Study L-3032 June 6, 2006

Memorandum 2006-19

Beneficiary Deeds (Discussion of Issues)

The Commission is engaged in a study of the beneficiary deed, or transfer on death deed (TOD deed), at the direction of the Legislature. The Commission's objective is to report by January 1, 2007, whether or not TOD deed legislation should be enacted in California and, if so, the content of the legislation.

To this end, the Commission is following a three-pronged approach. The Commission is (1) analyzing existing California devices for transfer of real property on death, (2) examining experience in other jurisdictions that have such a device, and (3) addressing issues that would have to be resolved if TOD deed legislation were enacted in California. After the Commission has completed this process, it will be in a position to come to a conclusion on the matter and submit its report to the Legislature.

This memorandum continues the process, focusing primarily on issues that would need to be resolved and legislative language that would be needed to resolve them, with also some emphasis on reporting experience in other jurisdictions. A large part of this memorandum continues material from Memorandum 2006-16 and its First Supplement, which the Commission began, but did not complete, consideration of at its April 2006 meeting.

This memorandum frequently refers to or quotes from communications the Commission has received concerning this study that were attached to earlier memoranda. These are available from the Commission at www.clrc.ca.gov. In the interest of economy we do not reproduce them again here.

A staff draft statute embodying the Commission's decisions to date is attached as an Exhibit, along with the following new communications that are also reviewed in this memorandum.

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DECISIONS TO DATE

Staff Draft Statute

A staff draft embodying the Commission's tentative decisions to date is attached at Exhibit pages 1-12. A number of issues have been raised in connection with the tentative decisions, which are addressed immediately below.

Terminology

The Commission has decided to adopt "transfer on death deed" (TOD deed) rather than "beneficiary deed" terminology. See Draft Section 5607 ("transfer on death deed" defined). Both terms are used in jurisdictions that have enacted the concept. The TOD deed terminology is more descriptive of the actual effect of the instrument.

A further refinement was suggested at the April Commission meeting — the instrument would be called a "*revocable* transfer on death deed". That would help reinforce the concept that the deed, like a will, has no effect until the transferor's death and is revocable until that time. We note that the Executive Committee of the State Bar Trusts & Estates Section refers to the concept as a "revocable transfer on death deed" in its communication with us. See Exhibit p. 17.

The staff has mixed feelings about the proposal. On the one hand, we agree that the term is descriptive. On the other hand, "transfer on death deed" is already a mouthful, and to add a polysyllabic qualifier would aggravate that. **But the shorthand "revocable TOD deed" would not be unreasonable.**

We are not overly concerned about a negative implication for other TOD and POD designations (such as for a securities registration or a multiple party account) that likewise are revocable even though not reflected in their nomenclature.

Property Subject to TOD Deed

The TOD deed transfers "real property" on the death of the transferor. But would a unit in a common interest development be considered real property for that purpose?

We estimate that CIDs constitute 25% of California's housing stock. Mary Pat Toups has suggested that it be made clear that a TOD deed may be used to transfer ownership of a condominium or cooperative, since many elderly citizens buy these homes which are cheaper than other homes. Her area has about 17,000 such homeowners, all elderly. Exhibit p. 14.

An ownership interest in a CID consists of an exclusive right of occupancy of a portion of a real property development, coupled with an undivided interest in the common area or membership in an association that owns the common area. A CID can take various forms, including a community apartment, condominium, planned development, or stock cooperative. Civ. Code §§ 1351-1352.

All of these interests, including membership in an association or ownership of a share in a stock cooperative, are defined as real property under CID law. (This issue was unsettled before enactment of the Davis-Stirling Act — California courts had distinguished between an owner of an undivided interest in a condominium or apartment project and a shareholder in a stock cooperative, who was held to be a lessee of the corporation that owns the property.) See discussion in C. Sproul & K. Rosenberry, Advising California Common Interest Communities, § 1.12, at 14 (Cal. Cont. Ed. Bar, 2005).

The staff thinks **it would not hurt to make clear that real property includes a CID** for the purpose of the application of any TOD statute:

> **"Real property" defined**
>
> As used in this part, "real property" means the fee or an interest in real property. The term includes but is not limited to all of the following interests in real property:
>
> (a) A leasehold.
>
> (b) An interest in a common interest development within the meaning of Section 1351 of the Civil Code.

Comment. This section supplements the definition of real property found in Section 68 ("real property" includes leasehold). Under subdivision (b), an interest in a CID includes a community apartment project, a condominium project, a planned development, and a stock cooperative.

☞ **Staff Note.** On enactment of our proposed CID law reorganization, a conforming revision to this section would be necessary.

Recordation

The Commission adopted the position that a TOD deed is ineffective unless recorded before the transferor's death. See Draft Section 5616 (recordation of TOD deed).

Prompt Recordation

The Commission considered the possibility of requiring recordation of the TOD deed promptly after execution, rather than at any time before death. The Commission did not adopt a prompt recording requirement, but decided to seek public comment on the concept. The staff draft includes a Note soliciting comment on the issue:

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

• Prompt recording could help expose fraud or undue influence before the transferor dies. However, such a requirement could frustrate the transferor's desire to maintain the privacy of the disposition.

• Prompt recording would be evidence of the transferor's intent. However, such a requirement could frustrate the intent of a transferor who seeks to pass the property to the beneficiary but is physically unable to record the instrument within the required period or where there is a failure of prompt recording for another reason.

David Mandel writes to advocate a requirement that the TOD deed be recorded within six months after execution. That "would strike a reasonable balance between the desire for privacy and the advantages of exposing potential abuse by creating a public record that could be checked by someone who suspects undue influence on a grantor." Exhibit p. 20. He thinks if privacy is of paramount importance, the transferor should use an instrument that does not require recordation, such as a will or trust. He suggests that, even if the

Commission does not adopt such a requirement, the Commission should consider it as a fallback during the legislative process if concern surfaces about potential abuse of the TOD deed.

The staff thinks these are strong arguments. However, we are concerned about a person who, sometime after execution of a TOD deed, gets around to recording it and thinks that everything is all squared away, not knowing that the TOD deed will fail because the recordation is stale. This could be addressed, to some extent perhaps, by requiring any TOD deed form to include a prominent warning that the TOD deed must be recorded within the prescribed period.

Post Death Recordation

The Commission also considered the concept of permitting recordation of a TOD deed up to a week after the transferor's death, if the deed was executed within three days before death. This is the scheme applicable to severance of joint tenancy. See Code Civ. Proc. § 683.2. The Commission requested further information about the operation of such a rule.

The joint tenancy severance rule was enacted in 1985. We have been able to find only one reported case on its operation. In *Dorn v. Solomon*, 57 Cal. App. 4th 650, 67 Cal. Rptr. 2d 311 (1997), a husband and wife held the family home as joint tenants. After their separation, the estranged wife executed a deed transferring her interest in the property to an irrevocable trust; she died the next day. Nine days after her death the surviving spouse recorded an affidavit of death of the joint tenant. Twenty-five days after that the wife's trustee recorded the deed transferring the wife's interest to the trust. The husband sued to quiet title. The court of appeal held that the transferring instrument was not a valid severance of the joint tenancy because not recorded within one week after the wife's death as required by Code of Civil Procedure Section 683.2, and therefore the property passed to the husband by right of survivorship. "Here, the trustee did not record the deed until a month after Dixie died, and thus it was invalid under this section." 54 Cal. App. 4th at 653, 67 Cal. Rptr. 2d at 313.

In order for the TOD deed to function effectively, a title company must be able to insure title in the named TOD beneficiary based on the record. For that reason, we require recordation of a TOD deed. But if recordation is allowed up to a week after the transferor's death, will that unduly impair insurability? The net result of such a provision would be to make all real property of all decedents uninsurable for a one week period after the decedent's death due to the

possibility that the decedent may have executed a TOD deed before death that is recorded within one week after death.

Suppose on the transferor's deathbed the transferor executes a deed of the property to a bona fide purchaser who is unaware that there is an unrecorded TOD deed for the same property. If the TOD deed is recorded within one week of the transferor's death, does it pass title despite the BFP's claim, and regardless of whether the BFP's deed is recorded before the TOD deed? We would need to address this issue if we allow for post-death recordation of a TOD deed.

