accept the deed, during the transferor's lifetime.
>
> **Comment.** This section makes clear that, notwithstanding the Law Revision Commission's Comment to Section 5000 (statute does not relieve against the delivery requirement of the law of deeds), delivery of a TOD deed is not necessary. Recordation of the TOD deed during the transferor's lifetime makes delivery unnecessary. See Section [to be provided].
>
> Consideration is not required for a TOD deed. See Civ. Code § 1040.
>
> A TOD deed has no effect, and confers no rights on the beneficiary, until the transferor's death. See Section [to be provided].
>
> Disclaimer procedures are available to a beneficiary. See Section [to be provided].

Recordation

The Commission decided that a TOD deed should be ineffective unless recorded before the transferor's death.

The Commission also decided that although there should be no requirement of prompt recording after execution, the tentative recommendation should solicit comment on the possibility of requiring prompt recording, such as within 30 or 60 days after execution, pointing out advantages and disadvantages.

> **Recordation of TOD deed**
>
> A transfer on death deed is not effective to transfer property on the death of the transferor unless before the transferor's death the deed is recorded in the county in which the property is located.
>
> **Comment.** This section requires recordation of the TOD deed before the transferor's death, but does not require recordation by the transferor; an agent or other person authorized by the transferor may record the instrument. The deed is considered recorded for purposes of this section when it is deposited for record with the county recorder. See Civ. Code § 1170.

☞ **Note.** The Commission particularly solicits comment on the question whether recordation of a TOD deed should be required within a short time after execution, for example 30 or 60 days. Considerations include:

- Prompt recordation could help expose fraud or undue influence before the transferor dies. But it could also frustrate the transferor's desire to maintain the privacy of the disposition.
- Prompt recordation would be evidence of the transferor's intent. However, it could frustrate the intent of a transferor who desires to pass the property to the beneficiary but is physically unable to record the instrument within the required period or there is a failure of prompt recordation for another reason.

Recordation of a TOD deed has the effect of severing a joint tenancy in the property, with the result that on the transferor's death, the transferor's interest in the property passes to the TOD beneficiary rather than to the joint tenant. See discussion of "Joint Tenancy" below. In this connection, it is worth noting that under general joint tenancy law, a deathbed severing instrument (executed within three days of death) may be effectively recorded up to seven days after death. Civ. Code § 683.2(c)(2). **Is this a concept worth importing into the TOD deed law — a TOD deed executed within three days of the transferor's death is effective if recorded within seven days after death?** The consequence would be that real property of a decedent would not be marketable for a week after death, due to the possibility of an after-recorded TOD deed. This is perhaps not an undue burden on successors to the property and may help effectuate the decedent's intent.

Battle of Recorded Deeds

The Commission concluded that if more than one TOD deed is recorded for the same property, the last executed of the recorded instruments should prevail.

Effect of multiple deeds

If a transfer on death deed is recorded for the same property for which another transfer on death deed is recorded, the later executed of the deeds is the operative instrument.

Comment. This section gives effect to the last executed of recorded TOD deeds. A TOD deed is executed by signing, dating, and acknowledging before a notary public. See Section [to be provided] (execution of TOD deed). For purposes of this section execution is complete when the transferor acknowledges the deed before a notary public, not when the deed is signed and dated.

☞ **Staff Note.** It is conceivable there could be multiple deeds for the same property that are not inconsistent because they convey different interests in the property (life estate, remainder, etc.). This issue is discussed under "Ownership Interest Conveyed" below.

Suppose the transferor records multiple deeds, intending by each new deed to revoke the earlier deed and that only the last deed be the effective dispositive instrument. And suppose further that for some reason the last deed fails to make the intended transfer — the named beneficiary is dead, or disclaims, for example. Does that revive earlier deeds in the recorded chain?

It is impossible to generalize as to the intent of any given transferor. In some instances the transferor might have wanted to revive earlier deeds, in other instances, not. Probably the safer rule, and the rule more consistent with the remainder of the TOD deed statute, would be that an earlier deed is revoked (not revocable) by subsequent a deed. It is risky to impute an intent to revive. We deal with lapsed gifts in a rational manner below, and lapse principles probably should control here (see discussion under "Failure to Survive and Lapse" below).

We would make clear in the statute that **recordation of a later deed revokes an earlier one**:

> If a transfer on death deed is recorded for the same property for which another transfer on death deed is recorded, the later executed of the deeds is the operative instrument and its recordation revokes the earlier executed deed.
>
> **Comment.** The failure of the later executed of the recorded deeds to effectuate the transfer does not revive an earlier executed deed, which is revoked by recordation of the later executed deed. Instead, the property passes pursuant to lapse principles. See Section [to be provided].

Effect of Other Instruments

The Commission took the general position that recordation should be the controlling factor among recorded and unrecorded dispositive instruments that affect property subject to a TOD deed.

> **Conflicting dispositive instruments**
>
> The following rules govern a conflict between a transfer on death deed of real property and another instrument that makes a disposition of the property:
>
> (a) If the other instrument is not recorded before the transferor's death, the transfer on death deed is the operative instrument.

(b) If the other instrument is recorded before the transferor's death, the later recorded instrument is the operative instrument.

Comment. This section establishes the general rule governing a conflicting disposition of property subject to a TOD deed. For special rules, see [to be provided].

The staff wonders whether we ought not to follow the same pattern we established for conflicting TOD deeds — the last **executed** of the recorded instruments, rather than the last recorded, prevails. The reasoning would be the same — a decedent may have a change of heart after executing an instrument, and leave it unrecorded. But that opens up the possibility of a disappointed heir discovering the earlier instrument when the transferor is incapacitated and recording it. The staff would revise the general rule to state:

(b) If the other instrument is recorded before the transferor's death, the later ~~recorded~~ executed instrument is the operative instrument.

Will

In case of a conflict between a will and a TOD deed, the TOD deed should control. The general rule proposed above would cover the situation, since a will is not recorded. We would expand the Comment:

Comment. Under this section the transferor's will does not override a TOD deed, notwithstanding a devise of the property in the will and regardless of the date of execution of the will. This section does not apply if the transferor revokes the TOD deed before death. See Section [revocation].

The Missouri statute admits of an exception where the beneficiary designation itself expressly grants the owner the right to revoke or change a beneficiary designation by will. Mo. Rev. Stat. § 461.033(4). The staff thinks such a provision in a TOD deed would be counterproductive — it would make the property unmarketable absent a probate to determine whether a will exists that affects the TOD deed. We would not encourage this possibility by mentioning it in the statute.

Trust

A TOD deed would be revoked by a later recorded transfer of the property into trust. Whether a TOD deed would revoke an earlier transfer of the property into a trust would depend on whether the trust is revocable. In either event, a

recorded instrument would prevail over an unrecorded instrument. To that extent our general provision appears satisfactory.

However, the law needs to be clear that **a TOD deed may not in effect undo an earlier irrevocable instrument**, such as an irrevocable trust. Although we could explain that in the Comment, perhaps it would be more helpful to set out the rule in black letter law, for the benefit of laypersons likely to use this device.

> (b) If the other instrument is recorded before the transferor's death, the later executed instrument is the operative instrument. This subdivision does not apply if the earlier executed instrument makes an irrevocable disposition of the property.
>
> **Comment.** Although subdivision (b) establishes the general rule that the later executed of two conflicting recorded instruments prevails, the rule is subject to the qualification that a TOD deed has no effect if the earlier instrument makes an irrevocable disposition of the property, such as by a transfer into an irrevocable trust.

Joint Tenancy

The Commission concluded that recordation of a TOD deed would have the effect of severing a joint tenancy in the property, enabling a TOD transferor to pass an interest to the TOD beneficiary on the transferor's death, rather than to the surviving joint tenant. Because this result is at odds with the results in other jurisdictions that have enacted TOD deed legislation, the staff would spell it out by statute:

> **Conflicting dispositive instruments**
>
> The following rules govern a conflict between a transfer on death deed of real property and another instrument that makes a disposition of the property:
>
> (a) If the other instrument is not recorded before the transferor's death, the transfer on death deed is the operative instrument.
>
> (b) If the other instrument is recorded before the transferor's death, the later executed instrument is the operative instrument. This subdivision does not apply if the earlier executed instrument makes an irrevocable disposition of the property.
>
> (c) If the earlier executed instrument creates a joint tenancy in the property, recordation of the transfer on death deed severs the joint tenancy to the extent provided in Section 683.2 of the Civil Code.
>
> **Comment.** Subdivision (c) addresses the conflict between a TOD deed and an earlier joint tenancy in the property. Because a joint tenancy deed creates a present interest in the joint tenants, a later TOD deed may affect only the transferor's interest in the

property. The TOD deed may have the effect of severing the joint tenancy under Civil Code Section 683.2.

Civ. Code § 683.2 (amended). Severance of joint tenancy

683.2. (a) Subject to the limitations and requirements of this section, in addition to any other means by which a joint tenancy may be severed, a joint tenant may sever a joint tenancy in real property as to the joint tenant's interest without the joinder or consent of the other joint tenants by any of the following means:

(1) Execution and delivery of a deed that conveys legal title to the joint tenant's interest to a third person, whether or not pursuant to an agreement that requires the third person to reconvey legal title to the joint tenant.

(2) Execution of a written instrument that evidences the intent to sever the joint tenancy, including a deed that names the joint tenant as transferee, or of a written declaration that, as to the interest of the joint tenant, the joint tenancy is severed.

(3) Execution and recordation of a transfer on death deed under Section [to be provided].

(b) Nothing in this section authorizes severance of a joint tenancy contrary to a written agreement of the joint tenants, but a severance contrary to a written agreement does not defeat the rights of a purchaser or encumbrancer for value in good faith and without knowledge of the written agreement.

(c) Severance of a joint tenancy of record by deed, written declaration, or other written instrument pursuant to subdivision (a) is not effective to terminate the right of survivorship of the other joint tenants as to the severing joint tenant's interest unless one of the following requirements is satisfied:

(1) Before the death of the severing joint tenant, the deed, written declaration, or other written instrument effecting the severance is recorded in the county where the real property is located.

(2) The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.

(d) Nothing in subdivision (c) limits the manner or effect of:

(1) A written instrument executed by all the joint tenants that severs the joint tenancy.

(2) A severance made by or pursuant to a written agreement of all the joint tenants.

(3) A deed from a joint tenant to another joint tenant.

(e) Subdivisions (a) and (b) apply to all joint tenancies in real property, whether the joint tenancy was created before, on, or after January 1, 1985, except that in the case of the death of a joint tenant before January 1, 1985, the validity of a severance under

subdivisions (a) and (b) is determined by the law in effect at the time of death. Subdivisions (c) and (d) do not apply to or affect a severance made before January 1, 1986, of a joint tenancy.

Comment. Section 683.2 is amended to recognize the effect of recordation of a TOD deed as a severing instrument. It should be noted that, notwithstanding subdivision (c), a TOD deed is ineffective unless recorded before the transferor's death. See Section [to be provided].

☞ **Staff Note.** Perhaps it would be possible to repeal subdivision (e), a transitional provision that is now more than 20 years old. It is conceivable it may continue to have some effect, but the staff suspects there are very few cases today that would be governed by it.

In the reverse situation, where the TOD transferor records a later joint tenancy deed for the same property, that instrument would have the effect of revoking the previously recorded TOD deed. Our general statute appears to be adequate on that issue, and no further revision is required.

Community Property

The Commission concluded that either spouse should be able to make a TOD deed affecting that spouse's one half interest in the community property. That would not affect the other spouse's one half interest, unless the other spouse joined in the deed.

Community Property

A transfer on death deed of community property made without the written joinder or consent of the transferor's spouse is effective to transfer on the transferor's death only the transferor's one-half interest in the property.

Comment. This section is a specific application of the rule that a person has the power of disposition at death of that person's interest in community property without the joinder or consent of the person's spouse. Cf. Section 100 (one-half of community property belongs to decedent). A TOD deed of community property made with the joinder or consent of the transferor's spouse is subject to Chapter 2 (commencing with Section 5010) of Part 1, relating to nonprobate transfers of community property. Comparable principles apply to the property of registered domestic partners pursuant to Family Code Section 297.5.

The statute creating the new title form of community property with right of survivorship indicates that termination of the right of survivorship may be accomplished pursuant to the same procedures by which a joint tenancy may be

severed. Comment language to the joint tenancy and community property statutes set out above should make the connection in the interest of clarity:

> **Comment.** Recordation of a transfer on death deed terminates the survivorship right in community property with right of survivorship. See Civ. Code § 682.1(a) ("Prior to the death of either spouse, the right of survivorship may be terminated pursuant to the same procedures by which a joint tenancy may be severed.")

Effectuation of Transfer

The Commission concluded that the TOD deed statute should make use of the same procedure for recordation of an affidavit of death and certified copy of death certificate that is used to effectuate passage of title by joint tenancy.

> **Effectuation of transfer pursuant to TOD deed**
>
> The beneficiary of a transfer on death deed may establish the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.
>
> **Comment.** This section makes clear that the beneficiary of a TOD deed may record an affidavit of death of the transferor to effectuate the transfer. See Section 212 (recordation is prima facie evidence of death to the extent it identifies real property located in the county, title to which is affected by the death).

Contest of Deed

The Commission directed the staff to look into possible use of the Probate Code Section 850 procedure for a person wishing to contest a named beneficiary's right under a TOD deed.

Judicial Proceeding

Probate Code Sections 850-859 provide a procedure for obtaining court resolution of a disputed conveyance or transfer of property involving a decedent. Under this procedure an interested person may petition the court for relief. The petitioner must, at least 30 days before the hearing, serve each person claiming an interest in or having title to or possession of the property. The court may grant appropriate relief, including an order that authorizes or directs the person having title to or possession of the property to execute a conveyance or transfer to the person entitled.

This procedure appears to the staff to be an established and reasonably expeditious procedure that is readily adaptable as a means to contest passage of title pursuant to a TOD deed.

Contest of transfer pursuant to TOD deed

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

Comment. This section incorporates the procedure of Sections 850-859, relating to conveyance or transfer of property claimed to belong to decedent or other person. It makes clear that a person adversely affected by a TOD deed has standing to contest the transfer. Cf. Section 48 ("interested person" defined).

Grounds for contest under this section may include but are not limited to lack of capacity of the transferor (Section [to be provided]), improper execution or recordation (Sections [to be provided]), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350).

Grounds for Contest

We have given a flavor of grounds for contest in the proposed Comment, but have not attempted to provide a complete catalog. Although the TOD deed is device not known to the law in California, presumably common law principles of fraud, mistake, duress, undue influence, and the like would apply to the TOD deed as they would to any other deed of gift or transfer. Missouri law makes clear that these principles apply to a nonprobate transfer. **The staff would include a specific provision for a TOD deed, parallel to this one found among the California statutes relating to a nonprobate transfer of community property:**

5015. Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a written consent to a provision for a nonprobate transfer of community property on death.

Statute of Limitations

The law perhaps should also include a short fuse on bringing a contest of a TOD deed. To the extent there is a possibility that the beneficiary's title may be voided by court order, it is likely that a title company will not issue title insurance. A typical California provision validating a transfer without probate would provide a 40 day window. See, e.g., Prob. Code §§ 13100 (collection or transfer of personal property by affidavit if 40 days have elapsed since death of decedent), 13151 (petition for court order determining succession to property if 40 days have elapsed since death of decedent), 13540 (right of surviving spouse

to dispose of property after 40 days from death of spouse). Forty days is perhaps not too long a period to require the beneficiary to wait before being able to mortgage or sell the property.

On the other hand 40 days is quite a short time for an adverse claimant to learn of the decedent's death and the existence of the TOD deed, as well as to investigate possible wrongdoing and commence a court proceeding. One option that might make sense would be to permit a challenge more than 40 days after the transferor's death but to limit the available remedies if there has been an intervening BFP. For example:

> **Time for contest of transfer pursuant to TOD deed**
>
> A contest of the validity of a transfer of property pursuant to a transfer on death deed shall be commenced within the earlier of the following times:
>
> (a) Three years after the transferor's death.
>
> (b) One year after the beneficiary establishes the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.
>
> **Remedies for contest of transfer pursuant to TOD deed**
>
> If the court determines that a transfer of property pursuant to a transfer on death deed is invalid, the court shall order the following relief:
>
> (a) If the contest was commenced and a lis pendens recorded within 40 days after the transferor's death, the court shall void the deed and order transfer of the property to the person entitled to it.
>
> (b) If the contest was commenced more than 40 days after the transferor's death, the court shall grant appropriate relief but shall not affect the rights in the property of a purchaser or encumbrancer for value and in good faith acquired before commencement of the contest and recordation of a lis pendens.

Would this be a workable scheme?

RIGHTS OF TRANSFEROR

Ownership Interest Retained

How does a TOD deed affect the transferor's ownership rights and control of the property during lifetime? Perhaps the most important incident of the TOD deed, as opposed to a method of transfer such as joint tenancy, is that the transferor retains full ownership and control of the property during lifetime. In that sense it is much like a will.

The statute needs to make clear that a TOD deed is not effective until the transferor's death and that the transferor retains full ownership rights until death. That is the rule in every jurisdiction that has TOD deed legislation, and it is central to the determination of the rights of the transferor and the rights of third persons, including the beneficiary and creditors.

A corollary of the principle that a transferor who executes a TOD deed retains full rights in the property during lifetime is that the beneficiary has no rights until the transferor's death. The statute should spell that out as well. This will help address problems such as those experienced in Arizona and New Mexico where it appears that a transferor must revoke a TOD deed in order to refinance or sell the property. That should not be necessary if it is clear that the beneficiary's right only arises if the TOD deed is still in effect and unrevoked at the transferor's death.

> What makes the deed most useful as an estate planning and/or probate avoidance technique is that the grantee-beneficiary has no vested interest in the property until the actual death of the current owner. The current owner is free to change the grantee-beneficiary at any time simply by executing a new deed (a beneficiary deed, quit claim deed, warranty deed or any other form of deed) and recording that new deed. Because the grantee-beneficiary does not have any current interest in the property, the current owner does not need the consent, signature, or cooperation of the grantee-beneficiary to revoke the beneficiary deed or execute a new deed.

Kirtland and Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law 118, 119 (March 2005).

The staff would add a provision along the following lines:

> **Effect of TOD deed on rights during lifetime of transferor**
>
> Neither execution nor recordation of a transfer on death deed of real property affects the ownership rights of the transferor, or creates a legal or equitable right in the beneficiary, during the transferor's life, and the transferor may convey, assign, contract, encumber, or otherwise deal with the property as if no transfer on death deed were executed or recorded.
>
> **Comment.** This section makes clear that a "transfer on death deed" means exactly what it says — it is a deed effective only on the transferor's death and not before. A transfer on death deed is revocable until that time. See Section [to be provided] (revocability of TOD deed). The beneficiary's joinder, consent, or agreement to any transaction by the transferor is irrelevant and unnecessary.

Revocability

TOD Deed Revocable at Any Time

One of the key incidents of retained ownership by a transferor is the right to change the beneficiary designation or revoke the TOD deed completely. This is not a necessary incident; the law could provide that a TOD deed is irrevocable. But that would destroy a significant aspect of the TOD deed's utility. Every jurisdiction that has enacted TOD deed legislation has made the deed revocable. **The staff would include a revocability feature in any California TOD deed legislation.**

> **Revocability of TOD deed**
>
> A transferor [that has testamentary capacity] may revoke a transfer on death deed at any time.
>
> **Comment.** This section makes clear that a transfer on death deed is revocable. The transferor's right of revocation may be subject to a contractual or court ordered limitation.

Revocability makes the TOD deed ambulatory, like a will. The transferor can make changes, or make a totally different disposition of the property, at any time until death. The revocability of the deed reinforces the concept that a designated beneficiary has no interest in the property until the deed is finalized by the transferor's death.

What capacity should be required for revocation? Although an argument can be made that only minimal capacity should be required to revoke, **the staff thinks the TOD transferor should have the same capacity as that required to make a TOD deed**. Presumably the transferor's intention was well thought through at the time the transferor made the deed; it should not be undone when the transferor no longer has the capacity to formulate a testamentary plan. Moreover, a lower standard would create an opening for end of life manipulation by a disappointed heir.