David Mandel writes to express his belief that "the allowance of a seven-day (or any) grace period for recording a TOD deed after the death of the grantor would be inadvisable, even if applied only to a deed executed within three days (or some short period) before death." Exhibit p. 19. He points out that deathbed estate planning is never recommended and is particularly susceptible to abuse and undue influence. He argues that there might be some utility to allowing deathbed severance of joint tenancy because of the adverse impact of joint tenancy on the rights of the parties [witness *Dorn v. Solomon*, above], but that is unnecessary in the case of a well drawn estate plan that includes a TOD deed. "The advantage of disallowing recordation of a TOD deed after death is avoidance of the possibility that the instrument's simplicity, appropriate under other circumstances, could facilitate abuse or undue influence in a deathbed situation." Exhibit p. 19.

The staff would stick with the Commission's initial decision to require recordation of a TOD deed before the transferor's death.

Interest Transferred

The Commission concluded that a TOD deed transfers all of the transferor's interest in the real property that is the subject of the deed. See Draft Section 5630 (effect of TOD deed at death). The reason for this is to facilitate the transfer — if the transferor retains an interest or creates a future interest, there will be questions of interpretation and a title company may be unwilling to insure title absent a court order confirming the specific interest acquired by the transferee. The TOD deed is in essence a quitclaim deed by the transferor.

Experience in Other Jurisdictions

The Commission directed the staff to pursue information about experience in jurisdictions that allow an owner to convey less than all of the owner's interest. Jurisdictions that allow a TOD deed of a fractional interest include Missouri

(deed of "any present or future interest in property" — Mo. Rev. Stat. §§ 461.003, 461.025), New Mexico (conveyance by owner that is "less than all of the record owner's interest" in the property — N.M. Stat. Ann. § 45-6-401), and Ohio ("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).

Unfortunately, Missouri is the only jurisdiction in which the law has been in place a sufficient length of time that there is much experience under it. But in one reported Missouri case, the transferor executed a beneficiary deed that conveyed a life estate in real property to the transferor's spouse and a remainder in fee simple to the transferor's son. The deed was challenged because it provided for transfer of the remainder on the death of the life tenant, not on the death of the transferor as required by the Missouri Nonprobate Transfers Law. The Missouri Court of Appeals, over a dissent, held that the beneficiary deed was ineffective. *Pippin v. Pippin*, 154 S.W. 3d 376 (2004). The holding was quickly overturned by legislation.

TOD Deed Subject to Life Estate

David Mandel argues for a limited exception to the rule that a TOD deed passes all of the transferor's interest in the property. He notes the common circumstance of a second marriage, where the transferor would like to be able to grant the surviving spouse a life estate in the property, with the remainder passing to the transferor's children of a previous marriage. This is precisely the fact situation in the *Pippin* case, cited above.

The advantage of using a TOD deed in this circumstance, rather than an intervivos deed, is that the TOD deed would be revocable in case the second marriage fails. "A license to use it in this way can be narrowly drawn to encompass a division solely between life and remainder interests without opening the door to other, more complicated dissections of title." Exhibit p. 20.

The staff is ambivalent about this one. We agree that the circumstance posed by Mr. Mandel is not uncommon. But it also is not free of problems. Working out the logistics of waste, etc., between life tenancy and remainder interests can be difficult, particularly where the children are resentful of their stepparent's continued occupancy of the family home. A trust might be a preferable instrument to fractionate interests in this way, where conditions can be imposed and a trustee may serve as an intermediary.

Consequence of Limitation in Deed

Suppose the transferor executes a deed that purports to transfer a limited interest in property, notwithstanding the rule that a TOD deed passes all of the transferor's ownership interest in the property. What is the result?

Another possibility is that the transferor makes a TOD deed that accurately describes the transferor's ownership interest — e.g., a half interest in the property as a tenant in common. Before the transferor dies, however, the transferor acquires the other half interest. Does the whole property pass, notwithstanding the limited description of the transferor's interest in the deed?

These cases would undoubtedly end up in court. The staff sees two possible outcomes — (1) the deed passes all of the transferor's interest notwithstanding the apparent or purported limitation in the deed, or (2) the deed is not an effective TOD deed and does not pass any of the transferor's interest in the property. The obvious third option — the deed passes just what it purports to pass — would not be permissible under the rule we have adopted.

The staff can see equities in either of the two likely outcomes, depending on the fact situation. The staff thinks on balance, though, that a transferor who puts a limitation in the deed on the property being transferred does that for a reason, and does not want the full interest in the property to pass to the TOD beneficiary. The staff thinks an outcome more likely to accord with the transferor's intent would be to void the deed and allow the property to pass under another instrument such as a will or trust, or by intestacy to the transferor's heirs. **The staff would incorporate that concept in the draft**:

> **§ 5630. Effect of TOD deed at death**
>
> 5630. (a) A transfer on death deed of real property transfers all of the transferor's interest in the property to the beneficiary on the transferor's death.
>
> (b) Property transferred to a beneficiary by a transfer on death deed is 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.
>
> (c) A transfer on death deed that purports to transfer less than all of the transferor's interest in the property is void, and the property does not pass to the beneficiary on the transferor's death pursuant to the transfer on death deed.

An alternate approach would be to back off the rule that a TOD deed passes all the transferor's interest in the property, and allow the transferor to fractionate the interest. The consequence would be that the case ends up in court and the transferor would not attain the hoped-for benefit of passing the property simply and without expensive court proceedings.

Effect of Transfer of Joint Tenancy Property

TOD Deed Executed by Joint Tenants

The Commission was unable to come to a conclusion as to the rule where joint tenants execute a TOD deed — does the interest of each joint tenant pass to the TOD beneficiary on the death of that joint tenant, or does the property first pass to the survivor and, on the death of the survivor, to the TOD beneficiary. The Commission decided to solicit public comment on the issue. See the Note to Draft Section 5636 (co-ownership):

> ☞ **Note.** The Commission particularly requests public comment on at least three alternative approaches to treatment of a TOD deed made by co-owners of property:
>
> 1. The interest of each co-owner passes to the named beneficiary on the death of that co-owner, with the TOD deed of the surviving co-owner being revocable.
> 2. The interest of each co-owner passes to the surviving co-owner and then to the named beneficiary on the death of the surviving co-owner, with the TOD deed of the surviving co-owner being either revocable or irrevocable.
> 3. There could be different rules depending on whether the property is held as joint tenancy, as community property, as community property with right of survivorship, or as tenancy in common.

David Mandel finds Approach #1 troubling with respect to joint tenancy (or community property with right of survivorship). He thinks people who hold property in that form have an expectation that the survivor of them will receive the whole property by right of survivorship and have full ownership of it. Approach #1 would frustrate the normal expectation.

He is also concerned about possible adverse consequences to the survivor, including co-ownership with a hostile co-tenant, vulnerability of the property for the co-owner's debts, adverse impact on refinancing options for a low-income senior (such as a reverse mortgage), and possible property tax reassessment.

He would prefer Approach #2 as a default for joint tenancy or community property with right of survivorship. An optional provision could permit the transferors to choose a different outcome, including the possibility of language in the TOD deed form that alerts them to the default rule and allows them to specify a different outcome. See Exhibit pp. 20-21.

TOD Deed Executed by Individual Joint Tenant

The situation where a TOD deed is executed by one of several joint tenants is different. The Commission concluded that the TOD deed should sever the joint tenancy effective on the TOD transferor's death, and pass the transferor's interest to the TOD beneficiary rather than to the surviving joint tenant. See Draft Section 5638 (effect of TOD deed on joint tenancy property).

The Executive Committee of the State Bar Trusts & Estates Section does not think this is an appropriate result. Their concerns are similar to Mr. Mandel's with respect to the consequences where joint tenants or spouses have jointly executed a TOD deed for joint tenancy property or community property with right of survivorship. Moreover, such a rule would create an inequity — the TOD transferor could receive property from the other joint tenant by right of survivorship, but the other joint tenant could not receive property from the TOD transferor by right of survivorship.