A major consequence of revocability is that the property is considered part of the transferor's estate for estate tax purposes. That may or may not be desirable. The matter is dealt with in "Estate Tax and Generation Skipping Transfer Tax" below.

Modification

Revocation implies modification. It is conceivable that the transferor could record an instrument that modifies a TOD deed by naming a new beneficiary. **The staff would not make special rules for modification**; it would unduly complicate the statute. The better approach is simply for the transferor to record a new TOD deed that has the effect of revoking the earlier deed.

Irrevocable Deed?

Suppose a transferor wishes to make an irrevocable TOD deed, for tax or other reasons? The deed might look pretty much like a standard revocable deed, but the transferor has appended the words, "This TOD deed is irrevocable." Does that make it so, or would the deed remain revocable by operation of law? Not surprisingly, no statute addresses this point.

Yet the TOD transferor can and will make an irrevocable deed. See, for example, *Bolz v. Hatfield*, 41 S.W. 3d 566 (2001) ("This deed is hereby expressly made irrevocable and not subject to change unless ... Grantor suffers a financial emergency which requires the sale of this property to cure the financial emergency.")

In theory there should be nothing to prevent the transferor from making an irrevocable TOD deed. After all, a trust can be made either revocable or irrevocable. An ordinary deed is irrevocable. A joint will may be made irrevocable by contract. The staff sees no conceptual difficulty with an irrevocable TOD deed.

But we would be concerned that permitting an irrevocable TOD deed would be litigation breeding. Suppose a transferor makes a TOD deed and subsequently executes a conveyance of the same property. Would the frustrated TOD beneficiary attempt to construe vague or conditional language in the TOD deed as creating an irrevocable transfer on death? In the joint will situation, a disposition inconsistent with an "irrevocable" devise is ordinarily recognized; a suit in equity is required to enforce the contractual commitment.

The staff's inclination would be not to build too many options into the TOD deed scheme. If we want the scheme to operate smoothly and efficiently, the simpler the better. A transferor who wants to get fancy has plenty of other devices available. We would refer in the Comment to the possibility that the owner may have a contractual or court-ordered obligation to transfer the property to the beneficiary, and leave it at that.

It is worth noting that if the transferor becomes incapacitated, that makes the TOD deed irrevocable as a practical matter. Whether that circumstance should entail any legal consequences before death is dealt with in connection with "Rights of Beneficiary" below.

Revocation Procedure

One of the questions the Legislature has asked in assigning us this study is:

> Whether it would be more difficult for a person who has transferred a potential interest in the property by beneficiary deed to change his or her mind than if the property were devised by will to the transferee or transferred through a trust or other instrument.

2005 Cal. Stat. ch. 422 § 1(b)(4).

How does one go about revoking a recorded TOD deed? The obvious approach is to record another instrument that cancels or revokes the previous instrument. To help protect against abuse by a disappointed heir, a purported revocation should be ineffective unless recorded before the transferor's death.

A number of the states with TOD deed legislation address the revocation procedure expressly. Arizona, Arkansas, Colorado, and Kansas all provide that a revocation must be executed by the transferor, must identify the property and otherwise comply with the general requirements for a recorded instrument, and must be recorded in the county in which the real property is situated before the transferor's death. A couple of states add the probably unnecessary but perhaps helpful remark that "The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective." **The staff would add comparable language expressly addressing the revocation procedure in California TOD deed legislation.**

> **Revocation of TOD deed**
>
> (a) An instrument revoking a transfer on death deed shall be executed and recorded before the transferor's death in the same manner as a transfer on death deed.
>
> (b) The joinder, consent, agreement of, or notice to, the beneficiary is not required for revocation of a transfer on death deed.
>
> **Comment.** Under subdivision (a) a revoking instrument must be signed, dated, acknowledged, and recorded by a transferor or a person acting at the transferor's direction. See Section [to be provided] (execution of TOD deed). The revoking instrument must be recorded in the county in which the property is located. See Section [to be provided] (recordation of TOD deed).

> Subdivision (b) implements the principle that creation and recordation of a TOD deed creates no rights in the beneficiary. See Section [to be provided] (effect of TOD deed on rights during lifetime of transferor).
>
> Revocation of a TOD deed does not revive survivorship rights in joint tenancy property or community property with right of survivorship that were previously severed by recordation of the TOD deed.

We will talk about statutory forms later in this memorandum, but it is worth noting at this point that three states prescribe a statutory form that may be used for revocation of a TOD deed.

The answer to the Legislature's question, then, is that it would be more difficult for the transferor to revoke a TOD deed or change a beneficiary than for other types of testamentary and nontestamentary transfers, since the revocation must be recorded to be effective. But that is the choice the transferor makes when selecting that form of disposition at death.

Revocation by Agent

The California Judges Association has been concerned that revocation of a TOD deed could be **more difficult** than creation. The statutes of some jurisdictions, for example, seem to suggest that, although a TOD deed may be recorded by an agent on behalf of the transferor, a revoking instrument must be recorded by the transferor personally.

> If a grantor forgets that he has already signed one deed, the second one his lawyer records [is] ineffective. The limited ability of the disabled or infirm to effect a change of estate plan appears unwarranted. Second, requiring recording in order to effect a change of beneficiary or revocation is limited to the business hours of the county recorder. A death bed estate plan, no matter how competent the owner and how well witnessed the plan, would be ineffective.

Cal. Judges Ass'n, *Letter re AB 12 (DeVore)* (4/28/2005).

The implication that the transferor must personally record a revocation is easily avoided by drafting, and the staff believes the draft set out above avoids that implication.

The concern of the judges about the business hours of the county recorder is not so readily addressed. An option would be to allow a revocation to be recorded within one week after the transferor's death, much as an instrument

severing a joint tenancy may be recorded up to one week after the transferor's death:

> The deed, written declaration, or other written instrument effecting the severance is executed and acknowledged before a notary public by the severing joint tenant not earlier than three days before the death of that joint tenant and is recorded in the county where the real property is located not later than seven days after the death of the severing joint tenant.

Civ. Code § 683.2(c)(2). Presumably such a provision would not cause problems for the title industry.

The staff is not convinced, however, that it is necessary to address this situation. Whether a last minute change to a transferor's estate plan is desirable is a matter for debate. **Perhaps the estate planning bar can provide us some practical guidance on this issue.**

Acts that Cause Revocation

Apart from an express revocation of a TOD deed, we may want to recognize other acts that cause or have the effect of revocation. These include such events as changing a beneficiary designation or making a subsequent conveyance of the property. The effect of a subsequent will or trust on a TOD deed we have dealt with above. The effect, if any, of the dissolution of the transferor's marriage to the TOD beneficiary is dealt with in connection with "Who May Be a Beneficiary?" below.

Change of Beneficiary. It is said that one of the benefits of the TOD deed is that it is flexible — the transferor may change the beneficiary at any time before death, just as with a will or revocable trust. How does one go about changing a beneficiary designation in a recorded instrument?

The staff sees two obvious ways — (1) record an instrument that modifies the earlier instrument, much like a will codicil, or (2) revoke the earlier instrument and record a new one. A number of jurisdictions (Kansas, New Mexico, Ohio) have provided that the transferor may change the beneficiary designation by recordation of a subsequent instrument that has the effect of a revocation of the previous instrument.

Colorado provides, for example, that "A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner's interest in the described real property." Colo. Rev. Stat. § 115-

15-405(2). The staff is concerned about the last clause, relating to a conveyance of "all of the owner's interest". See discussion of "Ownership Interest Conveyed" below.

In Kansas, the statutory TOD deed form makes clear that a new deed revokes a previous beneficiary designation:

> This transfer on death deed is revocable. It does not transfer any ownership until the death of the owner. It revokes all prior beneficiary designations by this owner for this interest in real estate.

Kan. Stat. Ann. § 59-3502.

New Mexico also provides that recordation of a subsequent TOD deed revokes a previous beneficiary designation, but with a twist:

> A designation of the grantee beneficiary may be changed by the record owner at any time prior to the death of the record owner, by the record owner executing, acknowledging and recording a subsequent transfer on death deed. The signature, consent or agreement of or notice to the grantee beneficiary or beneficiaries is not required. A subsequent transfer on death beneficiary designation revokes a prior designation **to the extent there is a conflict between the two designations**.

N.M. Stat. Ann. § 45-6-401(E) (emphasis added).

What is a conflict within the meaning of the New Mexico provision? If the transferor records a TOD deed in favor of A and a later TOD deed in favor of B, are these in conflict, or did the transferor intend merely to create co-ownership rights? If the transferor records a TOD deed of the fee simple in favor of A and a later TOD deed of a life estate in favor of B, are these in conflict, or did the transferor intend merely to create present and future interests? If the transferor records a TOD deed of a one-half interest in property in favor of A and a later TOD deed of a one-half interest in property in favor of B, are these in conflict, or did the transferor intend to cumulate the deeds and thereby convey the entire property to A and B?

The staff would not get into these complexities. We would follow the lead of jurisdictions that provide a subsequent TOD deed revokes an earlier one for the same property. See discussion of "Battle of Recorded Deeds" above.

Subsequent Conveyance. The law of other jurisdictions makes clear that a subsequent conveyance of the property acts as a revocation of a TOD deed. See, e.g., Mo. Rev. Stat. § 461.033 ("A transfer during the owner's lifetime of the

owner's interest in the property, with or without consideration, terminates the beneficiary designation with respect to the property transferred."); see also Nev. Rev. Stat. § 111.109(4).

The staff thinks the basic principle of these statutes is correct — a subsequent conveyance should terminate the TOD deed. But this should not be accomplished by an off-record instrument; that would undermine the efficacy of the TOD deed by making it impossible for a TOD beneficiary to obtain title insurance. A subsequent conveyance should be recorded before the transferor's death if it is to override a TOD deed. See discussion of "Effect of Other Instruments" above.

If we were to build in a delay before a BFP transaction could be protected, such as seven days or 40 days after the transferor's death, then a deathbed conveyance of the property could be given effect if recorded within that post death period.

Ownership Interest Conveyed

When we think of a conveyance of property we generally think of a conveyance of the fee simple interest. But suppose the transferor's interest is less than the fee, for example a reversionary interest, or mineral rights, or a ground lease. For that matter, the fee interest may be subject to an encumbrance or limitation. Is there any reason to preclude use of a TOD deed of a less than fee interest?

Other jurisdictions allow TOD deeds of fractional interests. For example:

- Missouri law permits a beneficiary deed of "an interest" in real property, defined as "any present or future interest in property". Mo. Rev. Stat. §§ 461.003(12), 461.025(1).
- New Mexico contemplates that the beneficiary takes the owner's interest in the property subject to any conveyance by the owner that is "less than all of the record owner's interest" in the property. N.M. Stat. Ann. § 45-6-401(I).
- Ohio provides that "A fee simple title or any fractional interest in a fee simple title may be subjected to a transfer on death beneficiary designation." Ohio Rev. Code Ann. § 5302.23(B)(5).

The staff is somewhat skeptical of this flexibility. It would seem to offer the opportunity to create plenty of constructional problems with the instrument, not to mention procedural problems where some interests in the property are

passing outside of probate and others are being probated. To the extent we can simplify this transfer device and minimize litigation over it, the device may be reasonably successful. **The staff's instinct is to provide simply that an owner of property may make a TOD deed that passes all of the owner's interest in the property to the named beneficiary.** If the owner wants to get more sophisticated, other devices, including a trust, are available.

On the other hand, the other jurisdictions have not reported any problems concerning this matter. True, the law is still relatively new in most of them, though we do have 15 years of experience under the Missouri statute. And the flexibility of allowing the owner to fragment the ownership interest is attractive, despite the potential for creating problems. That approach could also help avoid confusion over multiple TOD beneficiaries. See discussion of "Multiple Beneficiaries" below.

As our current draft stands, the situation is somewhat ambiguous. It is probably worth clarifying the matter one way or the other. For example:

> **Effect of TOD deed**
>
> A transfer on death deed of real property transfers all of the transferor's interest in the property.
>
> **Comment.** Under this section, whatever interest the transferor owned at death in property that is the subject of a TOD deed passes to the TOD beneficiary. It should be noted, however, that this provision is not limited to the fee interest. If the transferor's ownership interest is a less than fee interest in the property, that entire interest passes to the beneficiary on the transferor's death.

Or:

> **Effect of TOD deed**
>
> A transfer on death deed of real property transfers only the interest of the transferor identified in the deed.
>
> **Comment.** This section makes clear that the transferor may make a TOD deed of any or all of the transferor's interest in real property. The transferor may transfer a partial interest in the property.

In any event, whether a transferor makes a TOD deed of some or all of the transferor's interest in the real property, **the law should be clear that the property passes subject to any limitations on the transferor's interest**. Every jurisdiction that has TOD deed legislation makes that rule clear:

Interest transferred by TOD deed

A transfer on death deed of real property transfers the transferor's interest in the property to the beneficiary subject to any limitation on the transferor's interest that is of record at the transferor's death, including but not limited to a lien, encumbrance, easement, lease, or other instrument affecting the transferor's interest, regardless of whether the instrument is recorded before or after recordation of the transfer on death deed.

Comment. Under this section, a TOD beneficiary takes only what the transferor has at death. This is a specific application of the general rule that recordation of a TOD deed does not affect the transferor's ownership rights or ability to deal with the property until death. See Section [to be provided] (effect of TOD deed on rights during lifetime of transferor).

An important point about this provision is that the transferor's interest passes subject to limitations **of record** at the transferor's death. Thus a conveyance of the property that is unrecorded at the transferor's death is not recognized. We have taken that approach because we want to give a title insurer comfort in being able to deal with a TOD deed, free of an off-record instrument that could surface sometime later.

Other approaches are possible. A number of states that have enacted TOD deed legislation have adopted the opposite rule. See, e.g., Ariz. Rev. Stat. § 33-405(H) ("This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.")

Colorado takes a middle ground, giving effect to an instrument unrecorded at the transferor's death, so long as the instrument is recorded within four months after death. Colo. Rev. Stat. § 15-15-407(3). The effect of such a provision would be to make the beneficiary's interest uninsurable for four months after the transferor's death. This is perhaps not an unduly long period for the beneficiary to have to wait before being able to encumber or transfer the property.

The Commission should consider which treatment of an unrecorded instrument is preferable.

Multiple Owners

So far in this memorandum we have worked with the model of a single owner of property (except with respect to joint tenancy and community property). But how should multiple ownership be handled — should a co-owner

acting alone be able to make a TOD deed of that owner's interest, or should the joinder of all owners be required?

We have concluded in the discussion above that in the case of joint tenancy or community property, an owner should be able to make a TOD deed of that owner's interest without the joinder of the other joint tenant or spouse. The staff sees no reason why that principle should not apply to tenancy in common ownership as well. Likewise, co-owners should be able to act together to transfer full title to the property.

> **Co-ownership**
>
> (a) Co-owners of real property may jointly make a transfer on death deed of the property. The property passes to the beneficiary on the death of the last to die of the co-owners.
>
> (b) If fewer than all co-owners join in a transfer on death deed, the interests of the joining co-owners pass to the beneficiary on the death of the last to die of those co-owners.
>
> **Comment.** For special rules governing survivorship rights in joint tenancy and community property, see Sections [to be provided].

Multiple ownership creates special challenges with respect to revocability and other exercise of ownership rights between the time of the first and last to die of the co-owners. Suppose, for example, both spouses join in a TOD deed of their community property or joint tenancy property, naming their child as beneficiary. Suppose further that after the first spouse dies the survivor remarries and wishes to revoke the TOD deed and make a disposition of the property to the new spouse. Is that appropriate? Or should the survivor be allowed to revoke only as to the survivor's interest?

A resolution of the issue that would perhaps be truer to the intention of the parties would be to provide for immediate passage of the interest of the first owner to die, creating in effect a tenancy in common with the surviving owners who would continue to be able to exercise full ownership rights, including revocation, over their interests.

A number of jurisdictions have tried to deal with this situation, at length. Arizona, Arkansas, and Nevada say that any co-owner may revoke the TOD deed joined in by all, unless the co-owners hold the property as joint tenants or community property with right of survivorship (or tenancy by the entireties in Arkansas), in which case the revocation is effective only if joined in by all co-owners or by the last to die of the co-owners. Missouri offers a weak compromise

— a revocation or change of a beneficiary designation involving property of joint owners may only be made with the agreement of all owners then living.

The staff is not happy with any of the existing approaches; we can see nothing but complications with ownership rights until the death of the last of the surviving owners, not to mention possible unfairness to beneficiaries of the first to die of the co-owners. Short of writing an elaborate statute that allows the parties to complicate the situation with all kinds of conditions and covenants in the TOD deed, the staff thinks we must go for simplicity here. We would pass an interest immediately on death of a co-owner, and allow revocation as to a co-owner's interest, and leave it at that.

> **Co-ownership**
>
> (a) Co-owners of real property may jointly make a transfer on death deed of the property. The property interest of each co-owner passes to the beneficiary on the death of ~~the last to die of the co-owners~~ that co-owner.
>
> ~~(b) If fewer than all co-owners join in a transfer on death deed, the interests of the joining co-owners pass to the beneficiary on the death of the last to die of those co-owners.~~
>
> (b) A co-owner that joins in a transfer on death deed may revoke the transfer on death deed as to the interest of that co-owner. The revocation does not affect the transfer on death deed as to the interests of other co-owners.

The effect of such a provision is that in the case of community property or joint tenancy property, the surviving spouse or joint tenant would become a co-owner with the TOD beneficiary of the first to die. That would perhaps diminish the attractiveness of the TOD deed for many people. But there are other devices available to them if they wish to develop more sophisticated mechanisms for dealing with basically a life estate in the survivor. The TOD deed at its root should be a simple means to transfer property at death without probate. For that purpose, the staff thinks the simple approach set out above does the job.

Subsequent Incapacity of Owner

The State Bar Trusts & Estates Section raises a question about the subsequent incapacity of the owner after execution of a TOD deed.

> Anecdotal comments from people who have either used revocable deeds with life estate in their own practice or who have had to fix problems created by them indicate that issues arise when the owner later becomes incapacitated and there is uncertainty about the ability to deal with the property and with the problem of

dealing with incompleted or frustrated or inaccurate naming of ultimate owners.

May a conservator of the estate revoke the deed if the property is needed for the care of the conservatee? How about if the conservator believes that fraud or undue influence were used to procure the TOD deed in the first instance? Would the named beneficiary have a right to notice and an opportunity to be heard in any court proceeding to revoke?

The staff does not believe that a TOD deed would create any special problems that do not already exist with respect to any other estate planning instrument of a conservatee, including a nonprobate transfer instrument. Under general principles of substituted judgment, the conservatee's estate plan must be taken into account, and notice must be given to a beneficiary. See, e.g., Prob. Code §§ 2580-2586. **We would add a reference to these principles in the Comments.**

With respect to an action by the conservator to invalidate a suspect TOD deed, there is nothing unique about such a circumstance. Assuming that a conservator has authority to question estate planning decisions made by a conservatee (a dubious assumption), the conservator could challenge a suspect TOD deed. Among other procedures, the Section 850 challenge procedure would be available. See discussion of "Contest of Deed" above.

But the staff questions whether a conservator has the duty, or authority, to second guess a conservatee's proposed disposition of the property at death. That would ordinarily be the concern of interested persons, such as prospective heirs, not the conservator. The conservator's concern would be limited to lifetime needs of the conservatee under substituted judgment principles.

The situation with respect to the authority of an agent under a durable power of attorney is somewhat different. An agent, unlike a conservator, is a fiduciary personally selected by the principal to handle the principal's affairs. California law precludes an agent from making, amending, or revoking the principal's will. Prob. Code § 4265. But, perhaps inconsistently, the law does allow an agent to create, modify, or revoke the principal's trust, make or revoke a gift of the principal's property, create or change survivorship interests in the principal's property, and designate or change a beneficiary to receive property on the principal's death, **provided that** the principal expressly authorizes the act in the power of attorney. Prob. Code § 4264. That would appear to cover revocation of a TOD deed as well.

The jurisdictions that have enacted TOD legislation do not deal with these issues, except for Missouri. The Missouri statute appears to be generally consistent with what the staff perceives to be California law on this matter:

> **461.035. Revocation or change in beneficiary designation by agent**
>
> 1. An attorney in fact, custodian, conservator or other agent may not make, revoke or change a beneficiary designation unless the document establishing the agent's right to act, or a court order, expressly authorizes such action and such action complies with the terms of the governing instrument, the rules of the transferring entity and applicable law.
>
> 2. This section shall not prohibit the authorized withdrawal, sale, pledge or other present transfer of the property by an attorney in fact, custodian, conservator or other agent notwithstanding the fact that the effect of the transaction may be to extinguish a beneficiary's right to receive a transfer of the property at the death of the owner.

Mo. Rev. Stat. § 461.035.

Perhaps **it is worth adding a few words** on the authority of these fiduciaries (conservator and agent) with respect to a TOD deed:

> **Effect of TOD deed on rights during lifetime of transferor**
>
> Neither execution nor recordation of a transfer on death deed of real property affects the ownership rights of the transferor, or creates any legal or equitable right in the beneficiary, during the transferor's life, and the transferor or the transferor's agent or other fiduciary may convey, assign, contract, encumber, or otherwise deal with the property as if no transfer on death deed were executed or recorded.
>
> **Comment.** The reference to agent or other fiduciary includes a conservator. The authority of the fiduciary is subject to the qualification that the specific transaction entered into on behalf of the transferor must be within the scope of the fiduciary's authority.

With respect to possible self dealing by the TOD transferor's agent, see discussion of "Evaluation of TOD Deed" below.

RIGHTS OF BENEFICIARY

Basic Principle — TOD Deed Creates No Beneficiary Rights

The fundamental concept of the TOD deed is that its execution and recordation creates no rights in the beneficiary; the deed remains revocable and subject to modification by the transferor at any time before death.

The California Land Title Association has indicated that in many of the states that have created these instruments, "the problems that the title industry has encountered all flow from the fact that *no one seems to understand what, if any, present interest is created in favor of the grantees*" of a TOD deed. Cal. Land Title Assn., *Letter re AB 12 (DeVore)* (3/25/05, emphasis in original).

The staff thinks it is important to make clear in the statute that the TOD deed creates no rights in the beneficiary during the transferor's life. We have set out a draft of such a provision under the discussion of "Ownership Interest Retained" above.

Who May Be a Beneficiary?

Is there any reason to restrict the type of person that may be named as a beneficiary of a TOD deed? For example, limiting a TOD beneficiary to a natural person?

The staff sees no reason to impose such a limitation, and no state does. However, there may be other limitations in the law as to who may be named as a TOD beneficiary.

Drafter of the TOD Deed

Probate Code Section 21350 provides that no provision of any instrument is valid to make a donative transfer to any of the following persons:

> (1) The person who drafted the instrument.
> (2) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, the person who drafted the instrument.
> (3) Any partner or shareholder of any law partnership or law corporation in which the person described in paragraph (1) has an ownership interest, and any employee of that law partnership or law corporation.
> (4) Any person who has a fiduciary relationship with the transferor, including, but not limited to, a conservator or trustee, who transcribes the instrument or causes it to be transcribed.
> (5) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of a person who is described in paragraph (4).
> (6) A care custodian of a dependent adult who is the transferor.
> (7) A person who is related by blood or marriage to, is a domestic partner of, is a cohabitant with, or is an employee of, a person who is described in paragraph (6).

The law makes a number of exceptions to this rule, including an exception for (1) a person who is related to the transferor by blood, marriage, cohabitation, or domestic partnership, (2) a transfer that is reviewed by independent counsel, and (3) a transfer that is found by the court to be free of fraud, menace, duress, and undue influence. Prob. Code § 21350.5.

The staff sees **no need to address these provisions in the TOD deed statute**. They are general provisions applicable by their terms to all donative transfers, whether probate or nonprobate.

Ex-Spouse

It may be not uncommon that a person names the person's spouse as TOD beneficiary, and sometime later the marriage is dissolved. Should dissolution of the marriage have the effect of revoking the TOD beneficiary designation as to the former spouse? In the case of a will, dissolution of marriage revokes a devise to the former spouse and revokes an appointment of the former spouse as personal representative. Prob. Code § 6211. The same rule applies to termination of a domestic partnership. Prob. Code § 6211.1.

The jurisdictions that have enacted TOD deed legislation generally do not deal with the issue directly. Arkansas provides that in the event of a divorce, the TOD deed is treated as a revocable trust. We haven't tried to figure out what that means. The rule in Missouri is that divorce revokes a nonprobate transfer. See Mo. Rev. Stat. § 461.051.

California law deals with the effect of dissolution of marriage on a nonprobate transfer generally. See Prob. Code §§ 5600-5604. Under this scheme, a nonprobate transfer fails if, at the time of the transferor's death, the beneficiary is not the transferor's surviving spouse. This rule may be overridden by clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

Whether this scheme would by its terms apply to a TOD deed is slightly ambiguous. The staff would make its application clear:

> **§ 5600 (amended). Nonprobate transfer to former spouse**
>
> 5600. (a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage. A judgment of legal

separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(3) A court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

(e) As used in this section, "nonprobate transfer" means a provision, other than a provision of a life insurance policy, of either of the following types:

(1) A provision of a type described in Section 5000, including a transfer on death deed.

(2) A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.

Comment. Section 5600 is amended to make clear that a TOD deed is included within its coverage. See Section 5000 (provision for nonprobate transfer on death in instruments including conveyance, deed of gift, or other written instrument of similar nature).

Alternatively, and perhaps preferably, we could leave Section 5600 alone, and make clear directly that a TOD deed is a provision of a type described in Section 5000:

Prob. Code § 5000 (amended). Nonprobate transfers

(a) A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, conveyance, deed of gift, transfer on death deed, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

(b) Included within subdivision (a) are the following:

(1) A written provision that money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(2) A written provision that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law.

Comment. Section 5000 is amended to refer to a TOD deed. See Section [to be provided] (transfer on death deed). This is a specific instance of the general principle stated in the section.

This alternative is attractive since it will not only pick up existing cross-references to Section 5000, it will also obviate the need to add boilerplate provisions to the TOD deed statute such as a TOD deed is valid even though it does not comply with the requirements for execution of a will. This was also the approach taken by AB 12 (DeVore) as introduced.

In any event, a parallel provision relating to the effect of dissolution of marriage applies to severance of the survivorship right in joint tenancy and in community property with right of survivorship. Prob. Code § 5601.

A key difficulty with these provisions is that they bring into play off-record information — whether the beneficiary is the spouse of the transferor, and whether the parties were still married at the time of the transferor's death. The statute attempts to address these concerns by (1) protecting a BFP who lacks knowledge of the failure of a nonprobate transfer under the statute and (2) providing for a recorded affidavit of facts on which a BFP may rely. The staff believes this solution should be adequate to enable a title insurer to give effect to a TOD deed. See Prob. Code § 5602. **We solicit the input of the title industry** as to whether the law is operating smoothly in this area.

What happens to property that fails to pass because of dissolution of the marriage? The named beneficiary is treated as having predeceased the

transferor. For the consequences, see discussion of "Failure to Survive and Lapse" below.

Trust

A few state statutes include a provision to the effect that, "A transfer on death deed may be used to transfer an interest in real property to the trustee of a trust even if the trust is revocable." Such a provision would not technically be necessary in California. See, e.g., Prob. Code § 56 ("person" includes trust). But **it would perhaps be useful** due to possible confusion of a TOD deed beneficiary with a trust beneficiary. See Prob. Code § 24 ("beneficiary", as it relates to a trust, means a person who has a present or future interest, vested or contingent).

> **Transfer to trust**
>
> A transfer on death deed may be used to transfer real property to the trustee of a trust even if the trust is revocable.
>
> **Comment.** This section makes clear that the beneficiary under a TOD deed may be a trustee and need not be the trust beneficiary. See also Section 56 ("person" defined).

But what about the trust that is revoked before the transferor's death? General rules of construction that would be applicable to such a gift would govern. See Prob. Code § 21111 (failure of transfer). **We would cross-refer to this provision in the Comment.**

Homicide

Generally speaking, a beneficiary is not entitled to receive property from a decedent if the beneficiary "feloniously and intentionally" kills the decedent. Prob. Code §§ 250-258.

Would this rule destroy the efficacy of a TOD deed by making the right of a beneficiary subject to an off-record factual determination that might not occur until a remote time in the future? The general statute deals with this situation by protecting a BFP. See Prob. Code § 255.

These provisions would apply to a TOD deed. See Prob. Code §§ 250 (will, trust, intestate succession, other selected transfers), 251 (joint tenancy), 252 (bond, insurance, other contractual arrangement), 253 ("any case not described in Section 250, 251, or 252"). Assuming any TOD legislation would go into Division 5 of the Probate Code (see discussion of "Location of Statute" below), this may be an appropriate occasion to expand the coverage of Section 250:

Prob. Code § 250 (amended). Effect of homicide

250. (a) A person who feloniously and intentionally kills the decedent is not entitled to any of the following:

(1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust.

(2) Any property of the decedent by intestate succession.

(3) Any of the decedent's quasi-community property the killer would otherwise acquire under Section 101 or 102 upon the death of the decedent.

(4) Any property of the decedent under ~~Part 5 (commencing with Section 5700) of~~ Division 5 (commencing with Section 5000).

(5) Any property of the decedent under Part 3 (commencing with Section 6500) of Division 6.

(b) In the cases covered by subdivision (a):

(1) The property interest or benefit referred to in paragraph (1) of subdivision (a) passes as if the killer had predeceased the decedent and Section 21110 does not apply.

(2) Any property interest or benefit referred to in paragraph (1) of subdivision (a) which passes under a power of appointment and by reason of the death of the decedent passes as if the killer had predeceased the decedent, and Section 673 not apply.

(3) Any nomination in a will or trust of the killer as executor, trustee, guardian, conservator, or custodian which becomes effective as a result of the death of the decedent shall be interpreted as if the killer had predeceased the decedent.

Comment. Section 250 is amended to expand its express application to all forms of nonprobate transfer under Division 5, including a provision for transfer on death in a written instrument (Section 5000), a multiple party account (Section 5100), a TOD security registration (Section 5500), and a TOD deed (Section [to be provided]. This is consistent with Section 253.

What happens to property that fails to pass to a beneficiary under the homicide rule? The statutes provide that the beneficiary is treated as having predeceased the transferor. Prob. Code § 250(b). This provision is derived from the Uniform Probate Code, but may be problematic in some circumstances. See McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1164-1168 (1993). See discussion of "Failure to Survive and Lapse" below.

The staff also believes the BFP protection provision of existing law may be inadequate for a TOD deed. As currently drafted, it protects purchasers but not

encumbrancers and doesn't give a title insurer the security of reliance on recorded information.

> **Prob. Code § 255. Rights of bona fide purchaser or encumbrancer for value**
>
> 255. This part does not affect the rights of any person who, before rights under this part have been adjudicated, purchases from the killer for value and without notice property which the killer would have acquired except for this part, but the killer is liable for the amount of the proceeds or the value of the property.

The staff does not see an easy fix for this provision. An adjudication that a person has felonioulsy and intentionally killed another, whether made in a criminal or a civil proceeding, would not ordinarily be a recordable instrument. We may wish to rely instead on a general provision in the TOD deed statute. See discussion of "Rights of Third Party Transferee" below.

Minor or Incapacitated Person

It is quite possible the transferor could name as beneficiary a minor child or an adult who otherwise lacks capacity at the time of the transferor's death. The staff does not see this as a problem. The general statutes on appointment of a guardian or conservator to manage property for a minor or otherwise incapacitated person are adequate to handle this situation, just as they handle any other form of transfer to such a person. **We could, if people think it is helpful, add language to an appropriate Comment** explaining this. But we generally try to avoid writing a practice treatise in a Comment.

Survival

A TOD beneficiary does not take unless the beneficiary survives the transferor. But what does it mean to "survive" the transferor. A not uncommon situation arises where the transferor and beneficiary die at about the same time, perhaps in a motor vehicle accident.

California has in effect the old Uniform Simultaneous Death Act. Under that act, if it cannot be determined by clear and convincing evidence that the beneficiary has survived the transferor, the beneficiary is considered not to have survived. See Prob. Code §§ 222, 21109.

California has never adopted the revised Uniform Simultaneous Death Act, under which the beneficiary must survive the transferor by 120 hours in order to satisfy a survival requirement. The purpose of that provision is to minimize

litigation in a simultaneous death case, and to avoid a double probate or double transfer where persons injured in a common accident die within a few days of each other.

It would be possible to adopt the 120 hour rule for a beneficiary under a TOD deed. Although the staff believes the 120 hour rule is better than existing law, we also believe in uniformity of construction. It is hard for us to argue that only the TOD deed should be subject to a 120 hour survival rule when no other testamentary or nontestamentary instrument under California law is. The law should be changed for all, or not at all. **We would stick with the existing law governing survival.** No special provision is required to accomplish this; the existing general provision would apply by operation of law.

Failure to Survive and Lapse

A beneficiary must survive the transferor in order to take. See Prob. Code § 21109. What happens to the property if the beneficiary fails to survive?

Alternate Beneficiary

The transferor may wish to specify an alternate beneficiary in case the named beneficiary fails to survive the transferor — for example, "to John Doe or, if John Doe does not survive me, to Jane Doe." A number of states recognize this option for a TOD transferor. Reports of experience with this procedure under Arizona law indicate that it works just fine, and title companies approve of it. That would also be the result under general California rules of construction. See Prob. Code § 21111(a)(1) (failed transfer passes as provided in the instrument).

It is perhaps worth making clear in the statute that **a TOD deed may include an alternate beneficiary**:

> **Alternate beneficiary**
>
> A transferor may name an alternate beneficiary to take property under a transfer on death deed if a named beneficiary fails to survive the transferor.
>
> **Comment.** This section makes explicit the right of a TOD transferor to name an alternate beneficiary. The transferor may name more than one alternate beneficiary. See Section 10 (singular includes plural).

The staff has drafted this provision narrowly to address only the situation where the named beneficiary fails to survive. It is worth noting, however that other jurisdictions allow the TOD transferor to name an alternate beneficiary to

take on any specified condition. See, e.g., Ariz. Rev. Stat. § 33-405(C) ("A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary deed designates a successor grantee beneficiary, the deed shall state the condition on which the interest of the successor grantee beneficiary would vest.") Presumably under such a provision the transferor could impose a condition such as, "to my son John Doe, unless he puts me in a nursing home, in which case to my daughter Jane Doe."

Lest this example seem fanciful, consider the TOD deed that included a conditional transfer in a reported Missouri case:

> This Beneficiary Deed is executed pursuant to Chapter 561 R.S.Mo. It is not effective to convey title to the above-described real estate until Grantor's death or the death of the last to die of two or more Grantors. This deed is hereby expressly made irrevocable and not subject to change *unless Grantee fails to pay the property tax due on the property within thirty days of the yearly payment date for said tax* or Grantor suffers a financial emergency which requires the sale of this property to cure the financial emergency.

See *Bolz v. Hatfield*, 41 S.W. 3d 566 (2001) (emphasis added).

The staff thinks it would be a mistake to invite a TOD transferor to address a condition other than survival. That will complicate interpretation of the instrument, require reference to off-record material, and cause a title company to refuse to issue title insurance absent a court determination of ownership. Other instruments are available if the decedent wishes to make a more complex estate plan. **We would strive for simplicity and say nothing in the statute about a condition other than survival.** That would not prevent a TOD transferor from including other conditions if so inclined, and probably those would be given effect by a court.

Antilapse

If the transferor says nothing in the instrument about an alternate beneficiary, then general lapse (and antilapse) principles come into play. The concept behind antilapse legislation is that allowing a gift to lapse (in which case it reverts to the decedent's estate to pass by will or intestate succession) may in many cases frustrate the decedent's intent. The decedent may well have intended, if the named beneficiary did not survive, that the property go to the beneficiary's heirs. This is particularly true where the beneficiary is a child or other close relative of the decedent.

Thus the California antilapse statute provides:

> 21110. (a) Subject to subdivision (b), if a transferee is dead when the instrument is executed, or fails or is treated as failing to survive the transferor or until a future time required by the instrument, the issue of the deceased transferee take in the transferee's place in the manner provided in Section 240. A transferee under a class gift shall be a transferee for the purpose of this subdivision unless the transferee's death occurred before the execution of the instrument and that fact was known to the transferor when the instrument was executed.
>
> (b) The issue of a deceased transferee do not take in the transferee's place if the instrument expresses a contrary intention or a substitute disposition. A requirement that the initial transferee survive the transferor or survive for a specified period of time after the death of the transferor constitutes a contrary intention. A requirement that the initial transferee survive until a future time that is related to the probate of the transferor's will or administration of the estate of the transferor constitutes a contrary intention.
>
> (c) As used in this section, "transferee" means a person who is kindred of the transferor or kindred of a surviving, deceased, or former spouse of the transferor.

Interestingly, a number of the states that have enacted TOD deed legislation have specifically prohibited application of antilapse principles to a TOD deed. See, e.g., Colo. Rev. Stat. § 15-15-407(5) ("The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries."); N.M. Stat. Ann. § 45-6-401(K) ("If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse."). The same rule also appears to have been adopted in Missouri and Ohio.

The purpose of this departure from general antilapse principles is not clear. Professor McCouch states:

> The rationale of the antilapse statute applies with equal force to nonprobate transfers. In view of the close analogy between a specific devise and a beneficiary designation, the 1990 [Uniform Probate Code] revisions introduce a separate statute for deathtime transfers of nonprobate assets which mirrors the antilapse statute. The [Uniform Probate Code] drafts speculate that the nonprobate statute may be especially helpful because many beneficiary

> designations are drafted without the assistance of a lawyer. As a practical matter, however, many institutional payors use standardized governing instruments that expressly provide for the contingency of a predeceased beneficiary. The impact of the nonprobate statute should closely approximate that of the antilapse statute.

McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1157 (1993) (footnotes omitted).

Presumably the reason some jurisdictions depart from antilapse principles with respect to a TOD deed is to enable a title insurer to rely on the record. Under antilapse principles a beneficiary not specifically referred to in the deed may be entitled to the property.

Although the staff is concerned to make a TOD deed transfer as straightforward and insurable as possible, the staff does not believe this should be a factor where a named beneficiary has predeceased the transferor. There is no trap for a bona fide purchaser, or for a title insurer in that situation. A court order will be necessary in order to ascertain the alternate beneficiary or beneficiaries. But that should not be allowed to disrupt the transferor's estate plan.

This has also been a concern of the California Judges Association. They point out that a strict survival requirement could result in a gift lapsing even though the beneficiary has left heirs. "There is a concern that this survival requirement may not be understood, that these deeds will be understood ... One line of issue may have their inheritance stripped away by happenstance. When something seems unfair, litigation follows." Cal. Judges Ass'n, *Letter re AB 12 (DeVore)* (4/28/05).

The staff believes antilapse principles should apply to a TOD deed. Nothing needs to be done to implement this approach, since antilapse principles will apply by operation of law unless the transferor specifies some other consequence in the deed. See Prob. Code §§ 21101, 21110.

The staff might have a different conclusion with respect to designation of multiple beneficiaries. See discussion below.

Multiple Beneficiaries

We have so far been speaking in terms of a single beneficiary. But may the TOD transferor name multiple beneficiaries?

Named Beneficiaries

Our proposed definition of a TOD deed (see "Terminology" above) indicates that the deed makes a donative transfer to "a beneficiary". We selected this language advisedly, to distinguish the TOD deed from an instrument that makes a class gift, such as a gift to "my children." Class gift issues are discussed immediately below.

Suppose the TOD transferor names more than one beneficiary — for example "to John and Jane Doe, as joint tenants." Every jurisdiction that has enacted TOD deed legislation authorizes multiple named beneficiaries.

Some statutes are quite succinct. Kansas, for example, provides:

> An interest in real estate may be titled in transfer-on-death, TOD, form by recording a deed signed by the record owner of such interest, designating a grantee beneficiary **or beneficiaries** of the interest.

Kan. Stat. Ann. § 59-3501(a) (emphasis added).

Other statutes put a little flesh on the bones. In Arizona, for example:

> A beneficiary deed may designate multiple grantees who take title as joint tenants with right of survivorship, tenants in common, a husband and wife as community property or as community property with right of survivorship, or any other tenancy that is valid under the laws of this state.