The State Bar Committee would simply not allow a TOD deed of joint tenancy property or community property with right of survivorship. They believe that the issues involved are too complex for a layperson to handle without assistance of legal counsel. They note that this would limit the application of the TOD deed:

> If the revocable TOD deed does not apply to JTWROS or CPWROS, it would apply mainly to single individuals, generally, elderly unmarried persons whose primary asset is his or her house, the individuals who sought to have this form of property transfer enacted.

Exhibit p. 18.

The State Bar Committee observes that a person holding property in joint tenancy or as community property with right of survivorship who wants to use a TOD deed could do it by first severing the joint tenancy (or CPWROS) and then executing a TOD deed for that person's interest in the property.

While the staff is skeptical about requiring a person in that circumstance to execute two documents instead of one, we do acknowledge it would help ensure

that the TOD transferor is intentionally changing the disposition of the property. The danger is that the TOD transferor may be unaware title is held in joint tenancy, with the result that the transferor does not record a separate severing instrument and the TOD deed fails.

Automatic Temporary Restraining Order

The Commission directed the staff to review whether any special provisions need to be added to ensure that a TOD deed works in conjunction with Family Code Section 2040 (automatic temporary restraining order in dissolution proceeding). The Commission suggested that treatment of the TOD deed might parallel the treatment of severance of joint tenancy property in this circumstance.

The ATRO included in a marital dissolution summons precludes either party from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of the court. Fam. Code § 2040(a)(4). However, that restraint does not preclude any of the following:

> (1) Creation, modification, or revocation of a will.
> (2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to the instrument, provided that notice of the change is filed and served on the other party before the change takes effect.
> (3) Elimination of a right of survivorship to property, provided that notice of the change is filed and served on the other party before the change takes effect.
> (4) Creation of an unfunded revocable or irrevocable trust.
> (5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with Section 260) of Division 2 of the Probate Code.

Fam. Code § 2040(b).

The section as written would appear to allow a person to revoke a TOD deed that names the person's estranged spouse as beneficiary, provided notice of the change is filed and served on the spouse. **The staff would codify this interpretation** by making its application to a TOD deed explicit:

> **Fam. Code § 2040 (amended)**
> 2040. ...
> (d) For the purposes of this section:
> (1) "Nonprobate transfer" means an instrument, other than a will, that makes a transfer of property on death, including a revocable trust, pay on death account in a financial institution, Totten trust, transfer on death registration of personal property,

transfer on death deed, or other instrument of a type described in Section 5000 of the Probate Code.

...

Comment. Section 2040 is amended to make explicit its application to a TOD deed. See Part 4 (commencing with Section 5600) of Division 5 (transfer on death deed) of the Probate Code.

Contest of TOD Deed

The Commission concluded that a contest of a TOD deed is premature if brought before the transferor's death, since the deed would be revocable until then. See Draft Section 5652 (time for contest of transfer pursuant to TOD deed).

David Mandel writes to urge that a pre-death contest be allowed. He argues that it is better to obtain declaratory relief as to fraud or undue influence in the procurement of a TOD deed while the transferor and other witnesses are still able to testify as to capacity, etc. A post-death challenge is likely to be much more complex, involving multiple parties including bona fide purchasers vying for title. "If a TOD deed is questionable due to alleged incapacity at the time of its execution, the sooner the better to settle the matter, when other evidence is more fresh and available." Exhibit p. 20.

This is analogous to the approach advocated in Streisand, *Rumors of Their Death Are Greatly Exaggerated: The Pre-Death Will Contest and Other Strategies in Conservatorship Litigation*, 12 California Trusts & Estates Quarterly 6 (Issue 1, Spring 2006). The author argues for and suggests strategies to achieve a pre-death will or trust contest, as well as a Probate Code Section 850 petition (the device we have selected for a TOD deed contest).

While these arguments have some attraction to the staff, **we are quite concerned** both about destructive family litigation during the transferor's life, as well as the potential for an explosion of declaratory relief litigation such as we have witnessed under the no contest clause declaratory relief statute.

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 subject to modification or revocation 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. See Draft Section 5632 (effect of TOD deed on rights during lifetime).

Who May Be a Beneficiary?

Is there any reason to restrict the type of person that may be named as a TOD beneficiary? 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.

The staff notes that pending legislation would direct the Law Revision Commission to review the operation and effectiveness of the provisions of the Probate Code restricting donative transfers to certain classes of individuals. See AB 2034 (Spitzer).

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 (emphasis added):

> **§ 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.

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

We would make clear 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, <u>transfer on death deed,</u> 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 5607 (transfer on death deed). This is a specific instance of the general principle stated in the section.

This provision will not only make clear that existing cross-references to Section 5000 include a TOD deed, it will also obviate the need to add some boilerplate language to the TOD deed statute itself — e.g., 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.

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 all of 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 a 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 (conviction of homicide) 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 5600). This is consistent with Section 253.

What happens if property 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 together 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).

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, we do 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. But that should not be allowed to disrupt the transferor's estate plan.

This has also concerned 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.

Other Restrictions or Conditions

The State Bar Committee would have the statute determine how restrictions or conditions can be placed on a beneficiary.

Some jurisdictions allow the TOD transferor to name a 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 California Land Title Association is concerned that ambiguities will force title companies to require a TOD beneficiary who wishes to transfer property to get further "off record" documentation before title insurance will be offered. In some cases the documentation may be difficult to obtain and a quiet title action will be necessary. "If a quiet title action is required, this can run into the tens of thousands of dollars for heirs that would have been much better off if the transferor had undertaken estate planning steps on the front end of the process."

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 complex estate plan.

Despite all this, the staff thinks TOD transferors will not refrain from putting conditions and restrictions in TOD deeds. But the staff's position is that should not be encouraged.

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.

If the Commission feels that, nonetheless, something needs to be said about conditions, we would be minimalist about it. For example:

> **§ 5630. Effect of TOD deed at death**
>
> 5630. (a) A transfer on death deed of real property transfers all of the transferor's interest in the property to the beneficiary on the transferor's death.
>
> (b) Property transferred to a beneficiary by a transfer on death deed is subject to any condition or restriction in the deed and

> 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.

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 Draft Section 5607) indicates that the deed makes a donative transfer to "a named 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).

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 than 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". **Our draft could be more clear** on this point:

§ 5607. "Transfer on death deed" defined

5607. (a) As used in this part, "transfer on death deed" means an instrument that makes a donative transfer of real property ~~to a named beneficiary~~ effective on the death of the transferor.

Comment. The beneficiary must be identified by name in the TOD deed. See Section [below] (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.

Subsequent Incapacity of Owner

The State Bar Committee would have the statute identify the parties who may revoke the TOD deed, i.e., the transferor or the transferor's conservator. **The staff agrees that the statute should be clear on this point.** See Draft Section 5632 (effect of TOD deed on rights during lifetime). See also the Comment to Draft Section 5620 (revocability of TOD deed):

> A TOD deed may be revocable in some circumstances even though the transferor lacks testamentary capacity. The transferor's agent under a durable power of attorney may not revoke a TOD deed unless expressly authorized. See Section 4264 (agent's authority that must be specifically granted). If the transferor's conservator seeks to revoke a TOD deed, the transferor's estate plan must be taken into account under general principles of substituted judgment, and notice must be given to a beneficiary. See Sections 2580-2586.

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. 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 a TOD deed. (The transferor evidently gets that language from the deed by which the transferor originally acquired the property.)

Based on this experience, the staff thinks it is worthwhile to address the issue. We would reverse the Colorado statute 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 5630 (effect of TOD deed at death). 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 question 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.

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 Section 5607 (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), 5607 (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. But 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 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.

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. 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:

> **§ 5632. Effect of TOD deed on rights during lifetime**
>
> 5632. Neither execution nor recordation of a transfer on death deed 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, 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 tenants, and a 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:

§ 5632. Effect of TOD deed on rights during lifetime

5632. Neither execution nor recordation of a transfer on death deed ~~affects~~ :

(a) 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, 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.

After-Acquired Title

Under the doctrine of after-acquired title, if a person that does not have title to property makes an encumbrance or transfer in anticipation of acquiring title, the encumbrance or transfer affects the property by operation of law when title is acquired. See, e.g., Civ. Code §§ 2390 (mortgage), 1106 (transfer). That situation could occur where the beneficiary of a decedent has an expectancy of receiving

property and desires to convert the expectancy to cash. Cf. Civ. Code § 2883 (agreement by beneficiary of probate estate to create a lien on estate property creates no lien until distribution of property; any expectancy of lien is extinguished by sale of the property in probate).

Under these general principles, a lien would attach, or property would be transferred, as of the date a TOD beneficiary succeeds to the property. But would that affect the rights of the TOD transferor's creditors, particularly creditors whose secured or unsecured right arose *after* the beneficiary mortgaged or transferred the expectancy?

The after acquired title doctrine ought not to affect rights of the TOD transferor's creditors. The beneficiary may mortgage or transfer only what the beneficiary ultimately receives from the transferor, subject to all the transferor's encumbrances and liabilities. If the beneficiary were permitted to create a priority in the beneficiary's own creditors, to the detriment of the transferor's creditors, that would negate the fundamental TOD deed principle that the transferor retains full ownership rights, and the beneficiary acquires no interest, until the transferor's death.

It appears to the staff that the provisions we have assembled so far on the effect of a TOD deed are adequate to address the after-acquired title issue, at least with respect to a secured creditor of the transferor. See Draft Sections 5630 (effect of TOD deed at death), 5632 (effect of TOD deed during lifetime), as they would be revised in this memorandum. We have added language to the Comments to these provisions with an explanation of how they interact with the after-acquired title doctrine.

Whether the general provisions are adequate to address the rights of an unsecured creditor of the TOD transferor is less clear. The answer depends ultimately on the Commission's position on the rights of an unsecured creditor. If the Commission adopts the staff's recommendation, an unsecured creditor will have no rights against TOD property, only a right of recovery against the beneficiary. In that circumstance there will be no after-acquired title issue. But if the Commission takes the position that an unsecured creditor of the transferor has rights against TOD property itself, then we may need to clarify the priorities by statute. See discussion of "Creditor Rights After Transferor's Death" below.

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 add some language to 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.

Reverse Mortgage

The language set out above would perhaps also give comfort to Bonnie Zera of Laguna Woods, who is concerned about the effect of a TOD deed on a reverse mortgage. Mary Pat Toups is also concerned:

> Elderly citizens who lack an adequate income might want to apply for a Reverse Mortgage. I have advised many clients to do so. Some elderly citizens already have a Reverse Mortgage. I hope this new Deed can be created in such a fashion that it will allow the use of a Reverse Mortgage.

Exhibit p. 14.

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. An acceleration clause would only be triggered by the death of the owner and the passage of title to the TOD deed beneficiary. This interpretation has been confirmed for us by the California Bankers Association.

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 beneficiary takes 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 on transfer of the property to a TOD beneficiary. It **would perhaps be helpful to add to the statute express language** on the point:

> **§ 5630. Effect of TOD deed at death**
>
> 5630. (a) A transfer on death deed of real property transfers all of the transferor's interest in the property to the beneficiary on the transferor's death.
>
> (b) Property transferred to a beneficiary by a transfer on death deed is 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 5632 (effect of TOD deed on rights during lifetime). Likewise, a transfer by the TOD beneficiary financed by a purchase money mortgage is subject to the priority of a recorded encumbrance on the transferor's interest notwithstanding Civil Code Section 2898 (priority of purchase money encumbrance).

If the beneficiary sells the property and the sale is financed by a purchase money mortgage or deed of trust, the secured creditor may be entitled to a special statutory priority. See Civ. Code § 2898 (purchase money encumbrance "has priority over all other liens created against the purchaser, subject to the operation of the recording laws"). That provision is consistent with our general approach to give primacy to the recorded instrument. We have added language to the Comment cross-referencing Section 2898.

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.

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.

Subdivision (b) limits the beneficiary's liability to the "value of the real property received" under the TOD deed. For the purpose of that determination, the value of the property is reduced by liens and encumbrances on the transferor's interest (see Section 5630 — effect of TOD deed at death), but is not reduced by liens against the beneficiary that attach to the property on transfer to the beneficiary.

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."

An Alternate Approach

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 — Section 850.

The staff notes that 2006 legislation would have increased the value of real property that may be taken without probate under the affidavit procedure from $20,000 to $100,000. See AB 2267 (Huff, Benoit, DeVore, Maze, Mountjoy, Strickland, and Villines). That measure failed passage in Assembly Judiciary Committee.

Priorities As Between Creditors of Transferor and Creditors of Beneficiary

Commissioner Regalia has suggested that it might be useful to include a general provision on priorities as between creditors of the transferor and creditors of the beneficiary. That concept has obvious attraction, although we wonder whether we can say anything that has enough content to be meaningful, without at the same time causing unintended consequences. Here is a stab at some general statutory language:

Priorities among creditors

Notwithstanding any other statute governing priorities among creditors, the following priorities apply with respect to real property transferred by TOD deed:

(a) A creditor of the transferor whose right is evidenced by an encumbrance or lien of record at the time of the transferor's death has priority over a creditor of the beneficiary, regardless of whether the beneficiary's obligation was created before or after the transferor's death and regardless of whether it is secured or unsecured, voluntary or involuntary, recorded or unrecorded.

(b) A creditor of the transferor whose right is not evidenced by an encumbrance or lien of record at the time of the transferor's death [to be determined, based on Commission's decision as to how unrecorded debts of transferor, whether secured or unsecured, are to be treated].

Comment. Subdivision (a) of this section makes clear that a creditor of the transferor has priority over a creditor of the beneficiary, at least to the extent the transferor's creditor has a lien or encumbrance of record at the time of the transferor's death. Thus the doctrine of after-acquired title (Civ. Code §§ 1106, 2930) does not create a priority in the beneficiary's creditors, even if the right of the transferor's creditor was created after the interest of the beneficiary's creditor. Likewise, the priority given by statute to a purchase money encumbrance by the beneficiary's transferee does not override the general priority of an encumbrance of record by a creditor of the transferor. See Civ. Code § 2898 (priority of purchase money encumbrance, subject to operation of recording laws).

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 5619 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. 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.

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 is pushing 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. 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's 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 identify 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.

> **5619. Effectuation of transfer pursuant to TOD deed**
>
> 5619. (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 asks, "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, the answer to the 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, not 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 must notify the Department of Health Services. That should be the TOD deed beneficiary although the statute is 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 5632.

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).

5619. Effectuation of transfer pursuant to TOD deed

5619. (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.

On balance, the staff thinks 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 executed 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 suggestion of David Mandel and provide a separate form for use by multiple transferors. Either of those options would result in a more complex form than that found here. 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 5634.

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 should 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.

Retroactivity

We have become aware that instruments purporting to be "beneficiary deeds" exist and have been recorded in California, perhaps using a form deed from another jurisdiction. How should the TOD deed law deal with a preexisting instrument that purports to make a nonprobate transfer of real property effective on the death of the transferor?

If the instrument conforms to the requirements of the TOD deed law, the instrument should be recognized as a TOD deed executed under the law. That would have the effect of applying all the provisions of the TOD deed law to the instrument, including revocability, creditor rights, and the like. The staff has no problem with that approach, since (1) it would clarify the rules applicable to the instrument, and (2) it would not frustrate the transferor's expectations since there would have been no relevant law in effect at the time of execution of the instrument on which the transferor could base any expectations.

That approach would also be consistent with the general approach of the Probate Code generally to make a revision of the law applicable retroactively, to the extent practicable. See Prob. Code § 3 (new law applies to all matters governed by it regardless of whether an event occurred or circumstance existed before, on, or after operative date of new law).

But the staff would not invalidate an instrument that does not comply with the TOD deed law. After all, it may still be a valid transfer on death under Probate Code Section 5000:

> 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,* 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.