Ariz. Rev. Stat. § 33-405(B).

And others go into quite some detail. Missouri has the most elaborate statutes:

> If two or more beneficiaries survive, there is no right of survivorship among the beneficiaries in the event of death of a beneficiary thereafter unless the beneficiary designation expressly provides for survivorship among them, and, unless so expressly provided, surviving beneficiaries hold their separate interests in the property as tenants in common. The share of any subsequently deceased beneficiary belongs to that beneficiary's estate.

Mo. Rev. Stat. § 461.061. And further:

> (3) A beneficiary designation may designate one or more primary beneficiaries and one or more contingent beneficiaries;
>
> (4) On property registered in beneficiary form, primary beneficiaries are the persons shown immediately following the transfer on death direction. Words indicating that the persons shown are primary beneficiaries are not required. If contingent beneficiaries are designated, their names in the registration shall be

> preceded by the words "contingent beneficiaries", or an abbreviation thereof, or words of similar meaning;
>
> (5) Unless a different percentage or fractional share is stated for each beneficiary, surviving multiple primary beneficiaries or multiple contingent beneficiaries share equally. When a percentage or fractional share is designated for multiple beneficiaries, either primary or contingent, surviving beneficiaries share in the proportion that their designated shares bear to each other;
>
> (6) Provision for a transfer of unequal shares to multiple beneficiaries for property registered in beneficiary form may be expressed in the registration by a number preceding the name of each beneficiary that represents a percentage share of the property to be transferred to that beneficiary. The number representing a percentage share need not be followed by the word "percent" or a percent sign;

Mo. Rev. Stat. § 461.062(3).

Obviously, the TOD deed would be a more useful and flexible instrument if it could pass property to more than one person. But are multiple beneficiaries worth the complexity that would be created?

The main issues relate to the manner of tenure among the named beneficiaries and the consequences of some but not all surviving the transferor. Other issues relate to rights among surviving beneficiaries — management rights, liability for taxes, right to partition, and the like. The staff is not concerned about issues of that type. The rights of cotenants under a TOD deed transfer will be no different from rights of cotenants who take by will, intestate succession, or trust. Nothing special needs to be said here.

The staff thinks we can authorize multiple beneficiaries but still minimize complexity by prescribing only a few basic rules and for the rest relying on general rules for construction of instruments. Thus:

> **Multiple beneficiaries**
>
> A transferor may name more than one beneficiary of property under a transfer on death deed. Unless the instrument otherwise provides, the beneficiaries take the property as tenants in common.
>
> **Comment.** This section makes explicit the right of a TOD transferor to name multiple beneficiaries. A beneficiary must survive the transferor in order to take an interest under this section. Section 21109. For the consequence of a named beneficiary's failure to survive the decedent, see Section 21110 (antilapse).

If a named beneficiary fails to survive, that beneficiary's interest may terminate, or may go to that beneficiary's heirs, depending on application of antilapse principles.

Class Gift

When we depart from the realm of named beneficiaries, things get complicated quickly. A TOD transferor may be inclined to make a class gift, for example "to my children." Apart from the fact that a title insurer may be unable to ascertain from the record who the actual beneficiaries of a class gift are, a class gift generally is subject to more complex constructional issues that a gift to a named beneficiary.

Does a class gift to children include only children alive at the time the gift is made, or does it include afterborn children. What about an out of wedlock child, adopted child, step child, or child in law? Is it intended that antilapse principles apply where no specific beneficiary is named or that the share of a deceased class member go to enlarge the shares of surviving class members? And so on.

It is presumably for this reason that the statutes generally appear not to permit a class gift, but rather to require that a beneficiary be "named" or "identified in the deed by name". Perhaps **our draft could be more clear** on this point:

> **"Transfer on death deed" defined**
>
> (a) As used in this part, "transfer on death deed" means an instrument that makes a donative transfer of real property ~~to a beneficiary~~ effective on the death of the transferor.
>
> …
>
> **Comment.** The beneficiary must be identified by name in the TOD deed. See Section [to be provided] (beneficiaries).
>
> ~~**Multiple beneficiaries**~~ **Beneficiaries**
>
> (a) The transferor shall identify the beneficiary by name in the transfer on death deed.
>
> (b) A transferor may name more than one beneficiary of property under a transfer on death deed. Unless the instrument otherwise provides, the beneficiaries take the property as tenants in common.
>
> **Comment.** Subdivision (a) makes explicit the requirement that a TOD beneficiary be identified by name in the instrument. A class gift is not permissible.

Missouri explicitly allows a class gift, and provides some rules of construction. "A beneficiary designation designating the children of the owner or any other person as a class and not by name shall include all children of the person, whether born or adopted before or after the beneficiary designation is made." Mo. Rev. Stat. § 461.059(2).

Professor McCouch notes the constructional problem:

> Most will substitutes involve direct payments of cash or transfers of property either to named beneficiaries or to a class consisting of the owner's children or descendants who survive the deceased owner. More sophisticated disposition involving discretionary standards or postponed class gifts normally justify the additional expense and administrative safeguards of a formal trust agreement. Even a simple, immediate class gift, though, may raise constructional problems concerning the intended treatment of adopted children and children born out of wedlock or their respective descendants, as well as half blood relatives. Since the relevant statutory provisions in the intestacy context reflect the presumed intent of the average decedent, the revised [Uniform Probate Code] sensibly borrows them as constructional rules which apply not only to wills but also to donative transfers under other governing instruments.

McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1151 (1993) (footnotes omitted).

The staff thinks a TOD deed to a class is problematic because, in addition to constructional problems, it will render the property uninsurable until there is a court determination of class membership. The class gift will result in delay, expense, and complication — the matters of concern that might prompt a decedent to use a TOD deed in the first place.

It would be possible to permit, without encouraging, a class gift under a TOD deed. If we were to do that, we would also need to address constructional questions. California does have some general constructional rules for an instrument such as a will, trust, or deed. See, for example, Prob. Code §§ 21114 (transfer to heirs interpreted under intestate succession rules), 21115 (inclusion of halfbloods, adopted persons, persons born out of wedlock, step children, foster children, and their issue, in class).

We would not need to incorporate these rules for a class gift under a TOD deed. The rules would apply by operation of law. Prob. Code § 21101. It would be appropriate to cross-refer to the rules in commentary. See draft under "Terminology" above.

Covenants and Warranties

A TOD deed is a deed, and arguably carries with it the implied covenants and warranties of a grant deed unless we say otherwise. Typical implied covenants and warranties would include title and freedom from encumbrance.

We do not intend that with a TOD deed. The TOD deed is more akin to a quitclaim deed in that whatever interest the transferor has in the property is transferred to the beneficiary subject to all encumbrances. See discussion of "Ownership Interest Conveyed" above. One state makes this explicit in its statute:

> Unless the owner designates otherwise in a beneficiary deed, a beneficiary deed shall not be deemed to contain any warranties of title and shall have the same force and effect as a conveyance made using a bargain and sale deed.

Colo. Rev. Stat. § 15-15-404(2).

We would not have thought it necessary to say anything about this (just as most states do not). We provide for all kinds of conveyances of real property under the Probate Code, by the owner and various forms of fiduciary, and it has not before been felt necessary to address the issue of covenants and warranties of title. (The one exception is the authority of an agent under a power of attorney to convey property "with or without covenants". Prob. Code §§ 4451, 4452.)

However, the State Bar Trusts & Estates Section raises the issue in its analysis of AB 12 (DeVore) as introduced. "What warranties, if any, are contemplated? How will this affect title insurance?" Also, experience in other jurisdictions suggests that a transferor, acting without advice of counsel, may throw "warranty" language into the TOD deed. (The transferor evidently picks that language up from the deed by which the transferor originally acquired the real property.)

Based on this experience, the staff thinks it is worthwhile to address the issue. We would turn the Colorado statute on its head and pass TOD deed property free of warranties and covenants **notwithstanding** a provision otherwise in the deed:

> **Covenants and warranties of title**
>
> Notwithstanding a contrary provision in the deed, a transfer on death deed of real property transfers the property to the beneficiary without covenant or warranty of title.
>
> **Comment**. This section emphasizes the point that a TOD deed is basically a quitclaim, passing whatever interest the transferor had

at death to the beneficiary. See Section [to be provided]. A covenant or warranty of title included by the transferor in the deed has no effect.

Proceeds of Property

There may be an occasion where the property no longer exists at the time of the decedent's death, but a fund representing the property does exist. For example, there may be insurance proceeds, an eminent domain award, sale proceeds, or the like. Should the beneficiary be entitled to the fund?

Fortunately, California law already addresses this issue in detail. See Prob. Code §§ 21133, 21134 (right of at-death transferee to proceeds of specific gift). The answer is, it depends on the circumstances. We only need reinforce the principle that the Probate Code rules of construction applicable to nonprobate transfers generally are applicable to a TOD deed specifically. It would be appropriate to cross-refer to the rules in commentary. See draft under "Terminology" above.

Disclaimer of Interest

The named beneficiary may not wish to receive the transferred property. The property may be contaminated and carry significant liability with it. Or tax considerations may suggest that the beneficiary step aside in favor of another person. Or the beneficiary may not wish the property to be subject to claims of the beneficiary's creditors.

Ordinarily, a beneficiary may avoid a donative transfer of property by executing a disclaimer. California law includes detailed provisions governing the disclaimer, including manner of execution, time of execution, filing, and effect. See Prob. Code §§ 260-295. Under these provisions, the TOD beneficiary would be required to act within a "reasonable" time, and action within nine months after death is conclusively presumed to be reasonable. Prob. Code § 279. The disclaimer is recordable. Prob. Code § 280. The consequence of a disclaimer is that the property is treated as if the named beneficiary had predeceased the transferor. Prob. Code § 282.

These provisions would apply to a TOD deed beneficiary. Prob. Code § 267. It is perhaps worth making the statute explicit on this point:

Prob. Code § 267 (amended). "Interest" defined

(a) "Interest" includes the whole of any property, real or personal, legal or equitable, or any fractional part, share, or particular portion or specific assets thereof, or any estate in any

such property, or any power to appoint, consume, apply, or expend property, or any other right, power, privilege, or immunity relating to property.

(b) "Interest" includes, but is not limited to, an interest created in any of the following manners:

(1) By intestate succession.

(2) Under a will.

(3) Under a trust.

(4) By succession to a disclaimed interest.

(5) By virtue of an election to take against a will.

(6) By creation of a power of appointment.

(7) By exercise or nonexercise of a power of appointment.

(8) By an inter vivos gift, whether outright or in trust.

(9) By surviving the death of a depositor of a Totten trust account or P.O.D. account.

(10) Under an insurance or annuity contract.

(11) By surviving the death of another joint tenant.

(12) Under an employee benefit plan.

(13) Under an individual retirement account, annuity, or bond.

(14) Under a transfer on death beneficiary designation in a deed or other instrument.

(15) Any other interest created by any testamentary or inter vivos instrument or by operation of law.

Comment. New subdivision (14) is an explicit application of the general rule of subdivision (15). See Sections [to be provided] (transfer on death deed).

Prob. Code § 279 (amended). Time for exercise of disclaimer

(a) A disclaimer to be effective shall be filed within a reasonable time after the person able to disclaim acquires knowledge of the interest.

(b) In the case of any of the following interests, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after the death of the creator of the interest or within nine months after the interest becomes indefeasibly vested, whichever occurs later:

(1) An interest created under a will.

(2) An interest created by intestate succession.

(3) An interest created pursuant to the exercise or nonexercise of a testamentary power of appointment.

(4) An interest created by surviving the death of a depositor of a Totten trust account or P.O.D. account.

(5) An interest created under a life insurance or annuity contract.

(6) An interest created by surviving the death of another joint tenant.

(7) An interest created under an employee benefit plan.

(8) An interest created under an individual retirement account, annuity, or bond.

(9) An interest created under a transfer on death beneficiary designation in a deed or other instrument.

(c) In the case of an interest created by a living trust, an interest created by the exercise of a presently exercisable power of appointment, an outright inter vivos gift, a power of appointment, or an interest created or increased by succession to a disclaimed interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs latest:

(1) The time of the creation of the trust, the exercise of the power of appointment, the making of the gift, the creation of the power of appointment, or the disclaimer of the disclaimed property.

(2) The time the first knowledge of the interest is acquired by the person able to disclaim.

(3) The time the interest becomes indefeasibly vested.

(d) In case of an interest not described in subdivision (b) or (c), a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within nine months after whichever of the following times occurs later:

(1) The time the first knowledge of the interest is acquired by the person able to disclaim.

(2) The time the interest becomes indefeasibly vested.

(e) In the case of a future estate, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is filed within whichever of the following times occurs later:

(1) Nine months after the time the interest becomes an estate in possession.

(2) The time specified in subdivision (b), (c), or (d), whichever is applicable.

(f) If the disclaimer is not filed within the time provided in subdivision (b), (c), (d), or (e), the disclaimant has the burden of establishing that the disclaimer was filed within a reasonable time after the disclaimant acquired knowledge of the interest.

Comment. Subdivision (b)(9) is added in recognition of the establishment of the TOD deed and other nonprobate transfer instruments. See Sections 5000 (nonprobate transfer instruments), [to be provided] (transfer on death deed).

RIGHTS OF FAMILY MEMBERS

The California probate system incorporates a number of protections for family members of a decedent, including probate homestead and family allowance, as well as protection of a spouse or child inadvertently omitted from the decedent's estate plan. The probate system's treatment of family protection

developed in the context of probate administration, and doesn't comprehend passage of property entirely outside of probate.

Assuming it is sound public policy to provide family protection, shouldn't those protections apply regardless of whether the decedent's property passes by will or by trust or by some other nonprobate device, including a transfer under a TOD deed? If so, how are the protections to be administered, short of recreating the probate system for nonprobate assets?

Probate Homestead

The decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling for a period of time during probate administration. Prob. Code § 6500. The probate court may also set apart a probate homestead for as long as the lifetime of the surviving spouse or the minority of children. Prob. Code §§ 6520, 6524.

The interaction of these provisions with real property transferred under a TOD deed is unclear. The provisions are intended to operate in the context of probate administration, and a TOD deed makes a direct transfer of property outside of probate.

The surviving spouse presumably could commence a probate proceeding, obtain appointment as the decedent's personal representative, claim the real property for the estate, and retain temporary possession of the family dwelling pending a court order determining the claim. See discussion of "Contest of Deed" above. In any event, the ability to retain temporary possession would not affect the passage of title pursuant to the TOD deed. The staff does not see a need to make any adjustment to the statute for this purpose.

The probate homestead is potentially a more serious problem. Although it does not affect title to the property, possession of the probate homestead could endure for many years. It is not clear whether the device of opening a probate would suffice to bring TOD deed property within the jurisdiction of the court for purposes of imposing a probate homestead on it. However, the probate homestead statute itself appears to resolve the potential conflict:

> The probate homestead shall not be selected out of property the right to possession of which is vested in a third person unless the third person consents thereto. As used in this subdivision, "third person" means a person whose right to possession of the property (1) existed at the time of the death of the decedent or came into existence upon the death of the decedent and (2) was not created by testate or intestate succession from the decedent.

Prob. Code § 6522(b). The staff would not address the matter further.

Omitted Spouse or Child

A decedent may execute a will or trust before marriage or before the birth of a child, and may neglect to later revise the instrument to reflect the change in family circumstances. The law protects an inadvertently omitted spouse or child by awarding that person the equivalent of an intestate taker's share of the decedent's probate or trust estate. See Prob. Code §§ 21600-21630.

The decedent's use of nonprobate transfer instruments can effectively undermine this scheme. With enactment of TOD deed legislation, that threat is likely to become more significant, since real property may be the decedent's major asset.

Professor McCouch argues that a nonprobate transfer of an individual asset, such as a TOD deed of real property, should not be subject to omitted spouse and child protection:

> These protective provisions are intended to cure inadvertent disinheritance; they do not apply if the testator intentionally omits a spouse or child from the will. Similarly, they do not apply if the testator makes a transfer outside the will that is intended to take the place of a testamentary provision for the spouse or child. The provisions protecting an omitted spouse or child apply only to probate assets and operate essentially as constructional rules for wills. They take will substitutes into account solely for the purpose of determining whether a testator's failure to provide for a spouse or child in the will is intentional. In interpreting a will, which normally disposes of a decedent's residual property, it makes sense to inquire into the testator's overall dispositive plan. By contrast, the same inquiry with respect to each separate will substitute makes no sense as a practical matter. The [Uniform Probate Code] properly does not attempt to extend the provisions protecting an omitted spouse or child beyond the will context.

McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1180 (1993) (footnotes omitted).

Missouri states explicitly that, "No law intended to protect a spouse or child from unintentional disinheritance by the will of a testator shall apply to a nonprobate transfer." Mo. Rev. Stat. § 461.059(1).

The staff agrees that **the omitted spouse and child provisions should not be extended to a TOD deed**. Although we think something needs to be done with the family protection statutes in light of the nonprobate revolution, we need to deal with the problem globally, not in the context of an individual type of

nonprobate transfer instrument. This is particularly true where the nonprobate transfer instrument is a real property deed whose efficacy must depend on a clear statement of title in the record, and not on the possibility that the property may be subjected to an off-record interest established by a court perhaps years later.

The staff notes that this matter is on the Law Revision Commission's "probate back burner" along with many other important projects, including the matter of creditor rights against nonprobate assets. See discussion of "Rights of Creditors" below.

No Contest Clause

A transferor may add a "no contest clause" to a transfer instrument. Such a clause provides that if a person contests the validity of the instrument, the person takes nothing or a token amount under the instrument.

It is possible that a transferor might add a no contest clause to a TOD deed in an effort to deter a disappointed heir (typically a child) from contesting the instrument. The staff believes that would rarely occur. That is because a no contest clause in a TOD deed would not ordinarily deter a person not named as a beneficiary in the deed from contesting it.

The only realistic situation we can think of where a no contest clause would be relevant in a TOD deed is where the transferor names multiple beneficiaries or fractionates the property interests. In that circumstance, the prospect of losing an interest under the deed could deter a named beneficiary from contesting the allocation in the deed.

California law treats the no contest clause, its interpretation and effect, in some detail. See Prob. Code §§ 21300-21322. The law is so written that it would apply to a no contest clause in a TOD deed. See Prob. Code §§ 21300(d) ("no contest clause" defined), 24 ("beneficiary" defined), 45 ("instrument" defined). **The staff sees no need to make any special adjustments for a TOD deed.**

The staff notes that the Legislature has directed the Law Revision Commission to review the law governing a no contest clause. 2005 Cal. Stat. res. ch. 122. The Commission has assigned that project a medium priority, following completion of the current TOD deed project.

RIGHTS OF CREDITORS

Probate is essentially a bankruptcy process — the decedent's assets are collected, creditors notified and debts discharged, and whatever's left is distributed to beneficiaries. The Probate Code includes highly refined and detailed procedures for notifying creditors, allowing or disallowing and prioritizing claims, and liquidating assets and paying debts.

A nonprobate transfer passes property outside the probate system. As the nonprobate transfer has become an increasingly favored estate planning device — particularly the revocable trust — treatment of the decedent's creditors has emerged as a major concern.

There is at present no consistent treatment of creditor rights for nonprobate transfers in California. Each type of transfer is sui generis.

For example, a surviving joint tenant takes the property free of the decedent's debts. Presumably the same principle would apply to the surviving spouse of community property with right of survivorship (although there is some indication in the legislative history of this statute that creditors would have the same rights against CPWROS as against ordinary community property).

A trust estate is liable for debts to the extent the probate estate is inadequate. There is now in the law an optional system whereby a trustee may notify creditors in the same manner as probate, thereby enabling discharge of debts and passage of title to trust beneficiaries free of creditor claims. But if the optional procedure is not used, the method of subjecting a trust beneficiary to a decedent's debts is vague. May a creditor sue a beneficiary? If so, may the beneficiary cross complain against other beneficiaries? Against beneficiaries of other nonprobate transfers such as a POD account? If creditor claims exceed the value of property distributed, may creditors who are unable to collect seek apportionment from those that have collected? May a probate be opened and the former trust property recalled?