Prob. Code § 5000(a) (emphasis added). Such an instrument would be governed by the applicable law in effect at the time, whatever that might be. See Prob.

Code § 3(g) (if new law does not apply to a matter that occurred before the operative date, old law continues to govern the matter notwithstanding amendment or repeal by new law).

We would add a transitional provision along the following lines:

> **Transitional provision**
>
> (a) This part applies to a transfer on death deed of a transferor who dies on or after January 1, 2008, whether the deed was executed before, on, or after January 1, 2008.
>
> (b) Nothing in this part invalidates an otherwise valid transfer under Section [to be provided].
>
> **Comment**. This section implements the general rule that a new provision of the Probate Code applies retroactively. Section 3. However, this part does not interfere with rights of a decedent's successors acquired by reason of the decedent's death before the operative date of this part. An instrument of a decedent that dies before the operative of this part, or an instrument of a decedent that dies after the operative date of this part but that was not executed in compliance with this part, is governed by other law. See Sections 3(g) (application of old law), [to be provided] (effect on other forms of transfer).

LOCATION OF STATUTE

The TOD deed statute is logically 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 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 a couple of corrective cross references. We could then use Part 4 for the TOD deed statute, commencing with 5600. **This is the approach we have taken in the attached Staff Draft statute.**

EVALUATION OF TOD DEED

Adequacy of Other Instruments

The California Land Title Association raises the question whether existing conveyancing instruments are inadequate, necessitating the TOD deed. Perhaps better educational opportunities for seniors and unsophisticated consumers on how best to achieve their goals would be more effective than creating a new form of title. "[E]xisting laws — with enhanced educational opportunities for seniors and other parties — might be a less hazardous path to take than creating what might be viewed in hindsight as 'drive through deeds' that harm those we seek to protect: seniors and unsophisticated real property owners."

The staff agrees that the Commission should take these considerations into account when it gets to the point of making a policy determination whether or not to recommend enactment of a TOD deed law in California.

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.

Arizona

The California Land Title Association has forwarded us information concerning the operation of the Arizona beneficiary deed statute, enacted in 2001. The Land Title Association of Arizona notes the following issues that have arisen in Arizona (most of which were cured in 2002 or are addressed by pending legislation):

- Beneficiaries unaware that they need to record a death certificate.
- The consequences if the beneficiary predeceases the transferor.

- The effect of a conveyance or encumbrance by the transferor after recordation of a beneficiary deed.
- Whether notice of the beneficiary deed must be given to the beneficiary.
- The effect of a beneficiary deed on property held in joint tenancy.
- How to designate successor beneficiaries.
- The effect of a deed to a class, such as heirs, rather than to a named beneficiary.
- Whether a transfer to a beneficiary who is married requires any special community property waiver.
- Can the beneficiary be an entity?
- How do multiple grantees hold title if the transferor fails to specify?

The staff believes we adequately address all of these issues. (With the exception of the community property issue, which is governed by general law. Property acquired by a married person by gift, bequest, devise, or descent is separate property. Fam. Code § 770. Arguably this language would be construed to cover acquisition by TOD deed). The Land Title Association of Arizona's legislative committee chair observes, "Bottom line — with the 2002 revisions, I think the beneficiary deed is working pretty well — at least, we haven't seen significant issues, other than the one LTAA is trying to fix this session. I think the bill is pretty comprehensive."

CLTA has also provided us an article by Ciupak and Forest, *Beneficiary Deeds: Potential & Problems*, Arizona Journal of Real Estate & Business p. 37 (Oct. 2001). This article, written by two attorneys when the Arizona legislation was first enacted, notes a number of potential problems (all of which we address), and indicates that, "Because of these and other potential complications, various title companies have stated that they will refuse to issue Beneficiary Deeds and that they will require owners to revoke Beneficiary Deeds before selling or refinancing the property." (These concerns have now been resolved, according to the Land Title Association of Arizona.) The authors conclude:

> In short, Beneficiary Deeds are ideal for small estates wishing to avoid probate and associated costs, such as a single parent with a modest estate leaving the property to children at death. The Beneficiary Deed does not provide for posthumous control of the property, as would a trust, but does transfer ownership at death in an uncomplicated manner. There may be a relatively small niche best suited for the Beneficiary Deed, but it appears the Beneficiary

> Deed can be an effective, inexpensive estate planning tool when used correctly.

It is the last caveat that concerns CLTA — "when used correctly".

Colorado

We have spoken with personnel from the Colorado Bankers Association who worked with the Colorado Bar Association to address concerns of financial institutions with the 2004 Colorado beneficiary deed legislation. The issues were worked out satisfactorily, and the statute appears to be operating smoothly, although there is not yet much experience under it.

New Mexico

The TOD deed appears to be functioning reasonably well in New Mexico. Many people execute 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 deal with.

Support for Concept

Kings/Tulare Area Agency on Aging

Sarah Shena, an attorney with the Kings/Tulare Area Agency on Aging, has given a number of reasons for adoption of the TOD deed concept. She indicates some of the inadequacies of existing transfer devices:

> Over my 20 years in practice I have often seen expensive living trusts, bought from trust mills by senior clients. Some of the trusts were useless, and all of them cost the senior too much of his/her very limited resources. These elders simply wanted to pass their homes to their children outside of probate. If revocable transfer-on-death deeds had been available, all of those clients could have used that much simpler method, and would not have been such easy prey for the trust salespeople.
>
> As time has shown, often these predators offer trusts only to obtain financial information later used to pressure the seniors to

> buy products or services that are entirely inappropriate under the circumstances.
>
> Even the seniors who deal with reputable attorneys are using significant amounts of their limited incomes paying for living trusts that wouldn't be necessary if California allowed beneficiary deeds.

Ms. Shena also notes that she is the only attorney in her agency, which offers free services to 65,000 elderly. She argues that real property should be able to pass free of probate in most instances. "Probate is a highly complicated and expensive process that can take years; the court supervision it involves is unnecessary in nearly all of the cases I see. My office cannot handle probate cases because of the time involved. A beneficiary deed would help simplify and expedite the transfer of homeowners' property without forcing heirs to endure the costly and time-consuming probate process."

Contra Costa County Advisory Council on Aging

The Contra Costa County Advisory Council on Aging has written to express its strong support for establishment of the TOD deed in California. The Council points out that, due to recent increases in home values, many of the county's senior citizens have homes they paid well under $100,000 for that are now valued from $500,000 to $1,000,000.

> Large portions of these citizens live on small pensions that leave them no discretionary funds for which to hire an attorney to draft a revocable trust to avoid probate. However, most, if not all, of these citizens wish to avoid the possibility of their estates being subjected to the probate court system where from $11,000 to $20,000 of their estate is eaten up in attorney's fees for simply passing a single family house to heirs.
>
> The Council is persuaded that California should join the seven other states that have adopted this very sensible provision to allow its citizens to transfer their private home to their heirs as they can now do with virtually all their other assets (such as brokerage accounts, bank accounts, mobile homes, etc.) by the simple process of naming one or more individual beneficiaries in a Revocable Transfer-on-Death Deed.

Exhibit p. 13.

Others in Support

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?"

Peter H. Pickslay works through the San Diego Volunteer Lawyers Program, primarily with elders and the indigent. He believes the TOD deed is needed by may clients who cannot afford the creation, or understand the complexities, of a trust. Exhibit p. 15.

James A. Giblin volunteers as an emeritus attorney with Contra Costa Senior Legal Services, mostly dealing with low-income seniors. Many of them own a home but live on social security and cannot afford the cost of a trust in order to pass their home free of probate. "The proposal for a simple, one page state-recognized beneficiary deed that we could use at the Senior centers and elsewhere would be a real benefit to California seniors." Exhibit p. 16.

The communications attached at Exhibit pages 15 and 22-23 also urge the Commission to recommend adoption of TOD deed legislation.

Concern About TOD Deed Concept

The California Land Title Association cautions that the TOD deed could lend itself to use by a real property owner without adequate counseling of an attorney or estate planner. No one wants to burden a real property transfer with

unnecessary costs. While the TOD deed may be a way to cheaply and quickly transfer property, it may not be the safest or most reliable method of accurately ensuring the transferor's wishes are carried out as the transferor intended. "If a transferor saves $1,000 up front to convey his or her real property but another $10,000 is spent in attorney's fees after his or her death determining what was actually intended by the transferor, what has really been accomplished with the creation of a TOD deed process?"

CLTA also notes that historically, "fast and easy" conveyancing documents (such as a quit claim deed) are often the instrument of choice of con artists who prey on seniors and unsophisticated consumers. Because the quit claim deed is easy to use, cheap to record, and doesn't require the use of an attorney, it makes it easy for fraud to be perpetrated. CLTA expresses the concern that the TOD deed — because of the ease and simplicity of use associated with it — may lend itself to similar abuse. The ease and simplicity of use, without benefit of legal or financial advice, "simply shifts much of the work in estate planning from the front end — where it belongs — to the back end of the process, long after the transferor is dead and his or her intent difficult to sort out."

CLTA strongly urges the Commission to request feedback from district attorneys, law enforcement officers, and other related groups on what they think about the use of the TOD deed in California and what the potential for misuse would be. The staff thinks this is a good idea, and we will seek their comments on any proposal the Commission may develop. Also, experience in other jurisdictions that have enacted TOD deed legislation may be instructive.

Staff Analysis

Summary of Pros and Cons

Advocates of adoption of the TOD deed have pointed out 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.

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 would have to be recorded before the transferor's death to be effective. There is no such requirement in the case of a transfer of real property by inter vivos trust. We have also tentatively approved 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.

The most troubling set of issues raised concerning the TOD deed, in the staff's opinion, relates to the likelihood of uninformed self-help use of the device, leading to 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 facilitating manipulation and financial abuse against the transferor. It provides a seductively simple transfer of 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 agent under a durable power of attorney, executed a TOD deed 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, bank accounts, 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 during the summer, review comments this fall, and develop a final report on the matter for submission to the Legislature by January 1, 2007.

Respectfully submitted,

Nathaniel Sterling
Executive Secretary

Exhibit

PROPOSED LEGISLATION

Prob. Code §§ 5600-5604 (repealed). Nonprobate transfer to former spouse

SEC. ___. Part 4 (commencing with Section 5600) of Division 5 of the Probate Code is repealed.

Comment. Former Sections 5600-5604 are relocated to Chapter 3 (commencing with Section 5040) of Part 1 of Division 5 to make room for new Part 4 (commencing with Section 5600), relating to the transfer on death deed.

Prob. Code §§ 5600-xxxx (added). Transfer on death deed

SEC. ___. Part 4 (commencing with Section 5600) is added to Division 5 of the Probate Code, to read:

PART 4. TRANSFER ON DEATH DEED

CHAPTER 1. GENERAL PROVISIONS

Article 1. Short Title and Application

§ 5600. Short title

5600. This part shall be known and may be cited as the California TOD Deed Law.

Comment. Section 5600 is intended for convenience of reference.

Article 2. Definitions

§ 5607. "Transfer on death deed" defined

5607. (a) As used in this part, "transfer on death deed" means an instrument that makes a donative transfer of real property to a named beneficiary effective on the death of the transferor.

(b) A transfer on death deed may also be known as a "TOD deed".

Comment. Section 5607 adopts TOD deed terminology, rather than the "beneficiary deed" terminology used in some jurisdictions that have enacted comparable legislation.

A TOD deed may be made for real property or any interest in real property. Cf. Section 68 ("real property" includes leasehold interest in real property).

For construction of a TOD deed see Part 1 (commencing with Section 21101) of Division 11 (rules for interpretation of instruments).

See also Sections 24 (“beneficiary” defined), 45 (“instrument” defined), 81 (“transferor” defined).

CHAPTER 2. EXECUTION AND REVOCATION OF TOD DEED

Article 1. Execution

§ 5610. Capacity to make TOD deed

5610. An owner of real property that has testamentary capacity may make a transfer on death deed of the property.

Comment. Under Section 5610, testamentary, rather than contractual, capacity is required for execution of a transfer on death 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 will). 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).

§ 5612. Execution of TOD deed

5612. (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.

Comment. Section 5612 prescribes execution requirements. A transfer on death deed is not invalid because it does not comply with the requirements for execution of a will. See Section 5000(a) (provision for nonprobate transfer on death in written instrument).

A properly executed transfer on death deed is ineffective unless recorded before the transferor’s death. See Section 5616 (recordation of TOD deed).

§ 5614. Delivery and acceptance of TOD deed

5614. (a) The transferor need not deliver a transfer on death deed to the beneficiary during the transferor’s lifetime.

(b) The beneficiary need not accept a transfer on death deed from the transferor during the transferor’s lifetime.

Comment. Subdivision (a) of Section 5614 makes clear that, notwithstanding the Law Revision Commission Comment that Section 5000 does not relieve against the delivery requirement of the law of deeds, delivery of a TOD deed is not necessary. The recordation requirement for a TOD deed makes delivery unnecessary. See Section 5616 (recordation of TOD deed). Consideration is not required for a TOD deed. See Civ. Code § 1040.

Subdivision (b) states the rule that, unlike an inter vivos deed, a TOD deed does not require acceptance. Acceptance of a donative transfer is presumed. Disclaimer procedures are available to a beneficiary. See Section 56xx [to be drafted].

A TOD deed has no effect, and confers no rights on the beneficiary, until the transferor’s death. See Section 5632 (effect of TOD deed on rights during lifetime).

§ 5616. Recordation of TOD deed

5616. 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. Section 5616 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 by the transferor, for example within 30 or 60 days after execution. Considerations include:

• Prompt recording could help expose fraud or undue influence before the transferor dies. However, such a requirement could frustrate the transferor's desire to maintain the privacy of the disposition.

• Prompt recording would be evidence of the transferor's intent. However, such a requirement could frustrate the intent of a transferor who seeks to pass the property to the beneficiary but is physically unable to record the instrument within the required period or where there is a failure of prompt recording for another reason.

§ 5617. Recordation of multiple TOD deeds

5617. 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. Section 5617 gives effect to the last executed of TOD deeds recorded before the transferor's death. A TOD deed is executed by signing, dating, and acknowledging before a notary public. See Section 5612 (execution of TOD deed). Execution is complete when the transferor acknowledges the deed before a notary public, not when the deed is signed and dated.

Under this section, recordation of a TOD deed has the effect of revoking an earlier executed TOD deed, regardless of the order of recordation of the deeds. Subsequent revocation of the later executed deed does not revive an earlier executed deed. See Section 5624 (effect of revocation). Instead, the property passes pursuant to lapse principles. See Section 56xx [to be drafted].

§ 5619. Effectuation of transfer pursuant to TOD deed

5619. The beneficiary 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. Section 5619 establishes that a TOD deed beneficiary 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).

Article 2. Revocation

§ 5620. Revocability of TOD deed

5620. (a) A transferor that has testamentary capacity may revoke a transfer on death deed at any time.

(b) A revocation of a transfer on death deed is effective notwithstanding a provision in the deed that purports to make the deed irrevocable.

Comment. Section 5620 states the rule that a transfer on death deed is revocable. The transferor's right of revocation may be subject to a contractual or court ordered limitation.

A TOD deed may be revocable in some circumstances even though the transferor lacks testamentary capacity. The transferor's agent under a durable power of attorney may not revoke a TOD deed unless expressly authorized. See Section 4264 (agent's authority that must be specifically granted). If the transferor's conservator seeks to revoke a TOD deed, the transferor's estate plan must be taken into account under general principles of substituted judgment, and notice must be given to a beneficiary. See Sections 2580-2586.

§ 5622. Revocation of TOD deed

5622. (a) An instrument revoking a transfer on death deed shall be executed and recorded before the transferor's death in the same manner as execution and recordation of 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) of Section 5622 a revoking instrument must be signed, dated, acknowledged, and recorded by a transferor or a person acting at the transferor's direction. See Section 5612 (execution of TOD deed). The revoking instrument must be recorded in the county in which the property is located. See Section 5616 (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 5632 (effect of TOD deed on rights during lifetime).