The law governing many types of nonprobate transfers is uncertain. The general California statute authorizing nonprobate transfers says that "Nothing in this section limits the rights of creditors under any other law." Prob. Code § 5000(c). The same rule applies to securities that pass pursuant to a TOD security registration. Prob. Code § 5509(b). But there is no general state law governing rights of a creditor where a decedent's property passes outside of probate.

This is a significant problem in California probate law, and it needs to be addressed systematically. The issue has resided on the Law Revision Commission's probate back burner for many years, waiting for us to gain breathing space to turn to it.

Meanwhile, we must deal with the same types of issues in the context of a TOD deed. The State Bar Trusts & Estates Section indicates that, "An informal inquiry among attorneys around the country reveals that the treatment of creditors is a major issue, and a major area of differentiation among the states that have adopted some form of statute sanctioning beneficiary deeds." See Cal. State Bar Trust & Estates Section, *Letter re AB 12 (DeVore)* (4/26/05).

Creditor Rights During Transferor's Life

Does execution and recordation of a TOD deed have any effect on rights of creditors before the transferor dies and title passes to the beneficiary?

Creditors of Transferor

The intention of the TOD deed is that it is a revocable and ambulatory instrument, like a will, that does not have any effect on the transferor's ownership interest or rights in the property until the transferor dies. See discussion of "Ownership Interest Retained" above. As such, **the rights of the transferor's creditors should not be affected by the deed**. It wouldn't hurt to make this explicit in the statute:

> **Effect of TOD deed on rights during lifetime of transferor**
>
> Neither execution nor recordation of a transfer on death deed of real property affects the ownership rights of the transferor, or creates any legal or equitable right in the beneficiary, during the transferor's life, and the transferor may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor's creditors, as if no transfer on death deed were executed or recorded.
>
> **Comment.** This section makes clear that the transferor's execution and recordation of a TOD deed has no effect on the ability of the transferor's creditors to subject the property to an involuntary lien or execution of a judgment.

Creditors of Beneficiary

A joint tenancy deed creates a present interest in the joint tenant, and the joint tenant's creditors acquire immediate access to the joint tenant's interest in the property. That is a significant problem with joint tenancy as a means of passing

property at death, and is one of the key reasons the TOD deed may be an attractive option for many people.

A TOD deed creates no present interest in the beneficiary and **the beneficiary's creditors acquire no access to the property during the transferor's lifetime**. It wouldn't hurt to point that out in the statute, either:

> **Effect of TOD deed on rights during lifetime of transferor**
>
> Neither execution nor recordation of a transfer on death deed of real property ~~affects~~ :
>
> (a) Affects the ownership rights of the transferor~~, or creates any rights in the beneficiary,~~ during the transferor's life, and the transferor may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor's creditors, as if no transfer on death deed were executed or recorded.
>
> (b) Creates any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary's creditors, during the transferor's life.
>
> **Comment.** Subdivision (b) makes clear that the transferor's execution and recordation of a TOD deed does not enable the creditors of a beneficiary to subject the property to an involuntary lien or execution of a judgment.

Secured Creditors

In other jurisdictions questions have arisen concerning the effect of a TOD deed on encumbered property. For example, must the trustee under a deed of trust notify the beneficiary of a trustee's sale? If the transferor wishes to refinance, must a quitclaim or subordination agreement be obtained from the beneficiary, or the TOD deed revoked and re-recorded after imposition of the encumbrance?

The staff believes **the draft language set out immediately above is adequate** to address these issues. We could also toss some language into the Comment if people think that would be useful:

> **Comment.** Subdivision (b) makes clear that the transferor's execution and recordation of a TOD deed does not enable the creditors of a beneficiary to subject the property to an involuntary lien or execution of a judgment. The beneficiary is not entitled to notice of a trustee's sale, nor is the beneficiary's consent required to enable the transferor to refinance.

It is worth noting in this connection that Ohio addresses the matter explicitly:

> No rights of any lienholder, including, but not limited to, any mortgagee, judgment creditor, or mechanic's lien holder, shall be affected by the designation of a transfer on death beneficiary pursuant to this section and section 5302.22 of the Revised Code. If any lienholder takes action to enforce the lien, by foreclosure or otherwise through a court proceeding, it is not necessary to join the transfer on death beneficiary as a party defendant in the action unless the transfer on death beneficiary has another interest in the real property that is currently vested.

Ohio Rev. Code Ann. § 5302.23(B)(7).

Another concern is that execution and recordation could trigger an acceleration clause in a loan secured by the property. It ought not to, under the principles set out above, but the staff can conceive of an instrument that is so written that recordation of a document of transfer of any type accelerates the loan. It might help to add language such as:

> **Effect of TOD deed on rights during lifetime of transferor**
>
> Neither execution nor recordation of a transfer on death deed of real property:
>
> (a) Affects the ownership rights of the transferor during the transferor's life, and the transferor may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor's creditors, as if no transfer on death deed were executed or recorded.
>
> (b) Creates any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary's creditors, during the transferor's life.
>
> (c) Results in a transfer or conveyance of any right, title, or interest in the property before the transferor's death.
>
> **Comment.** Subdivision (c) reinforces the concept that a TOD deed does not effectuate a transfer before the transferor's death. Creation of a TOD deed should not have the effect of a default on a loan, since it is not a disposition of the property.

That language would perhaps also give comfort to Bonnie Zera of Laguna Woods. Ms. Zera is concerned about the effect of a TOD deed on a reverse mortgage. See Exhibit p. 6. The staff's analysis is that the lienholder on a reverse mortgage would be protected to the same extent as any other lienholder, and that execution of a TOD deed should not trigger an acceleration clause.

Creditor Rights After Transferor's Death

Creditor rights issues become more interesting once the TOD deed operates to pass the property to the beneficiary.

Secured Creditors

The discussion of "Ownership Interest Conveyed" above makes clear that the beneficiary would take property under a TOD deed subject to the transferor's encumbrances. That rule is consistent with the general constructional principle that a specific gift of property carries with it an existing mortgage, deed of trust, or other lien; the underlying debt is not discharged out of the decedent's other assets but is a liability of the beneficiary. See Prob. Code § 21131 (no exoneration).

If execution and recordation of a TOD deed does not trigger an acceleration clause, passage of the property to the beneficiary undoubtedly would. The staff does not see any impediment to a secured creditor taking steps to enforce its security interest even though the property has been transferred to a TOD beneficiary. It **would perhaps be helpful to add to the statute express language** on the point:

> **Interest transferred by TOD deed**
>
> A transfer on death deed of real property transfers the transferor's interest in the property to the beneficiary subject to any limitation on the transferor's interest that is of record at the transferor's death, including but not limited to a lien, encumbrance, easement, lease, or other instrument affecting the transferor's interest, regardless of whether the instrument is recorded before or after recordation of the transfer on death deed, and the holder of rights under the instrument may enforce those rights against the property notwithstanding its transfer to the beneficiary by the transfer on death deed.
>
> **Comment.** Under this section, a TOD beneficiary takes only what the transferor has at death. This is a specific application of the general rule that recordation of a TOD deed does not affect the transferor's ownership rights or ability to deal with the property until death. See Section [to be provided] (effect of TOD deed on rights during lifetime of transferor).

Unsecured Creditors

What is the fate of an unsecured creditor of a TOD transferor following the transferor's death? The property passes outside probate and its system for satisfying debts. Should liability for the transferor's debts fall to the TOD property or the TOD beneficiary, and if so, by what mechanism?

The staff thinks public policy should not permit a decedent to defeat creditors by the device of a TOD transfer. The trick is to find a mechanism that will allow discharge of debts without recreating the probate system.

Obvious approaches, based on existing California models would include:

- Making the TOD property liable to the extent the transferor's estate is inadequate.
- Subjecting the TOD property to recapture by the transferor's estate to the extent the estate is inadequate.
- Making the TOD beneficiary liable to the extent of the value of the property.
- Limiting liability of the property or the beneficiary to a pro rata share based on the value of the property.
- Limiting liability to the general one year period for claims against a decedent.

Under Colorado and New Mexico law, if the probate estate is insufficient to satisfy claims of creditors, the estate may recapture the TOD property for that purpose. Colo. Rev. Stat. § 15-15-409; N.M. Stat. Ann. § 45-6-401(J).

Colorado also allows the estate to assess the TOD beneficiary for the value of the property, as does Missouri. The Colorado assessment procedure is subject to a one-year limitation period, and permits the beneficiary to seek contribution from beneficiaries of other nonprobate transferees. Colo. Rev. Stat. §§ 15-15-409, 411. The Missouri assessment process is subject to an 18 month limitation period; all nonprobate transfer beneficiaries are assessed proportionately based on the value of property received. Mo. Rev. Stat. § 461.300.

The Uniform Probate Code now deals comprehensively with creditor rights in the event of a nonprobate transfer. See UPC § 6-102 (1998 addition). Under the Uniform Probate Code, if the probate estate is insufficient to cover debts of the decedent, beneficiaries of a nonprobate transfer (but not the property transferred) are liable, not to exceed the value of the property transferred. It is not clear how the value is determined. The estate must first seek recovery from the decedent's revocable trust before going against nonprobate transfer beneficiaries, pro rata. The statute of limitations for such a proceeding is one year after the decedent's death.

Ideally we would deal comprehensively with creditor claims against nonprobate transfers. It is problematic to specify creditor rights against TOD deed property or a TOD deed beneficiary, when the law does not specify creditor rights against other nonprobate transfers such as a TOD security registration. Why should the beneficiary of a TOD deed be subject to creditor claims but not the beneficiary of a TOD security registration?

On the other hand, if the real property were to pass through probate or through a trust it would be subject to creditor claims. The fact that we are creating an alternative and efficient means of transferring the property at death does not require that we exempt it from creditor claims. A transferor has a number of probate and nonprobate devices available, each of which has different characteristics. A transferor whose main objective is to defeat creditors might want to use joint tenancy, or an outright gift, although fraudulent transfer principles could come into play in that circumstance. **The staff would specify creditors rights against a TOD deed and would not attempt to deal comprehensively with nonprobate transfers in this project.**

All the creditor right schemes that have been developed so far to deal with nonprobate transfers apply only to the extent the decedent's estate is inadequate. As a theoretical matter, the staff does not necessarily believe that nonprobate transfer beneficiaries should be favored over will beneficiaries. But a TOD deed makes a specific gift, and there is a strong argument that a specific gift should receive preferential treatment with respect to creditors regardless of whether the gift is made by will or by nonprobate transfer. See Prob. Code §§ 21117 (classification of at-death transfers), 21402 (abatement). **The staff would subject a TOD deed to creditor claims only after the probate estate is exhausted.**

For similar reasons, we also like the Uniform Probate Code's approach to subject a trust estate to creditor claims before an individual nonprobate transfer becomes liable. In modern estate planning the trust is the most common comprehensive will substitute, and treatment of creditor claims is well articulated. See Prob. Code §§ 19000-19403. **The staff would subject a TOD deed to creditor claims only after the trust estate is exhausted.**

Assuming probate and trust assets, if any, have been exhausted, the creditor comes down to a nonprobate transfer such as a TOD deed. Do we subject the property to the claims of the creditors, or do we make the beneficiary liable for the value of the property, or both? The staff thinks we should avoid making the property subject to creditor claims. Our whole effort here has been to protect the security of the transaction and facilitate title insurance. Instead, **we would make the beneficiary liable for the transferor's unsatisfied debts, not exceeding the value of the property received**.

How is the value of the property to be determined? Since it is not part of the probate estate, it will not have been subject to an inventory and appraisal. If there is an estate tax return, we could use that value. But ultimately, since the

beneficiary's liability for debts is not automatic and a court proceeding will be necessary to establish it, **we would leave value to be determined by the court as part of the liability calculus**.

The statute of limitations for a claim against a decedent is one year after the decedent's death. Code Civ. Proc. § 366.2. **One year appears to the staff to be an appropriate limitations period for the potential liability of the transferor's beneficiary as well.** We are somewhat concerned about the possibility of a TOD beneficiary being stuck with a crushing liability to the transferor's creditors after having transferred the property to a BFP, but that would be constrained by the one year limitation period.

Another option would be simply to **allow the beneficiary to return the property to the estate**, and be free of personal liability. There is the possibility of waste during the interim of the beneficiary's possession of the property. But again, the one year limitation period would act as a natural constraint.

We need to specify the mechanism by which the beneficiary's liability is to be determined. The staff thinks it would be a mistake to allow a creditor to directly sue the TOD beneficiary. There may be a number of creditors that seek recovery, and a multiplicity of lawsuits. **A more efficient technique would be to funnel all creditor claims through the transferor's probate estate and allow for a suit only by the transferor's personal representative.** That would mean that, if the property transferred by TOD deed were the transferor's only asset, a creditor would have to commence a probate proceeding, have a personal representative appointed, and proceed from there. The staff does not think such a procedure is onerous; it is commonly used, and we rely on it in connection with a contest of the TOD deed. See discussion of "Contest of Deed" above.

Due to high real property values in California, collection may be sought from the TOD deed beneficiary before other nonprobate transfer beneficiaries. On the other hand, a creditor may find it simpler to recover against a more liquid asset such as a POD (pay on death) bank account or TOD registered security. However, the law governing liability of those assets and those beneficiaries is not as clear as the liability in the case of a TOD deed will be. The staff does not think it is fair to subject the TOD deed beneficiary to liability to the exclusion of other nonprobate transfer beneficiaries. But we also do not think we can establish liability of other nonprobate transfer beneficiaries in this project. We could try to limit the TOD deed beneficiary's liability to a pro rata share of the unsatisfied debts. That would not preclude a creditor from seeking to impose liability on

other nonprobate property or beneficiaries under other law, if applicable. On balance, though, **the staff thinks the more straightforward approach is simply to make the TOD deed beneficiary liable without proration** and worry about a more equitable approach when we have the whole array of nonprobate transfers before us. Again, a decedent who is worried about liability issues can use another device such as a joint tenancy or a lifetime transfer.

In essence, the staff recommends something very close to the Uniform Probate Code scheme, except limited to a TOD deed, with no proration, and allowing for return of the property as an alternative to liability. It is analogous to the approach used in Colorado and Missouri. **We would start with the Uniform Probate Code and adapt it** for specific application to a TOD deed. We have deleted from the draft language that would make the beneficiary liable for an allowance for an omitted spouse or child, consistent with our discussion of "Omitted Spouse or Child" above. But it would be possible to include an omitted spouse or child, just as a general creditor. In any event, we would not include expenses of administration — we would honor the transferor's intent to separate out the real property that is the subject of the TOD deed from the balance of the estate. The cost of bringing an action against the beneficiary would be treated the same as any other lawsuit to establish liability.

> **Liability of beneficiary of TOD deed for creditor claims**
>
> (a) The beneficiary of a transfer on death deed is liable to the transferor's estate for an allowed or approved claim against the estate to the extent provided in this section.
>
> (b) A beneficiary's liability under this section may not exceed the value of the real property received under the transfer on death deed. A beneficiary may satisfy in full the liability under this section by transferring the property to the transferor's estate, together with rents and profits received on the property and free of encumbrances imposed since receipt of the property.
>
> (c) A beneficiary is liable under this section only if the claim remains unsatisfied after exhaustion of all of the following property:
>
> (1) Property in the transferor's estate.
>
> (2) Property of a trust serving as the principal nonprobate instrument in the transferor's estate plan as shown by its designation as devisee of the transferor's residuary estate or by other facts or circumstances, to the extent of the value of the property received or controlled by the trustee.
>
> (d) On due notice to the beneficiary of a transfer on death deed, the liability imposed by this section is enforceable in a proceeding in this state, whether or not the beneficiary is located in the state.

(e) A proceeding under this section shall be commenced within one year after the transferor's death.

Comment. This section is adapted from Uniform Probate Code Section 6-102 (1998 addition). It is narrower in scope than the Uniform Probate Code provision in that (1) it does not subject the beneficiary to liability for family protection provisions or expenses of administration, (2) it deals only with the liability of a TOD deed beneficiary and not a beneficiary of other forms of nonprobate transfer, (3) it allows for imposition of liability on a TOD deed beneficiary without proration among other nonprobate transfer beneficiaries. It also allows a TOD deed beneficiary to satisfy the liability by returning the property to the transferor's estate, a feature not included in the Uniform Probate Code provision.

The one year statute of limitations for an action under this section is consistent with the general limitations period for an action against a decedent. See Code Civ. Proc. § 366.2.

The Official Comments to Uniform Probate Code Section 6-102 state, in relevant part:

Added to the Code in 1998, this section clarifies that the recipients of nonprobate transfers can be required to contribute to pay allowed claims and statutory allowances to the extent the probate estate is inadequate. The maximum liability for a single nonprobate transferee is the value of the transfer. Values are determined under subsection (b) as of the time when the benefits are "received or controlled by the transferee." This would be the date of the decedent's death for nonprobate transfers made by means of a revocable trust, and date of receipt for other nonprobate transfers.

...

If there are no probate assets, a creditor or other person seeking to use this Section 6-102 would first need to secure appointment of a personal representative to invoke Code procedures for establishing a creditor's claim as "allowed." The use of probate proceedings as a prerequisite to gaining rights for creditors against nonprobate transferees has been a feature of UPC Article VI since originally approved in 1969. It works well in practice. The Article III procedures for opening estates, satisfying probate exemptions, and presenting claims are very efficient.

...

Note that either a revocable or an irrevocable trust might be designated devisee of a pour-over provision that would make the trust the "principal non-probate instrument in the decedent's estate plan" and, consequently, make it liable under subsection (c)(2) ahead of other nonprobate transferees to the extent of values acquired by a transfer at death as described in subsection (a). Note, too, that nothing would pass to the receptacle trust by the pour-over devise if all probate estate assets are used to discharge statutory allowances and claims. However, the fact that the trust

was designated to receive a pour-over devise signals that the trust probably includes the equivalent of a residuary clause measuring benefits by available assets and signaling probable intention of the settlor that residuary benefits should abate to pay the settlor's debts prior to other trust gifts.

...

Subsection (f) builds on the principle employed in the Code's augmented estate provisions (UPC §§ 2-201 - 2-214) in relation to nonprobate transfers made to persons in other states, possibly by transactions governed by laws of other states. The underlying principle is that the law of a decedent's last domicile should be controlling as to rules of public policy that override the decedent's power to devise the estate to anyone the decedent chooses. The principle is implemented by subjecting donee recipients of the decedent to liability under the decedent's domiciliary law, with the belief that judgments recovered in that state following appropriate due process notice to defendants in other states will be accorded full faith and credit by courts in other states should collection proceedings be necessary.

...

Subparagraph (h) meshes with time limits in the Code's sections governing allowance and disallowance of claims. See Sections 3-804 and 3-806.

The policy decisions reflected in this draft are close calls, in the staff's opinion, and we could easily go another way on them. We do note, however, that the concept of personal liability of a TOD deed beneficiary is generally consistent with existing California liability concepts for a successor that takes a decedent's property without probate under small estate or spousal affidavit procedures. See Prob. Code §§ 13109-13113 (affidavit procedure for collection or transfer of personal property); 13204-13208 (affidavit procedure for real property of small value); 13550-13564 (passage of property to surviving spouse without administration).

In fact, **an alternate approach would be simply to incorporate these provisions by reference in the TOD deed legislation**, or adapt them for inclusion in the TOD deed statute. They are generally consistent with the policy decisions suggested above, and include a substantial amount of detail.

Here, for example, are selected provisions of the existing statute governing the affidavit procedure under which a successor may take the decedent's real property of small value ($20,000 or less) without probate:

Liability for unsecured debts

13204. Each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section

13202 is personally liable to the extent provided in Section 13207 for the unsecured debts of the decedent. Any such debt may be enforced against the person in the same manner as it could have been enforced against the decedent if the decedent had not died. In any action based upon the debt, the person may assert any defense, cross-complaint, or setoff that would have been available to the decedent if the decedent had not died. Nothing in this section permits enforcement of a claim that is barred under Part 4 (commencing with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure applies in an action under this section.

Return of property to estate

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a

person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, determined as of the time of the issuance of the certified copy of the affidavit under Section 13202, less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. In an action to enforce the liability under this section, the court's judgment may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Limitation on liability

13207. (a) A person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is not liable under Section 13204 or 13205 if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, and the person satisfies the requirements of Section 13206.