§ 5624. Effect of revocation

5624. Revocation of a transfer on death deed does not revive an instrument earlier revoked by recordation of that deed.

Comment. Under Section 5624, the failure of a recorded TOD deed to effectuate a transfer does not revive an earlier executed deed. Cf. Section 5617 (recordation of multiple deeds). Instead, the property passes pursuant to lapse principles. See Section 56xx [to be drafted].

CHAPTER 3. EFFECT OF TOD DEED

§ 5630. Effect of TOD deed at death

5630. (a) A transfer on death deed of real property transfers all of the transferor's interest in the property to the beneficiary on the transferor's death.

(b) Property transferred to a beneficiary by a transfer on death deed is 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 subdivision (a) of Section 5630, whatever interest the transferor owned at death in the TOD property 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, the transferor's entire less than fee ownership interest passes to the beneficiary on the transferor's death.

Under subdivision (b), 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 5632 (effect of TOD deed on rights during lifetime). Likewise, if an obligation of the beneficiary attaches to the property by as a result of the doctrine of after-acquired title, that obligation is subordinate to any prior limitations on the transferor's interest in the property.

§ 5632. Effect of TOD deed on rights during lifetime

5632. Neither execution nor recordation of a transfer on death deed 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. Section 5632 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 5620 (revocability of TOD deed). The beneficiary's joinder, consent, or agreement to any transaction by the transferor is unnecessary and irrelevant. Thus if an obligation of the beneficiary incurred during the transferor's life attaches to the property on transfer as a result of the doctrine of after-acquired title, that obligation is subordinate to prior limitations on the transferor's interest in the property.

The reference to agent or other fiduciary in this section 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. See, e.g., Section 4264 (agent's authority that must be specifically granted).

§ 5634. Conflicting dispositive instruments

5634. If a transfer on death deed and another instrument, each of which purports to dispose of the same property, are both recorded before the transferor's death:

(a) If the other instrument makes a revocable disposition of the property, the later executed of the transfer on death deed or the other instrument is the operative instrument.

(b) If the other instrument makes an irrevocable disposition of the property, the other instrument and not the transfer on death deed is the operative instrument.

Comment. Section 5634 establishes the general rules governing a conflicting disposition of property that is subject to a recorded TOD deed. A TOD deed has no effect unless recorded. Section 5616 (recordation of TOD deed). A conflicting instrument may not affect a TOD deed under this section unless recorded before the transferor's death.

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 a recorded TOD deed before death. See Section 5620 (revocability of TOD deed).

Absent a total disposition of the property before death, the TOD deed passes property subject to conflicting interests of record. See Section 5630 (effect of TOD deed at death).

§ 5636. Co-ownership

5636. (a) Co-owners of real property may jointly make a transfer on death deed of the property. The property passes [in a manner to be determined].

(b) If fewer than all co-owners join in a transfer on death deed, the property passes [in a manner to be determined]. This subdivision does not apply to property held as joint tenancy or community property.

Comment. For special rules governing survivorship rights in joint tenancy and community property, see Sections 5638 (effect of TOD deed on joint tenancy property) and 5640 (effect of TOD deed on community property).

☞ **Note.** The Commission particularly requests public comment on at least three alternative approaches to treatment of a TOD deed made by co-owners of property:

1. The interest of each co-owner passes to the named beneficiary on the death of that co-owner, with the TOD deed of the surviving co-owner being revocable.
2. The interest of each co-owner passes to the surviving co-owner and then to the named beneficiary on the death of the surviving co-owner, with the TOD deed of the surviving co-owner being either revocable or irrevocable.
3. There could be different rules depending on whether the property is held as joint tenancy, as community property, as community property with right of survivorship, or as tenancy in common.

§ 5638. Effect of TOD deed on joint tenancy property

5638. If a transfer on death deed of joint tenancy property is made without the joinder of all joint tenants:

(a) The death of the transferor severs the joint tenancy as to the interest of the transferor.

(b) The interest of the transferor passes pursuant to the transfer on death deed and not by right of survivorship pursuant to the joint tenancy.

Comment. Section 5638 addresses the conflict between a TOD deed and an earlier joint tenancy in the property, where fewer than all joint tenants join in the TOD deed. If all joint tenants join in the TOD deed, the disposition of the property is governed by Section 5636 (co-ownership).

Because a TOD deed is revocable until the transferor's death, execution and recordation of a TOD deed does not sever a joint tenancy unless the transferor dies with the TOD deed still in effect. If another joint tenant predeceases the TOD transferor, the TOD transferor takes the other joint tenant's interest by right of survivorship, and the combined interest passes pursuant to the TOD deed.

Death of the TOD transferor would likewise terminate the survivorship right in community property with right of survivorship. See Section 5640 (effect of TOD deed on community property); cf. 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.")

§ 5640. Effect of TOD deed on community property

5640. (a) A transfer on death deed of community property made without the written joinder or consent of the transferor's spouse is effective only as to the transferor's one-half interest in the property.

(b) A transfer on death deed of community property with right of survivorship made without the written joinder or consent of the transferor's spouse is governed by the rules applicable to joint tenancy property under Section 5638.

Comment. Subdivision (a) of Section 5640 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.

Under subdivision (b), death of the TOD transferor terminates the survivorship right in community property with right of survivorship. See Section 5638 (effect of TOD deed on joint tenancy property); cf. 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.")

CHAPTER 4. CONTEST OF TOD DEED

§ 5650. Contest of transfer pursuant to TOD deed

5650. (a) The transferor's personal representative or an interested person may contest the validity of a transfer of real property pursuant to a transfer on death deed under Part 19 (commencing with Section 850) of Division 2.

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

Comment. Section 5650 incorporates the procedure of Sections 850-859, relating to a conveyance or transfer of property claimed to belong to a decedent or other person. A person adversely affected by a TOD deed has standing to contest the transfer. Cf. Section 48 ("interested person" defined).

Grounds for contest may include but are not limited to lack of capacity of the transferor (Section 5610), improper execution or recordation (Sections 5612-5616), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350). See also Section 5656 (fraud, undue influence, duress, mistake, or other invalidating cause).

Recordation of a lis pendens within 40 days after the TOD transferor's death preserves remedies for the contestant. See Section 5654 (remedies for contest of transfer pursuant to TOD deed).

§ 5652. Time for contest of transfer pursuant to TOD deed

5652. (a) A contest proceeding may not be commenced before the transferor's death.

(b) A contest proceeding shall be commenced within the earlier of the following times:

(1) Three years after the transferor's death.

(2) 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.

Comment. Section 5652 limits the contest of a TOD deed to a post death challenge. A challenge before the transferor's death would be premature since a TOD deed may be revoked at any time until the transfer occurs by reason of the transferor's death.

§ 5654. Remedies for contest of transfer pursuant to TOD deed

5654. If the court in a contest proceeding determines that a transfer of real property pursuant to a transfer on death deed is invalid, the court shall order the following relief:

(a) If the proceeding 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 proceeding was commenced more than 40 days after the transferor's death, the court shall grant appropriate relief but the court order shall not affect the rights in the property of a purchaser or encumbrancer for value and in good faith acquired before commencement of the proceeding and recordation of a lis pendens.

Comment. Section 5654 draws on the 40-day periods applicable to disposition of an estate without administration under Sections 13100 (affidavit procedure for collection or transfer of personal property) and 13151 (court order determining succession to property).

§ 5656. Fraud, undue influence, duress, mistake, or other invalidating cause

5656. Nothing in this article limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a transfer of real property by a transfer on death deed.

Comment. Section 5656 is drawn from Section 5015 (nonprobate transfer of community property).

CONFORMING REVISIONS

Prob. Code § 4264 (amended). Authority that must be specifically granted

4264. A power of attorney may not be construed to grant authority to an attorney-in-fact to perform any of the following acts unless expressly authorized in the power of attorney:

(a) Create, modify, or revoke a trust.

(b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.

(c) Make or revoke a gift of the principal's property in trust, by transfer on death deed, or otherwise.