(b) Except as provided in subdivision (b) of Section 13205, the aggregate of the personal liability of a person under Sections 13204 and 13205 shall not exceed the sum of the following:

(1) The fair market value at the time of the issuance of the certified copy of the affidavit under Section 13202 of the decedent's property received by that person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(2) The net income the person received from the property.

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this paragraph, "fair market value of the property" has the same meaning as defined in paragraph (2) of subdivision (a) of Section 13206.

The liability under Section 13205 referred to in these provisions is liability to a person having a superior right to the property by testate or intestate succession. We have omitted this provision because the Commission has tentatively concluded that situation should be handled under a different statute. See discussion of "Contest of Deed" above.

The staff notes that legislation is currently pending to increase the value of real property that may be taken without probate under the affidavit procedure from $20,000 to $40,000. See AB 2267 (Huff, Benoit, DeVore, Maze, Mountjoy, Strickland, and Villines). This is an alternate approach that could offer a viable option to the TOD deed, but the values involved are so low that it has limited usefulness.

RIGHTS OF THIRD PARTY TRANSFEREE

Throughout this memorandum we have been careful to ensure that a third party that in good faith purchases or encumbers real property that passes under a TOD deed takes the property free of any adverse claims. That is essential to enable the TOD deed to operate as intended — any other rule would make the property uninsurable and frustrate the purpose of the TOD deed.

Would it be useful to include a general declaration of BFP protection in the statute? The Missouri and Colorado statutes include a such a provision. See Mo. Rev. Stat. § 461.067; Colo. Rev. Stat. § 15-15-410. The staff does not think it would hurt to have a general statement of the principle. For example, **we could include a simple provision** along the lines of those found in the existing small estate affidavit statutes:

BFP protection

A person acting in good faith and for a valuable consideration with the beneficiary of a transfer on death deed of real property for

which an affidavit of death is recorded under Section [to be provided] has the same rights and protections as the person would have if the beneficiary had been named as a distributee of the real property in an order for distribution of the transferor's estate that had become final.

Comment. This section is drawn from Section 13203(a) (affidavit procedure for real property of small value).

TAXATION ISSUES

Gift Tax Issues

Are there gift tax consequences when the transferor executes and records a TOD deed? The staff does not think so. The deed has no present effect, the transferor retains full ownership rights, and the beneficiary acquires no ownership rights. See discussion of "Ownership Interested Retained" above. A gift tax liability arises only when it becomes a completed gift. Int. Rev. Reg. § 25.211-2. Therefore execution and recordation of a TOD deed would not be a taxable event for gift tax purposes.

The State Bar Trusts & Estates Section asks, "If there are two co-owners, A and B, and A executes, acknowledges and delivers a TOD deed to C, an unrelated third party, to take effect on A's death, and A dies before the deed is recorded, but B finishes the work and records the deed after A's death, has B made a taxable gift?" Under our requirement that a TOD deed must be recorded before the transferor's death to become effective, the scenario postulated by the State Bar could not occur. See discussion of "Recordation" above.

Estate Tax and Generation Skipping Transfer Tax

The future of the estate tax and the generation skipping transfer tax is unclear. Under existing federal law the estate tax exclusion amount is currently $2 million, the exclusion amount increases to $3.5 million in 2009, and the estate tax is eliminated completely in 2010. But the federal estate tax is reinstated in 2011 with an exclusion amount of $1 million. Similarly the generation skipping transfer tax will be repealed in 2010 but reinstated in 2011 with a 55% rate. President Bush has indicated his intention to push for permanent repeal of these taxes.

Given the uncertainty over the future of the estate and generation skipping transfer taxes, we must proceed on the assumption that these taxes will continue to exist in the future and will look something like the current taxes.

Property included in the decedent's gross estate for estate tax purposes includes property in which the decedent had a beneficial interest transferable at death. Int. Rev. Code § 2033; Int. Rev. Reg. § 2033-1. That describes the TOD deed as we have conceived it. See discussion of "Ownership Interested Retained" above. Property that passes by TOD deed would be included in the transferor's taxable estate.

Similarly, a direct TOD deed to a grandchild would be considered a taxable distribution on the transferor's death, and subject to generation skipping transfer tax liability. Int. Rev. Code §§ 2611-2613; Int. Rev. Reg. § 26.2612-1.

If there is an estate tax liability, or a generation skipping transfer tax liability, how would that be applied to a transfer outside of probate, such as a TOD deed? Fortunately, general California law already answers that question for us.

Under the statutes governing proration of estate taxes, proration is required "in the proportion that the value of the property received by each person interested in the estate bears to the total of all property received by all persons interested in the estate." Prob. Code § 20111. A TOD deed beneficiary is a person interested in the estate for that purpose. Prob. Code §§ 20100(b) ("person interested in the estate" means person that receives property by reason of death of decedent), 20100(d) ("property" means property included in gross estate for federal estate tax purposes). See also the Law Revision Commission Comment to Section 20100 — "The definition of 'person interested in the estate' in subdivision (b) includes but is not limited to persons who receive property by nonprobate transfer, such as a joint tenant or the beneficiary of a trust."

A similar rule applies to equitable proration of the generation skipping transfer tax. Prob. Code §§ 20211 (proration based on value of property), 20200(b) ("property" defined), 20200(c) ("transferee" defined).

Although the beneficiary of a TOD deed would be liable for a proportionate share of estate and generation skipping transfer taxes under these general provisions, **the staff would make that point clearly** in the TOD deed statute:

> **Liability of beneficiary of TOD deed for estate and generation skipping transfer taxes**
>
> The beneficiary of a transfer on death deed is liable to the transferor's estate for prorated estate and generation skipping transfer taxes to the extent provided in Division 10 (commencing with Section 20100).
>
> **Comment**. This section is a specific application of Division 10 (commencing with Section 20100), relating to proration of taxes.

> The beneficiary of a nonprobate transfer on death, such as a TOD deed, is liable for a pro rata share of estate and generation skipping transfer taxes paid by the transferor's estate. See Sections 20100 et seq. (proration of estate taxes), 20200 et seq. (proration of taxes on generation-skipping transfer).

Income Tax Issues

In California it will be common that real property passing from a decedent has appreciated in value since the time of its acquisition by the decedent. Who pays the income tax on the gain?

The basis of property acquired from a decedent is generally the fair market value of that property on the date of the decedent's death. Int. Rev. Code § 1014(a)(1). This will result in a stepped up basis to the decedent's beneficiary. The increased value of the real property is recognized in the decedent's gross estate, and recaptured through the estate tax.

Property is deemed to pass from a decedent if it is acquired by reason of death, form of ownership, or other condition and is required for that reason to be included in the decedent's gross estate. Int. Rev. Code § 1014(b)(9).

Under these principles, real property that passes to a beneficiary under a TOD deed would be entitled to a stepped up basis for income tax purposes, at least under the law as it exists now.

But if the estate tax is permanently repealed, the beneficiary will not be entitled to an adjustment to basis. Instead, the beneficiary will receive the property with a carryover basis from the transferor. Int. Rev. Code § 1015.

These rules are determined by federal law. We need not make any adjustments to the TOD deed legislation to accommodate them.

Property Tax Issues

One of the specific questions the Legislature has asked us is whether property transferred by TOD deed would be reassessed. 2005 Cal. Stat. ch. 422 § 1(b)(5).

Under California law a reassessment is triggered when there is a change in ownership. That occurs when there is "a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the interest." Rev. & Tax. Code § 60. The statutes elaborate transfers that are not a change in ownership for reassessment purposes, including a transfer to a revocable trust, a transfer reserving a life estate, and a transfer in which proportional ownership interests remain the same before and after the transfer. Rev. & Tax. Code § 62.

Under these principles, execution and recordation of a TOD deed would not constitute a change in ownership so as to trigger a reassessment. A change of ownership would occur on the transferor's death, when the beneficiary acquires the property. However, there are special exemptions for transfers between spouses and between registered domestic partners, as well as transfers from a parent to a child or grandchild. See Rev. & Tax. Code §§ 62-63.

Although it is clear that execution and recordation of a TOD deed is not a change in ownership for tax reassessment purposes, it is probably worth stating that expressly by the statute. We could do that indirectly by a provision in the TOD statute, such as:

> **Effect of TOD deed on property tax**
>
> Execution and recordation of a transfer on death deed of real property is not a change in ownership of the property, but transfer of the property on the death of the transferor is a change in ownership of the property, for the purpose of application of the property taxation provisions of the Revenue and Taxation Code.
>
> **Comment.** This section prescribes the effect of a TOD deed for purposes of property tax reassessment. Although a transfer of property under a TOD deed is a change of ownership for reassessment purposes, the transfer may qualify for exclusion under other provisions of the Revenue and Taxation Code, depending on the parties to the transfer. See, e.g., Rev. & Tax. Code §§ 62-63.1.

An alternate approach would be to put such a provision in the Revenue and Taxation Code itself, rather than in the TOD deed statute. But the staff is apprehensive of opening up that code and exposing a TOD deed bill to possible political pressures on unrelated matters. Moreover, a change to the Revenue and Taxation Code is certain to trigger a fiscal tag on the bill, whereas a general statement of principles in the Probate Code will not necessarily have that effect.

Ordinarily the personal representative or trustee files a change in ownership statement on the decedent's death. A transferee of real property is required to file a change in ownership statement within 150 days of the transferor's death. Rev. & Tax. Code § 480(b). Because a TOD transfer passes outside of probate and the beneficiary may be unaware of this obligation, the staff thinks it would be worthwhile to highlight this duty in the statute.

> **Effectuation of transfer pursuant to TOD deed**
>
> (a) The beneficiary of a transfer on death deed may establish the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.

(b) The beneficiary of a transfer on death deed is a transferee of real property by reason of death for the purpose of filing the change in ownership statement required by Section 480 of the Revenue and Taxation Code.

Comment. Subdivision (b) cross-references the duty imposed on a TOD deed beneficiary to file a change of ownership statement with the country recorder or assessor within 150 days after the transferor's death. See Rev. & Tax. Code § 480.

Other Tax Issues

State Death Taxes

An issue we have not considered above is state death taxes. The state abolished its inheritance tax in 1982. California has a pickup tax based on the federal credits for estate and generation skipping transfer taxes. Rev. & Tax. Code § 13302. Thus the California pickup tax would not be affected by a transfer under a TOD deed; it would be affected only by changes to the federal tax law.

Tax Manipulation

The California Judges Association has asked, "Will there be tax consequences which will cause a beneficiary to reject a grant and file a probate years after demise of the property owner?" Cal. Judges Ass'n, *Letter re AB 12 (DeVore)* (4/28/2005). Under the staff's analysis above, the answer to this question would be "No". A transfer under a TOD deed would be treated the same as a transfer under a will for tax purposes. A beneficiary that wishes to disclaim would have to do that promptly. See discussion of "Disclaimer of Interest" above. The beneficiary would gain nothing by filing a probate years after the transferor's death. Property taxes that accumulate in the interim would be a lien against the property.

Would Tax Burdens Change?

The Legislature has also asked us whether tax burdens would shift or decrease as a result of TOD deed legislation. 2005 Cal. Stat. ch. 422 § 1(b)(5).

Assuming that TOD deed legislation has the basic attributes we have recommended for it, the answer is "No". A transfer under a TOD deed would be treated the same as a transfer under a will for tax purposes.

Medicaid is a federal program that provides medical assistance to eligible low-income persons and that is administered by the states under a cooperative federal-state funding scheme. A state's participation in Medicaid is voluntary, but participating states must comply with the federal Medicaid Act. California participates through its Medi-Cal program.

Medi-Cal is particularly useful for long term care in a skilled nursing facility, which Medicare does not cover. Strict asset guidelines govern Medi-Cal eligibility. On the death of a person that has received Medi-Cal assistance, the state has a claim against the person's estate for reimbursement.

A transfer or gift of real property is a technique commonly used to help a person achieve or maintain Medi-Cal eligibility. It is particularly favored by estate planners because that may put the property out of the decedent's estate and immunize it from the state's reimbursement claim. A transfer without consideration made in advance of the transferor's application for Medi-Cal benefits may cause a loss of eligibility for a period of time. Generally, a transfer of the family home, a transfer to a spouse or registered domestic partner, or a transfer to a disabled child is exempt.

A transfer occurs when a person's control over an asset is relinquished or diminished. Because a TOD deed does not affect the transferor's control of the property, it would not be considered a transfer for Medi-Cal purposes. It would neither diminish the transferor's assets for qualification purposes, nor would it cause a loss of eligibility for Medi-Cal benefits.

It is noteworthy that the Colorado statute takes a different approach and specifically denies eligibility to a person who executes a TOD deed:

> **Colo. Rev. Stat. § 15-15-403. Medicaid eligibility exclusion**
>
> No person who is an applicant for or recipient of medical assistance for which it would be permissible for the department of health care policy and financing to assert a claim pursuant to section 26-4-403 or 26-4-403.3, C.R.S., shall be entitled to such medical assistance if the person has in effect a beneficiary deed. Notwithstanding the provisions of section 15-15-402(1), the execution of a beneficiary deed by an applicant for or recipient of medical assistance as described in this section shall cause the property to be considered a countable resource in accordance with section 26-4-403.3(6), C.R.S., and applicable rules and regulations.

On a Medi-Cal recipient's death, the state has a claim for reimbursement against the decedent's "estate" or against a recipient of the decedent's property "by distribution or survival". Welf. & Inst. Code § 14009.5. For that purpose, the decedent's estate includes property in which the decedent had any legal title or interest at the time of death including "assets conveyed to a survivor, heir, or assignee of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement." 42 U.S.C. § 1396p(b)(4); Cal. Code Regs., tit. 22, § 50960(b)(1). Under this standard, real property that a transferor gave by deed to the transferor's children while reserving a life estate and the right to revoke the transfer was held to be part of the transferor's estate for reimbursement purposes. *Bonta v. Burke*, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

The staff believes a TOD deed would not operate to divest the transferor's "Medi-Cal estate" of the property. On the transferor's death, the property would be subject to the state's Medi-Cal reimbursement claim.

The Arkansas, Colorado, and Nevada TOD deed laws make the same rule explicit by statute. E.g.:

> A beneficiary deed transfers the interest to the designated grantee beneficiary effective upon the death of the owner, subject to ... [a] claim for the amount of federal or state benefits that could have been recovered by the Department of Health and Human Services from the estate of the grantor under §20-76-436 but for the transfer under the beneficiary deed.

Ark. Code Ann. § 18-12-608(a)(1)(B)(i)(b).

> The provisions of this section must not be construed to limit the recovery of benefits paid for Medicaid.

Nev. Rev. Stat. § 111.109(5).

There is a three-year limitation period for recovery, running from the time the state is given written notice of the decedent's death under Probate Code Section 215. The beneficiary or person in possession of the decedent's property is required to notify the Department of Health Services. That should be the TOD deed beneficiary although the statute would be slightly hazy as applied to a TOD deed.

The staff thinks TOD deed legislation should be explicit on these points:

Effect of TOD deed on Medi-Cal eligibility and reimbursement

(a) Execution and recordation of a transfer on death deed of real property is not a lifetime transfer of the property for the purpose of determination of eligibility for health care under Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code.

(b) Real property transferred to a beneficiary by a transfer on death deed is a part of the estate of the decedent, and the transferee is a recipient of the property by distribution or survival, for the purpose of a claim of the Department of Health Services under Section 14009.5 of the Welfare and Institutions Code.

Comment. Subdivision (a) is a specific application of the general rule that execution and recordation of a TOD deed divests the transferor of no interest in the property, and invests the beneficiary with no rights in the property, during the transferor's lifetime. Section [to be provided].

Subdivision (b) is consistent with case law interpretation of the meaning and purpose of Welfare and Institutions Code Section 14009.5, providing for reimbursement to the state for Medi-Cal payments made during the decedent's lifetime. See Bonta v. Burke, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

Effectuation of transfer pursuant to TOD deed

(a) The beneficiary of a transfer on death deed may establish the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.

(b) The beneficiary of a transfer on death deed is a transferee of real property by reason of death for the purpose of filing the change in ownership statement required by Section 480 of the Revenue and Taxation Code.

(c) The beneficiary of a transfer on death deed is a beneficiary of the transferor for the purpose of giving the notice provided for in Section 215.

Comment. Subdivision (c) cross-references the duty imposed on a TOD deed beneficiary to give the Director of Health Services notice of the death of a transferor who has received Medi-Cal benefits. See Section 215.

STATUTORY FORM

Pros and Cons of Statutory Form

Six of the eight states that have TOD deed legislation also prescribe a statutory form for creation of a TOD deed. Three of those states also prescribe a form for revocation of a TOD deed.

Often these are safe harbor forms — a TOD deed in substantially the prescribed form is "sufficient". A few states (Kansas, New Mexico, and Ohio) appear to mandate the statutory form — the TOD deed "shall be" in substantially the prescribed form.

A statutory form offers a number of advantages. It provides a model for a type of deed new to the law, so that a person dealing with the instrument will have some assurance that it is proper. A statutory form would also help to standardize usage — it may deter a transferor from putting into the deed a special covenant, condition, or other unique language that would cause constructional problems and make it less likely that the beneficiary's title would be clear absent a court proceeding. A statutory form could also serve an educational purpose by including language that describes the rights of a transferor and beneficiary under the deed.

David Mandel sees a statutory TOD deed as analogous to the existing statutory will, statutory durable power of attorney, and advance care directive forms that "the Legislature has previously seen fit to create in connection with the general field of estate planning. While they do not apply to every possible situation, these existing forms are important tools for use by the public, effectively and at low cost."

John A. Cape of Grass Valley has written to the Commission urging a statutory form. "It is long past time for California to adopt a revocable beneficiary deed in a format similar to that of the statutory will so that property owners will have a simple way to pass real property to their heirs in a manner consistent with the POD and TOD process available for savings and securities."

A significant concern with a statutory form is that it could encourage uninformed self-help use of the TOD deed device. Whether the TOD deed would achieve the transferor's objectives with respect to taxes, creditors, Medi-Cal, family protection, and like, will not be apparent on the face of the deed. The TOD deed should be viewed as one of a number of estate planning devices, each of which has advantages and disadvantages. The statutory form could make its uninformed use deceptively simple.

But whether or not the statute prescribes a form, it is likely that entrepreneurs will draft forms, and probably make them available for downloading on the internet for a small charge. Given that likelihood, would it be better for the statute to prescribe standards?

We understand that in New Mexico the forms publishers reprint the statutory form for sale in stationery stores, and that is the form that people use.

The Law Revision Commission historically has shied away from drafting statutory forms. The Commission has been concerned about the procrustean nature of a statutory form. The Commission has also felt that a professional forms maker can probably do a better job at making a simple, user-friendly, plain English form than can a Commission of lawyers in a public meeting.

A less significant consideration, but still a consideration, is that the Office of State Printing has a devilish time trying to cope with a form in a bill draft. Not to mention what happens when a law publisher tries to replicate the form in its code compilation.

An alternative would be to prescribe the contents of the deed with some particularity without setting out form language. Kirtland and Seal observe:

> To ensure that the beneficiary deed is not misused, the laws of the various states require specific language be prominently displayed in the deed indicating that the interest does not pass to the grantee-beneficiary until the death of the current owner. The statutes further state that the right to revoke and the requirement to record the deed are also prominently noted in the deed itself.

Kirtland and Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law. 118, 120 (March 2005).

David Mandel has suggested that there should be a statutory form, but it should be a model, and not be mandatory. Other forms would have to be substantially similar. More detailed, mandatory language for the TOD deed itself would have to be attached to it. A sample of a model form draft provided by Mr. Mandel is attached as Exhibit p. 1.

On balance, the staff is inclined to think that **a simple model statutory form is the way to go**. That will be informative and help effectuate the transfer, if used. A transferor should not be encouraged to get fancy with special conditions and the like. Such a transferor can, and should, use some other device such as a trust.

Drafts of Statutory Form

The following draft of a model form for creation of a TOD deed is an amalgam of the forms of TOD deed found in various jurisdictions.

Creation of TOD deed

(a) A transferor may make a transfer on death deed by an instrument in substantially the following form:

TOD Deed

Caution: This deed must be recorded before the transferor's death in order to be effective. It does not transfer ownership in property until the transferor's death, and the beneficiary acquires no rights in the property until then. On the transferor's death the beneficiary must file the change in ownership notice required by Revenue and Taxation Code Section 480 and notify the Department of Health Services if required by Probate Code Section 215.

Name of Transferor: _____
Address or Other Description of Property: _____
Name of Beneficiary: _____

The transferor transfers on death the described property to the beneficiary. This TOD deed revokes any previously recorded TOD deed of the transferor for the described property. This TOD deed may be revoked by another instrument recorded before the transferor's death.

Signature of Transferor:_____
Date: _____
(ACKNOWLEDGMENT)

(b) Nothing in this section limits the right of a transferor to make a transfer on death deed by an instrument not in substantially the form provided in this section.

Comment. This section prescribes a form for creation of a simple TOD deed. Use of the form is not mandatory, since a TOD deed may be made by coowners of property, or may make a transfer to multiple beneficiaries. See Sections [to be provided].

This rudimentary form contemplates one transferor and one beneficiary. However, it will be routine that co-owners (such as spouses) wish to convey their common interest to multiple beneficiaries (such as children) and to name alternate beneficiaries in case their primary beneficiaries fail to survive them. We could expand this form so that it is more flexible for that purpose. Or we could follow the example of David Mandel and provide a separate form for use by multiple transferors. Either of those options would result in a more complex form that found here. See, e.g., Exhibit pp. 1-4. The states that have enacted TOD deed legislation have generally limited their statutory deed to the simpler form.

The following draft of a model form for revocation of a TOD deed is an amalgam of the forms of deed found in various jurisdictions.

Revocation of TOD deed

(a) A transferor may revoke a transfer on death deed by an instrument in substantially the following form:

Revocation of TOD Deed

Caution: This revocation must be recorded before the transferor's death in order to be effective.

Name of Transferor: _____
Address or Other Description of Property: _____
County of Recordation of TOD Deed: _____
Date of Recordation of TOD Deed: _____
Book and Page or Series Number of TOD Deed: _____

The transferor by this instrument revokes the described TOD deed and any other TOD deed of the transferor recorded in this county for the described property.

Signature of Transferor:_____
Date: _____
(ACKNOWLEDGMENT)

(b) Nothing in this section limits the right of a transferor to revoke a transfer on death deed by an instrument not in substantially the form provided in this section.

Comment. This section prescribes a form for revocation of a TOD deed. Use of the form is not mandatory, since other recorded instruments may revoke a TOD deed. See Section [to be provided].

Alternative Forms of Instrument

The foregoing discussion assumes that a transferor may make a valid transfer of real property effective on death without using the statutory form, or even a form that looks like the statutory form. However, the beneficiary may have trouble getting a title insurer to recognize a variant form, and a court order might ultimately be required confirming title in the beneficiary.

A related concern is that the TOD deed not drive out any other means by which a decedent might transfer real property to a beneficiary effective on death. For example, California law recognizes the validity of a revocable transfer of property with a reserved life estate.

Other states have addressed this concern in their statutes. **Such a provision is perhaps useful**:

> **Effect on other forms of transfer**
>
> (a) This part does not preclude use of any other method of conveying property that is permitted by law and that has the effect of postponing enjoyment of an interest in real property until the death of the owner.
>
> (b) This part does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.

LOCATION OF STATUTE

The staff plans to assemble the drafts of the various policy decisions made by the Commission, and fill in gaps, to make a complete and unified draft TOD deed statute for review by the Commission at its next meeting.

The TOD deed statute would logically be located in Division 5 of the Probate Code, relating to nonprobate transfers. That division consists of the following parts:

Part 1. Provisions Relating to Effect of Death	§ 5000
Chapter 1. General Provisions	
Chapter 2. Nonprobate Transfers of Community Property	
Part 2. Multiple-Party Accounts	§ 5100
Chapter 1. Short Title and Definitions	
Chapter 2. General Provisions	
Chapter 3. Ownership Between Parties and Their Creditors	
Chapter 4. Protection of Financial Institution	
Part 3. Uniform TOD Security Registration Act	§ 5500
Part 4. Nonprobate Transfer to Former Spouse	§ 5600
Part 5. Gifts in View of Impending Death	§ 5700

A striking fact about this structure is its profligacy. Seven hundred prime nonprobate transfer slots in the Probate Code are allocated to about 75 sections. Particularly egregious is the Multiple Party Accounts law, which occupies 400 spots for fewer than 40 sections. We are not pointing any fingers here — the Law Revision Commission itself is mainly responsible for this travesty.

The staff thinks it's time to start compacting and filling in. **We would designate the TOD deed statute as Part 3.5, occupying the slot between Sections 5550 and 5599.** The staff believes we will easily be able to fit the statute within 50 spaces.

Another option would be to take Part 4 — nonprobate transfer to former spouse (five sections total) — and make it Chapter 3 of Part 1, comprised of Sections 5040-5044. The renumbering would cause few problems to anyone, the staff believes, and would require only two or three corrective cross references. We could then use Part 4 for the TOD deed statute, but would still commence numbering at 5550 rather than 5600.

The staff is esthetically attracted to this alternative, but is wary of it as a practical matter. Relocating the "nonprobate transfer to former spouse" material would require setting it out in the bill, which may attract unwanted attention from anyone who has a problem with those provisions. If we go ahead with the TOD deed concept, we will have our hands full dealing with TOD deed issues; there is no need to invite static on an unrelated matter.

On the other hand, we may wish to amend Section 5600 to clarify its application to a TOD deed in any event. See discussion of "Who May Be a Beneficiary?" above.

EVALUATION OF TOD DEED

Experience in Other Jurisdictions

The staff has previously gathered information about experience with the TOD deed in other jurisdictions. See CLRC Staff Memo. 2006-5 (available at www.clrc.ca.gov). Since then we have received the following information.

New Mexico

The TOD deed appears to be functioning reasonably well in New Mexico. Many people are executing TOD deeds without advice of counsel, using the statutory form which is available from forms publishers through stationery stores.

There are a number of issues that have surfaced in connection with the New Mexico statute, including questions about what interests the beneficiary takes "subject to", the authority of the transferor's agent, the priority of an encumbrance imposed after recordation of a TOD deed and before the transferor's death, inappropriate use of a warranty deed, and notification of the tax assessor.

All of these issues we have dealt with in this memorandum.

Staff Analysis

Advantages

The TOD deed offers a number of attractive features for a person seeking to transfer real property at death to a beneficiary, including:

- The deed avoids probate — it is substantially cheaper and quicker. It also ensures more privacy than a public probate proceeding, although ultimately the deed must be recorded to be effective.
- Like a will, the deed is revocable, preserving flexibility for the transferor to change the beneficiary designation, revoke the deed, or sell or encumber the property.
- The deed is less expensive than a trust, and is also self-executing, requiring no intermediary to effectuate the transfer.
- Unlike a joint tenancy the property is protected against claims of the beneficiary's creditors during the transferor's lifetime, does not incur potential gift tax liability, and the entire property receives a stepped up basis.
- The deed does not impact the transferor's Medi-Cal eligibility.

We have received the comments and petitions of interested persons attached as Exhibit pages 9-32. Many of the comments make the general point that a homeowner should be able to deed property directly to heirs without the expense of a trust or a probate proceeding, and urge the Commission to report favorably on this matter.

John A. Cape indicates that in his experience of providing volunteer pro bono legal services, one of the most frequent problems of seniors is the need for a simple way to pass property on their death to the persons they designate.

> Many senior citizens have little in liquid assets and most of their estate is in their residence. When they find out that they have to incur the expense and administrative burdens of a revocable trust, or subject their heirs to the cost and delays of probate they sometimes try to use other devices to pass on their property. One of the most frequent is to retitle their property in joint tenancy with the heirs. That is very risky since they subject the property to liabilities incurred by the joint tenants. Often they execute an undated quitclaim deed that is not recorded with the hope that it can be used to transfer the property after their death. In other situations they deed the property to the heirs and reserve a life estate. That creates complications because the transfer is not revocable. In addition it is difficult to deal with that situation when the life tenant is no longer capable of living on the property. Such

devices also trigger elder abuse concerns when the relationship between the parties becomes strained.

Mr. Cape notes that it is simple and straightforward to pass an unlimited amount of liquid assets in the form of a savings account or securities by means of a beneficiary designation under California law, but it is not possible to easily pass real property exceeding $20,000 in value. "Is there any significant difference between passing a real property interest and an interest in securities to one's heirs? Why should there be a time consuming and expensive process for realty yet securities of any value can pass with a simple beneficiary designation?"

Disadvantages

Professionals who would have to deal with the TOD deed — attorneys, judges, title companies, lenders — have expressed concerns about the concept, including:

- The TOD deed would create and encourage an estate planning substitute that is likely to be a self-help device for the elderly, resulting in (1) inappropriate use where another device might be more suited to the transferor's circumstances, (2) an increase in title problems caused by lay drafting and execution of the instrument, (3) susceptibility to elder abuse, and (4) avoidance of competent estate planning advice and assistance, resulting in adverse consequences. "It would create more opportunities than presently exist for non-lawyers to give inadequate or poor advice to persons wishing to avoid probate, and more opportunities for abusers to obtain title to property from the elderly, without the court overseeing the transfer." Sacramento County Bar Association.
- The privacy inherent in the TOD deed "does not allow heirs at law or creditors to know real property has passed to named designees upon the death of a family member, and as a result the property may be sold or refinanced before possible abuse claims can be raised." State Bar Conference of Delegates, Resolutions Committee.
- The TOD deed would add an ad hoc device to the proliferation of other types of estate planning mechanisms, particularly nonprobate transfers that are not controlled by a will or trust. "This proliferation results in confusion, inconsistency, litigation, and frustration for all involved. It makes it increasingly difficult to prepare estate plans for people and have any assurance that the plan will be consistently implemented by all the beneficiary choices that people make." State Bar Trusts & Estates Section.

- The TOD deed would be a new and untested estate planning device that is unnecessary because existing devices are available to achieve the same purpose.
- In states that have adopted the TOD deed there has been confusion about rights as between the transferor and beneficiary during the transferor's lifetime.

Balancing Advantages and Disadvantages

The experience in states that have adopted TOD deed legislation has been generally favorable, although there have been problems of the type identified by professionals that have occasion to deal with property that is subject to a TOD deed. The staff believes that these types of problems can be resolved by clearly drafted legislation, and this memorandum is largely an attempt to do that. However, because all of the TOD deed legislation is of relatively recent vintage, there may be problems that have not yet surfaced.

The staff is not impressed with the argument that the TOD deed is unnecessary because California already recognizes the functional equivalent — a revocable deed with reserved life estate — which has been the law for nearly a century. See *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914). That device is little known, and its legal effect and consequences are unclear. The State Bar Trusts & Estates Section has noted problems reported by practitioners of situations where the revocable deed was used pursuant to authority of the *Tennant* case:

> In one case, the beneficiary's trustee in bankruptcy forced the owners of the property to litigate at considerable expense to retrieve their own property in the face of a claim that the beneficiary (an overreaching religious organization) had something more than a mere expectancy. The claim was expensive and traumatic to resist. Other practitioners report instances of people making significant errors in completing deeds that they were using to qualify for Medi-Cal benefits.

It would be preferable for the law to provide a simple, understandable device with clear rules, such as the TOD deed, than to encourage people to rely on a shadowy device such the revocable deed with reserved life estate.

The staff agrees that California law has allowed nonprobate transfer devices to proliferate without consistent standards or consistent consequences. We think at some point we need to take a step back and treat this area of law comprehensively. This matter is on the Law Revision Commission's calendar to

look at some time in the future. The question is, should the TOD deed concept be deferred until that can be done? The staff does not think the two projects should be linked. First, it is not clear when, if at all, the comprehensive overview could happen. Second, to the extent we are able to develop appropriate and clearly expressed solutions for TOD deed issues, that will facilitate sensible treatment of nonprobate transfer issues generally by providing a model for guidance.

The probate system has due process concepts built into it. It is designed to provide notice to the decedent's heirs and would be beneficiaries, and to provide them an opportunity to challenge the decedent's will or other dispositional plan, or lack of it. The privacy of a transfer by a TOD deed, without notice to interested persons and an opportunity to intervene in the transfer, is to some extent troubling. But that is inherent in the concept of the nonprobate transfer. The trust, which has become the dominant estate planning mechanism today, has even more privacy associated with it. At least the TOD deed must be recorded before the transferor's death to be effective (or at least as the Commission has tentatively concluded that should be the rule). There is no such requirement in the case of a transfer of real property by inter vivos trust. We might also want to consider a moderate limitations period after the transferor's death during which a person might challenge the transfer and, if not recapture the property, at least be compensated by damages. See discussion of "Contest of Deed" above.

The most troubling set of issues raised concerning the TOD deed, in the staff's opinion, relates to the likelihood of self-help use of the device, leading to uninformed use of the device with adverse estate planning consequences for the transferor, improperly drafted instruments that defeat the transferor's intent, failure to effectuate the transfer by proper recording, and facilitation of manipulation and financial abuse against the transferor. It provides a seductively simple means of transferring what could well be the transferor's major asset without any neutral guidance or assistance.

A New Mexico title officer (who is also an attorney) that we spoke with was troubled by a situation he had seen where an elderly person's son, who had been appointed as an agent under a durable power of attorney, executed a TOD on behalf of his parent and then took the property as his own on the parent's death, without a third party ever having been involved. The title company insured the son's title, but was concerned about the potential for abuse in that situation.

Of course the same circumstance could occur with many different types of transfer devices, not just a TOD deed. David Mandel believes that the TOD deed

would not add to the danger that now exists — "Deeds, wills, trusts, equity loans, co-signing for credit and other instruments are already used abusively far too often. Law enforcement, attorneys and others have their hands full in dealing with the problem. But I can't imagine how the existence of a TOD deed form would trigger abuse by a motivated criminal who would otherwise not act. The other methods are there for the using." He points out that the TOD deed may be safer in that, unlike a standard deed, there is no immediate transfer and the TOD deed is revocable, and the required recording of the TOD deed will provide public exposure (unlike a will or trust that may remain private until the transferor's death).

Some of the problems with uninformed use of the TOD deed can be addressed by a statutory deed form that is clear and informative to the transferor and beneficiary. Even with a statutory form, advocates of the TOD deed suggest that a person should seek competent advice before executing a TOD deed. David Mandel remarks, "I would still recommend to anyone considering use of such a form that legal help be obtained if possible to answer questions and provide guidance on its appropriate use. Private attorneys who wish could do this efficiently, saving time for themselves and money for clients of modest means who would otherwise either spend far more than necessary on a full-blown trust or fall into the clutches of a trust mill, where they'd still be overcharged and risk getting something useless or worse."

Consider this scenario:

> Where the client informs the attorney s/he wishes to execute a beneficiary deed, having been brought to the attorney's office by an adult child or other relative or friend who will also be the grantee-beneficiary, the attorney needs to evaluate the influence the proposed grantee-beneficiary may be having on the client in executing the beneficiary deed. While this is a classic, textbook example of a potential undue influence situation, it may not immediately present itself as such to the attorney, especially if the attorney does not regularly deal with elderly clients. The proposed grantee-beneficiary may easily come across as simply wanting to assist the current owner is placing into effect their desires. Careful discussion as to the motives and intent of the current owner, however, need to be held to ensure that the execution of the beneficiary deed is, in fact, an independent act by the current owner and not the product of thoughts and ideas imposed upon the current owner by the proposed grantee-beneficiary. Where the determination is made by the attorney that the execution of the beneficiary deed is inconsistent with the remainder of the estate

> plan of the client, or where it appears questionable whether or not the client understands the significance of execution of the beneficiary deed, it may be proper to suggest that a single transaction conservatorship be considered to execute the beneficiary deed. (This is true of placing the grantee-beneficiary's name on currently existing types of deeds as well, including joint tenancy with right of survivorship, quitclaim and tenant in common deeds.) Expect the client and the proposed grantee-beneficiary to resist such a suggestion.

Kirtland and Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law 118, 121 (March 2005).

While the staff is concerned about misuse and abuse of the TOD deed, we do not think that its existence will generate problems that do not already exist for an individual inclined to avoid counsel and to avoid probate. An outright transfer of the property, or creation of a joint tenancy, is likely to be a greater source of problems than a TOD deed. At least the TOD deed is a relatively benign instrument, and a statutory form could help direct its informed use.

Conclusion

The nonprobate revolution has largely bypassed real property. Nearly all other significant assets, including life insurance, securities, accounts in financial institutions, and pension plans pass commonly by beneficiary designation outside the probate system. Real property is the last significant holdout, although substantial amounts of real property pass by right of survivorship under joint tenancy or community property or under a trust. It has been observed that ownership of real property is the factor most likely to determine whether a death will lead to a probate proceeding. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1119 (1984).

The staff believes that California law does not adequately deal with the many types of nonprobate transfer and their consequences. We need comprehensive treatment of the area, much as Missouri has done with its law. But we do not think that should be the cause for delay in considering the concept of the TOD deed on its merits.

After having worked through the issues with the TOD deed that we have identified, and having proposed solutions, the staff believes **this is a promising device that should be further explored**. We would compile the Law Revision Commission's policy decisions on the issues raised in this memorandum in a

draft proposal for TOD deed legislation. After review and approval of the draft by the Commission, we would circulate it as a tentative recommendation for public comment over the summer, review comments this fall, and develop a final report on the matter for submission to the Legislature by January 1, 2007.

Meanwhile, the Commission should monitor the progress of AB 2267 (Huff, Benoit, DeVore, Maze, Mountjoy, Strickland, and Villines). See discussion of "Creditor Rights After Transferor's Death" above. This legislation, as presently drafted, would increase the value of real property that may be taken under the statutory affidavit procedure from $20,000 to $40,000. Because of the low values involved, that procedure is not currently a realistic alternative to the TOD deed.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

RECORDING REQUESTED BY:

WHEN RECORDED, MAIL TO:

THIS SPACE FOR RECORDER'S USE ONLY

REVOCABLE TRANSFER ON DEATH DEED – REAL ESTATE
FOR USE WITH PROPERTY OWNED SOLELY BY ONE PERSON

Part I. Important notice to property owner:

1. **Be sure you fully understand the meaning of this deed before you sign. If you have any questions, obtain legal advice.**
2. **Completing Part IV, Section A or B of this deed means that the person or people you name as beneficiary/ies will become the owner/s of your property upon your death, as long as the deed is properly signed and recorded – and is not revoked.**
3. **Your instructions according to Part IV, Sections A or B of this deed will apply even if you write something different in a will or a living trust.**
4. **You can change or cancel the instructions by completing a new beneficiary deed.**
   - **By completing Part IV, Section B, you can remove and/or add beneficiaries.**
   - **By completing Part IV, Section C, you can revoke the deed. Your property will then pass after your death according to a valid will or trust, or by state law.**
5. **If you sell or give away your share of the property, this deed will no longer have any effect.**
6. **If a named beneficiary dies before you do, the property will go upon your death to any other beneficiaries named in this deed. If there are none, the property will pass after your death as it would have otherwise, as stated in paragraph 4, above.**
7. **Property that is transferred to one or more beneficiaries after your death by this deed is subject to any mortgages or liens in existence at that time.**
8. **To take effect, this deed must be signed before a notary and filed with the county recorder for the county where the property is located. It must be filed within 30 days of the date you sign the deed or before your death, whichever is sooner. If more than one transfer on death deed is recorded for the same property, the one signed last shall apply.**

Part II. Real property affected by this deed:

Address: _____

Assessor's parcel number: _____

Legal description (copy from a prior deed):

Part III. Person writing this deed:

I, _____, am the sole owner of the real property described above, hereby instruct that upon my death, the provisions written in Part IV below shall apply.

CONTINUED FROM REVERSE

REVOCABLE TRANSFER ON DEATH DEED – REAL ESTATE
FOR USE WITH PROPERTY OWNED SOLELY BY ONE PERSON

Part IV. Transfer on death instructions (*Complete only one of Sections A, B or C):*

Section A:

_____I have not previously named a beneficiary using a transfer on death deed for the property described above. Upon my death, ownership of the property shall pass to the following person or people:

One beneficiary only: Name:_____ Relationship:_____

or

The following _____ (enter number) beneficiaries (list names and relationships):_____

_____

_____

Initial here ____ if multiple beneficiaries are to own the property as joint tenants with right of survivorship. Otherwise, ownership will be as tenants in common.

Section B:

_____I have previously named the following one or more beneficiaries in a prior transfer on death deed for the property described above *(list names)*:_____

_____

I now hereby:

Delete the following ____ *(enter number*) beneficiaries *(list names)*: _____

_____

Add the following ____ *(enter number*) beneficiaries *(list names and relationships)*:

_____

_____

Initial here____ if multiple beneficiaries are to own the property as joint tenants with right of survivorship. Otherwise, ownership will be as tenants in common.

Section C:

_____By initialing here, signing below and recording this deed, I hereby revoke the naming of any and all beneficiaries on a previously signed transfer on death deed with regard to the property described above.

Part V. Signature and notary acknowledgment

I certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:_____ Signature:_____

(Standard notary acknowledgment and seal)

RECORDING REQUESTED BY:

WHEN RECORDED, MAIL TO

THIS SPACE FOR RECORDER S USE ONLY

REVOCABLE TRANSFER ON DEATH DEED – REAL ESTATE
FOR USE WITH PROPERTY OWNED BY TWO OR MORE PEOPLE

Part I. Important notice to property owner(s):

1. Be sure you fully understand the meaning of this deed before you sign. If you have any questions, obtain legal advice.
2. Completing Part IV, Section A or B of this deed means that the person or people you name as beneficiary/ies may receive your share of the property upon your death. The final result may also depend on choices made by the co-owner/s of your property, and on which of you dies last. Upon the death of one joint tenant, for instance, the property passes to the other joint tenant/s. It will go to the beneficiary named on this deed only upon the death of the last joint tenant, and only if that person also signed this deed.
3. Your instructions according to Part IV, Sections A or B of this deed will apply, subject to the conditions mentioned in paragraph 2, even if you write something different in a will or a living trust.
4. You can change or cancel the instructions by completing a new beneficiary deed.
   - By completing Part IV, Section B, you can remove and/or add beneficiaries.
   - By completing Part IV, Section C, you can revoke the deed. Your property will then pass after your death as it would have otherwise, depending on how title is held or according to a valid will or trust, or by state law.
5. If you sell or give away your share of the property, this deed will no longer have any effect upon your death.
6. If a named beneficiary dies before you do, the property will go upon your death to any other beneficiaries named in this deed, subject to the conditions mentioned in paragraph 2, above. If there are no other beneficiaries named, the property will pass after your death as it would have otherwise, as stated in paragraph 4, above.
7. Property that is transferred to one or more beneficiaries after your death by this deed is subject to any mortgages or liens in existence at that time.
8. To take effect, this deed must be signed before a notary and filed with the county recorder for the county where the property is located, within 30 days of the date you sign the deed or before the death of any signer, whichever is first. If more than one transfer on death deed is recorded for the same property, the one signed last shall apply.

Part II. Real property affected by this deed:

Address: _____

Assessor's parcel number: _____

Legal description (copy from a prior deed):

Part III. Current ownership of the property; person or people writing this deed

The property described above is currently owned by (list all owners): _____

_____

Form of ownership: ___ Joint tenancy; ___Tenancy in common; ___Community property

CONTINUED FROM REVERSE

REVOCABLE TRANSFER ON DEATH DEED – REAL ESTATE
FOR USE WITH PROPERTY OWNED BY TWO OR MORE PEOPLE

Part IV. Declaration by owner or owners signing this deed.

I/we_____

_____ hereby instruct that upon my/our death/s, the provisions written in Part IV below shall apply, if all other circumstances permit.

Initial here: _____I/we understand that If title is currently held in joint tenancy or by spouses as community property and if fewer than all owners of the property sign this deed, it may apply only to the portion/s held by the signer/s.

Initial here: _____I/we further understand that even if this deed is signed by both spouses or by more than one joint tenant, title may pass according to this deed only upon the death of the last spouse or joint tenant._____

Part V. Transfer on death instructions (***Complete only one of Sections A, B or C):***

Section A:

I/we have not previously named a beneficiary using a transfer on death deed for my/ our interests in the property described above. Upon my/our death/s, ownership of the property shall pass to the following person or people, if the ownership at that time makes it possible:

One beneficiary only: Name:_____ Relationship:_____

or

The following _____ (enter number) beneficiaries (list names and relationships):

_____

_____

Initial here _____ if multiple beneficiaries are to own the property as joint tenants with right of survivorship. Otherwise, ownership will be as tenants in common.

Section B:

_____I/we have previously named the following one or more beneficiaries in a prior transfer on death deed for the property described above *(list names)*:_____

_____

I/we now hereby:

Delete the following _____ *(enter number)* beneficiaries *(list names)*:_____

_____

Add the following _____ *(enter number)* beneficiaries *(list names and relationships)*:

_____

_____

Initial here_____if multiple beneficiaries are to own the property as joint tenants with right of survivorship. Otherwise, ownership will be as tenants in common.

Section C:

_____By initialing here, signing below and recording this deed, I/we hereby revoke the naming of any and all beneficiaries on a previously signed transfer on death deed with regard to the property described above.

Part VI. Signature and notary acknowledgment

I/we certify under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Date:_____ Signature:_____

Date:_____ Signature:_____

Date:_____ Signature:_____

Date:_____ Signature:_____

(Standard notary acknowledgment and seal)

2/24/06

California Law-Revision Commission

Re: Tiemper-on Death Beneficiary Deed

I am very supportive of the proposed bill to establish the Tiemper-on Death Beneficiary Deed. It will greatly benefit many of us in the Senior World Senior Community as well as others in this State. It would allow those of us who cannot afford Trust and still want to spare our relatives of the cost of probate + Capital Gains taxes.

Thank you for your consideration

Sincerely,

Joe Martorano

March 1, 2006

Bonnie Zera
136 U Avenida Majorca
Laguna Woods, Ca
92637

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, Ca., 94303-4839

I am very interested in Assembly Bill "AB 12 Beneficary Deeds." As an owner of a co-op in Laguna Woods Village, (formerly Leisure World) Laguna Woods, California. I currently have an existing reverse mortgage, and I would like to be able to participate in the utilization of a Revocable Transfer-on-Death Beneficary Deed. Please consider those homeowners with reverse mortgages in your deliberations concerning this forthcoming legislation.

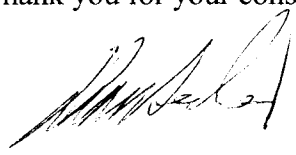
Bonnie Zera

March 20, 2006

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

I would like to notify the Commission that I want California to have a law that would allow the homeowner to transfer the home at the time of death in a Revocable Transfer-on-Death Beneficiary Deed. This would help homeowners who cannot afford a trust, or who do not want a trust, and who want to protect their loved ones from the expenses of Probate. It would prevent elder abuse. It would help the Beneficiaries avoid expensive Capital Gains Taxes. We must work to defeat the actions of AB 12 opponents.

Thank you for your consideration.



Don Scales
352 A Avenida Sevilla
Laguna Woods, CA 92637
949-462-3937

March 20, 2006

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

I would like to notify the Commission that I want California to have a law that would allow the homeowner to transfer the home at the time of death in a Revocable Transfer-on-Death Beneficiary Deed. This would help homeowners who cannot afford a trust, or who do not want a trust, and who want to protect their loved ones from the expenses of Probate. It would prevent elder abuse. It would help the Beneficiaries avoid expensive Capital Gains Taxes. We must work to defeat the actions of AB 12 opponents.

Thank you for your consideration.

Marilyn Skonberg
352 A Avenida Sevilla
Laguna Woods, CA 92637
949-462-3937
Mskon@lworld.net

REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED

This Petition will be mailed to the CALIFORNIA LAW REVISION COMMISSION, 4000 Midlefield Road, Room D-1, Palo Alto, CA 94303-4739.

Signers of this Petition request that the Commission recommend to the California Legislature the enactment of a new law that would allow Californians to transfer real estate to a benficiary on the death of the property owner without probate. Several states have such a non-probate real estate transfer law.

This REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED would allow the homeowner to avoid the expenses of Probate, a Trust, and Capital Gains Taxes.

The first name is to be used as an example.

	NAME:	ADDRESS
1.	Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2.	Bernard Bogin BERNARD BOGIN	3323 C Via Carrizo, Laguna Woods, CA 92637
3.	Janet Rae Bogin JANET RAE BOGIN	3323 C Via Carrizo LAGUNA WOODS, CA., 92637
4.		
5.		
6.		
7.		
8.		
9.		
10.		

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The first name is to be used as an example.

	NAME:	ADDRESS
1.	Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2.	Hillel Pottle: Arthur Pottle	3181A ALTA VISTA LAGUNA WOODS, CA 92637
3.	Lane Wolman: LANE WOLMAN	5446 ALTA VISTA LAGUNA WOODS, CA 92637
4.		
5.		
6.		
7.		
8.		
9.		
10.		

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This REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED would allow the homeowner to avoid the expenses of Probate, a Trust, and Capital Gains Taxes.

The first name is to be used as an example.

NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Linda G. Wilson: Linda G Wilson	816-P Via Alhambra Laguna Woods Ca 92637
3. Lily Marks: LILY MARKS	832 CALLE ARAGON Laguna Woods, CA 92637
4. Kenneth D Bennett	942A AVE MAJORCA Laguna, Woods CA 92637
5. Jane Shenton	3458-L Calle Azul La Jolla Woods, CA. 92637
6. Robert Morton	5514 Paseo Del Lago #A 92637
7.	
8. Jim KEYSOR JIM KEYSOR	5518 3C Paseo del Lago E
9. CATHERINE MIGHIS: Catherine Myles-	466-O AVE SEVILLA LAGUNA WOODS 92637 466-O Ave. Sevilla Laguna Woods 92637
10.	

REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED

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The first name is to be used as an example.

NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Dorothy I Bilecki: Dorothy I Bilecki	3491-O Monte Hermoso Laguna Woods 92637
3. Marilynn Sorting: Marilynn Sorting	4008-1G Calle Sonora West LW 92637
4. John Sorting: John Sorting	4008-1G Calle Sonora Laguna Woods 92637
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REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED

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NAME:	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Kaye L Mann KAYE L. MANN	2070-Q Via MARIPOSA EAST LAGUNA Woods, CA 92637-2206
3. Roger Schwenn Roger	2070-P Via Mariposa East Laguna Woods, CA 92637
4. Joyce Coker Joyce Coker	24911 Valley Rim Ter. Lake Forest, CA 92630
5. Eleanore M. Valek Eleanore M Valek	2070-O Via Mariposa E. Laguna Woods 92637
6. George Valek George Valek	Same as 5
7. MARY ECHURCH Mary E Church	212 NORTH COAST HWY #6 LAGUNA BEACH, CA 92651
8. Randy Wang Randy Wang	2069-C Via Mariposa E. Laguna Woods, CA 92637
9. Vickie Lowenstein Vickie Lowenstein	26154 Cordillera Drive MV/CH 92691 — 1 —
10. [illegible]	22965 VESPER LAKE FOREST 92630

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NAME:	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Mary Margaret Grady Mary Margaret Grady	2233-P Via Puerta Laguna Woods, CA 92637
3. Chris O'Grady Chris O'Grady	8 Eisenhower CdC Ca. 92679
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1.	Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2.	NORMAN MARVIN RADKIE Norman Marvin Radkie	72C CALLE ARAGON Laguna Woods, CA, 92637
3.	THELMA F BATTEN Thelma F. Batten	159A AVENIDA MAJORCA 159A Avenida Majorca, Laguna Woods CA 92637
4.	MARVIN SILVA: Marvin Silva	5601 DEVERNAY LAGUNA WOODS
5.	Howard L Carpenter Howard L. Carpenter	173E Via Estrada LW
6.	Hugh Batten Hugh Batten	159A Majorca LW
7.	MICHAEL DEAGAL Michael A Deagal	449 Ave Sevilla Laguna Woods CA 92637
8.	MARC COHEN Marc Cohen	74-A Calle Velarde Laguna Woods CA 92637
9.	~~Regine Carmichael~~ REGINE CARMICHAEL	~~Aut. Castilla~~ LAGUNA WOODS CA 92637
10.	RAY A KUNZE Ray A Kunze	110 B VIA ESTRADA Laguna Woods, CA 92637

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NAME:	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Mary Joice Chase MARY JOICE CHASE	2283-D Via Puerta Laguna Woods, CA, 92637
3. Arthur Chase	2283 D VIA PUERTA LAGUNA WOODS CA 92637
4. Philip & Mohler	2104 B RONDA GRANADA, LAGUNA WOODS CA 92637
5. Harry Beale	3443 A Calle Aguil Laguna Woods Village CA 92637
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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. BARBARA E. COPLEY Barbara E. Copley	410 Avenida Castilla - Unit D Laguna Woods, CA 92637
3. Pamela J. Grundke PAMELA J. GRUNDKE	Laguna Woods, Ca. 92637 2214-B. VIA MARIPOSA E.
4. RUTH J MAY	671 B VIA MENDOZA LAGUNA WOODS CA 92651
5. LEONARDO C. REVERERI	76 CALLE ARAGON P CA 92637
6. KATHLEEN L. MARGASON Kathleen L. Margason	510 CALLE SEVILLA L.W. CA 92637
7. [illegible] BARNES	276 B. AVE Carmel Laguna Woods Ca 92637
8. Mary Ann Shine MARY ANN SHINE	4667 Ave Sevilla Laguna Woods Ca 92637
9. GAIL McNULTY	2140-D RONDA GRANADA LAGUNA WOODS CA 92637
10. Gunther Austin Gunther Austin	376B ave Carmel Laguna Woods Ca 92637

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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Gerald T. Richards: GERALD T. RICHARDS	1099 Baywood Ln, Hercules, CA 94547
3. Laine Lawrence: Laine Lawrence	[illegible]
4. SHIRLEY KROHN: Shirley Krohn	324 EL DIVISADERO AVE Walnut Creek CA 94598
5. [illegible]	[illegible]
6. [illegible]	[illegible]
7. [illegible]: ARTHUR C. HOLLISTER, M D	[illegible]
8. Katherine Barnes: Katherine Barnes	2173 Gill Dr. Concord, CA 94520
9. James Ray: JIM E RAY	4939 Midland Martinez CA 94553
10. Mary Lou Richards: Mary Lou Richards	1099 Baywood Lane Hercules, CA 94547

Law Revision Commission
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File:

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	NAME:	ADDRESS
1.	Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA 92637
2.	Lydia L. Gantt LYDIA L. GANTT	1621 Country Club Drive, Glendale, Ca 91208
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The first name is to be used as an example.

NAME: ADDRESS

1. Mary Pat Toups: 3467B-Bahia Blanca West
Mary Pat Toups Laguna Woods, CA, 92637
2. Jeryanne Bailey 334-K-Cerrada Sevilla
Jeryanne Bailey Laguna Woods CA 92637
3. Betty A. Forbester 817-C Via Alhambra, Lag. Woods Vlg. CA 92637
Ellen L Wilson 383-C Avenida Castilla, Laguna Woods, CA 92637
4. Bess Nauta 384-A-AV. CASTILLA, LAGUNA WOODS CA, 92637
5. Mary Dalt, 2353 Mariposa W-113, Lag. Woods CA 92637
6. Martha Sauder, 25162 Derby Cir., Lag. Hil., 92653
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	NAME:	ADDRESS
1.	Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2.	[illegible] Daniel Hinkle	[illegible] Laguna Woods, CA, 92637
3.	[illegible]	[illegible]
4.	Phyllis Boerema	3393 Santa Alta- Laguna Woods, Ca 92637
5.	Margaret McKinney	5392-A Santa Alta, Laguna Woods Village 92637
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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Helen W. Lyon	23445 El Toro Rd, Lake Forest, 92630
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NAME:	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. H. Wendell Smith H. WENDELL SMITH	32211 Via Barrida, S.J. Capo 92675
3. E. Nadine Smith E. NADINE SMITH	32211 VIA BARRIDA, SAN JUAN CAPO. 92675
4. John R West Jr. Joan A West	5510 Paseo Del Lago W I G Laguna Woods Ca. 92637
5. Virginia C Lewis	756-C Avd Majorca, Laguna Woods CA 92637
6. Candice L. Burton	257-A Calle Aragon, Laguna Woods Village, CA 92637
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1.	Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2.	MARILYN J. NOBLE Marilyn J. Noble	3490 A Calle Azul, Laguna Woods, CA 92637
3.	ROGER S. NOBLE Roger S. Noble	3490A CALLE AZUL LAGUNA WDS. 92637
4.	BETTY R. SHOUP Betty R. Shoup	2587-3M VIA MARIPOSA, Laguna Woods CA 92637
5.	JEAN H. MORAN Jean H. Moran	116-D VIA ESTRADA, LAGUNA WOODS CA 92637
6.	Norma Jean Davis	437 Ave Sevilla Ca 92637
7.	Jean Anderson	441 Ave Sevilla Ca 92637
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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Bill McCoy	791-B Los Altos
3. Ann Hillstrom	4005 Calle Sonata Laguna Woods, 92637
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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Terry Lambden - Terry Lambden	446-A Ave Sevilla ~~CA 92637~~ Laguna Woods 92637
3. Sue P. Miller - Sue P. Miller	3350-P Bahia Blanca E. Laguna Woods, CA. 92637
4. Alberta J. Booth - Alberta J. Booth	31423 So. Coast Hwy #58 CA 92651 " "
5. Eileen Donahue	3351-N Bahia Blanca E 92637
6. Betty A Cox	3425-P Bahia Blanca W. 92637
7. Alfreda Dockery	4015 Calle Sonora Oeste Laguna Woods, Ca 92637
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	NAME:	ADDRESS
1.	Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2.	Donna Johnson	3096B Via Serena North Laguna Woods CA 92637
3.	[illegible]	[illegible]
4.	[illegible]	[illegible]
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1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. ELSIE M CORBETT - Elsie M Corbett	616-D AVE SEVILLA-L.H. 92637-4583
3. ERNEST A. BUFURD, JR, Ernest A Bufurd	2030-B VIA MARIPOSA E, LAGUNA WOODS, CA 92637
4. S. Wayne McFarland	5523-B VIA LA MESA, CA. 92637
5. Robert Engle, Robert E. Milne	4002-3B Calle Sonora Laguna Woods CA 92637
6. Catherine B. Semple, Leah L Packard	2286 Unit N Via Puesta E. Woods 5362-B Alicante LWV, Ca
7. Wayne McFarland	5523 VIA LA MESA, LWV. 92637
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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. RICHARD C. NOVAK	3056 VIA SERENA S. - UNIT A LAGUNA WOODS, CA 92637
3. MYRTLE NOVAK	LAGUNA WOODS, CA 92637
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1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Geraldine C. Knight Geraldine C. Knight	314-A Avenida Castilla Laguna Woods, CA 92637
3. Phyllis Rice Phyllis Rice —	72T Calle Aragon L.W 92637
4. Jack Rice Jack Rice —	72T Calle Aragon L.W 92637
5. Nina Nesbit Pierce NINA NESBIT PIERCE	622 Vista Alameda San Clemente, 92672
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NAME	ADDRESS
1. Mary Pat Toups	3467B - Bahia Blanca West
Mary Pat Toups	Laguna Woods, CA, 92637
2. GEORGE W. ANDREWS	118 VIA ESTRADA UNIT G
George W. Andrews	LAGUNA WOODS CA 92637
3. Bette Bond	3412 Calle Azul - Laguna Wood
[illegible]	172 H Ave. Majorca Laguna Woods
4. Kenyon [illegible]	2053B Via Mariposa East, Laguna Woods
5. Dean Davisson	136-Q AVE MAJORCA
DEAN DAVISSON	Laguna Woods, CA 92637
6. GEORGETTE A. DAVISSON	136-Q AVE MAJORCA
Georgette A. Davisson	Laguna Woods, CA 92637
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NAME:	ADDRESS
1. Mary Pat Toups: Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Dorothy Leight DOROTHY LEIGHT	4011-1F Calle Sonora West Laguna Woods 92637
3. ~~Francis Hoth~~ FRANCIS H BOTH	405-B Av Castilla Laguna Woods CA 92637
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