(d) Exercise the right to make a disclaimer on behalf of the principal. This subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.

(e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.

(f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.

(g) Make a loan to the attorney-in-fact.

Comment. Subdivision (c) of Section 4264 is revised to make explicit its application to a TOD deed. See Part 4 (commencing with Section 5600) of Division 5 (transfer on death deed). Subdivisions (d) and (f) would likewise apply to a TOD deed. Cf. Section 24 ("beneficiary" means person to whom donative transfer of property is made).

Prob. Code § 5000 (amended). Nonprobate transfers

5000. (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 revised to make explicit its application to a TOD deed. See Section 5607 (transfer on death deed). This is a specific instance of the general principle stated in the section.

Prob. Code §§ 5040-5048 (added). Nonprobate transfer to former spouse

SEC. ___. Chapter 3 (commencing with Section 5040) is added to Part 1 of Division 5 of the Probate Code, to read:

CHAPTER 3. NONPROBATE TRANSFER TO FORMER SPOUSE

Comment. Sections 5040-5048 continue former Sections 5600-5604 without change, other than numbering. The sections are relocated to make room for new Part 4 (commencing with Section 5600) of Division 5, relating to TOD deeds.

5040. (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.

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

5042. (a) Except as provided in subdivision (b), a joint tenancy between the decedent and the decedent's former spouse, created before or during the marriage, is severed as to the decedent's interest if, at the time of the decedent's death, the former spouse is not the decedent'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 sever a joint tenancy in either of the following cases:

(1) The joint tenancy is not subject to severance by the decedent at the time of the decedent's death.

(2) There is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

(c) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under this section or who lacks knowledge of a severance under this section.

(d) For purposes of this section, property held in "joint tenancy" includes property held as community property with right of survivorship, as described in Section 682.1 of the Civil Code.

5044. (a) Nothing in this part affects the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury under the laws of this state that states all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent's death.

(3) A description of the real property transferred to the affiant or declarant by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship.

(4) Either of the following, as appropriate:

(A) The affiant or declarant is the surviving spouse of the decedent.

(B) The affiant or declarant is not the surviving spouse of the decedent, but the rights of the affiant or declarant to the described property are not affected by Section 5040 or 5042.

(b) A person relying on an affidavit or declaration made pursuant to subdivision (a) has no duty to inquire into the truth of the matters stated in the affidavit or declaration.

(c) An affidavit or declaration made pursuant to subdivision (a) may be recorded.

5046. Nothing in this part is intended to limit the court's authority to order a party to a dissolution or annulment of marriage to maintain the former spouse as a beneficiary on any nonprobate transfer described in this part, or to preserve a joint tenancy in favor of the former spouse.

5048. (a) The operative date of this chapter (formerly Part 4, commencing with Section 5600) is January 1, 2002.

(b) Except as provided in subdivision (c), this chapter applies to an instrument making a nonprobate transfer or creating a joint tenancy whether executed before, on, or after the operative date of this chapter.

(c) Sections 5040 and 5042 do not apply, and the applicable law in effect before the operative date of this chapter applies, to an instrument making a nonprobate transfer or creating a joint tenancy in either of the following circumstances:

(1) The person making the nonprobate transfer or creating the joint tenancy dies before the operative date of this chapter.

(2) The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before the operative date of this chapter.

Prob. Code § 5302 (amended). Multiple party account

5302. Subject to Section ~~5600~~ 5040:

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more parties, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole party or of the survivor of two or more parties, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a Totten trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, cannot be changed by will.

Comment. Section 5302 is amended to reflect the renumbering of former Section 5600 as Section 5040.

Advisory Council on Aging

AREA AGENCY ON AGING
2530 Arnold Drive, Suite 300
Martinez, California 94553-4359
(925) 335-8700
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Contra Costa County

April 19, 2006

Nathaniel Sterling, Executive Director
California Law Revision Commission
4000 Middlefield Rd., Rm. D-1
Palo Alto, CA 94303-4739

RE: Revocable Transfer-on-Death Deeds

Dear Mr. Sterling:

On behalf of the Contra Costa County Advisory Council on Aging, I write to express our strong support for the establishment of a Revocable Transfer-on-Death Beneficiary Deed in California pursuant to Assembly Bill "AB12 Beneficiary Deeds." Contra Costa County is one of those counties in California where home prices have soared in recent years. Many of our senior citizens find themselves with homes valued between $500,000 and $1,000,000 or more, for which they paid well under $100,000, sometimes as little as $12,000. Large portions of these citizens live on small pensions that leave them no discretionary funds for which to hire an attorney to draft a revocable trust to avoid probate. However, most, if not all, of these citizens wish to avoid the possibility of their estates being subjected to the probate court system where from $11,000 to $20,000 of their estate is eaten up in attorney's fees for simply passing a single family house to heirs.

The Council is persuaded that California should join the seven other states that have adopted this very sensible provision to allow its citizens to transfer their private home to their heirs as they can now do with virtually all their other assets (such as brokerage accounts, bank accounts, mobile homes, etc.) by the simple process of naming one or more individual beneficiaries in a Revocable Transfer-on-Death Deed.

I ask that this letter become part of the record of the proceedings before the California Law Revision Commission in the matter of the Revocable Transfer-on-Death Deed hearings, and urge the Commission to return a favorable recommendation to the legislature on this matter.

Sincerely,

Vernon Jones

Vernon Jones, President

MARY PAT TOUPS
EMERITUS ATTORNEY

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May 8, 2006

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

Re: AB12 Beneficiary Deeds

Dear Mr. Sterling,

At the conclusion of the most recent meeting of the Commission, I expressed my concerns regarding owners of condominiums and co-operatives, since many elderly citizens buy these homes which are cheaper than other homes. My area has about 17,000 such homeowners, all elderly. They appear to be interested in a possible Revocable Transfer-on-Death Deed, because many cannot afford to pay a lawyer for a Trust, and they want their loved ones to avoid the costs of Probate.

I also am concerned about the Reverse Mortgage as to this new Deed. Elderly citizens who lack an adequate income might want to apply for a Reverse Mortgage. I have advised many clients to do so. Some elderly citizens already have a Reverse Mortgage. I hope this new Deed can be created in such a fashion that it will allow the use of a Reverse Mortgage.

I am delighted with the work of the Commission. I have always admitted I am not an expert at anything. I enjoy my work serving Senior Citizens under the Older Americans Act. I am glad I told my Assemblyman Chuck DeVore about the states that already have a TOD Deed statute, and that California needs such a statute. I am especially happy that the Commission, and its staff, are composed of such experts who grasp the significance of this study. California is lucky to have you all.

Sincerely,

Mary Pat Toups

Mary Pat Toups

cc: Brian Hebert

Subject: Transfer Upon Death Deeds
Date: May 13, 2006 2:25:19 PM PDT
To: sterling@clrc.ca.gov

I urge that Transfer Upon Death Deeds be legitimized in California.

Alan F. Marblestone, SBN 44564
Emeritus Attorney

Subject: AB12
Date: May 15, 2006 11:49:52 AM PDT
To: sterling@clrc.ca.gov

Dear Mr. Sterling,

I am an Emeritus Attorney and have been such for many years. I work through the San Diego Volunteer Lawyers Program, primarily with Elders and the Indigent.

I am writing you to urge your support of AB12, Nonprobate Transfers bill which legislation is truly needed by many clients I have come across who either cannot afford the attorney fees connected with the creation of a trust or who are not able to fully comprehend the complexities of such. There are many such citizens and taxpayers in San Diego and their number is increasing daily. Let's see if we can help make life a little simpler and less expensive for them.

The probate and estate planning lawyers think they will be losing money and clients, but the people this legislation is designed to help will never be their clients because they cannot afford to be.

Thank you very much for your support.

Sincerely, Peter H. Pickslay, Emeritus Attorney

Date: May 18, 2006 5:08:25 PM PDT
To: sterling@circ.ca.gov
Cc: toupsmp@fea.net, ccsls@jps.net, assemblymember.hancock@assembly.ca.gov
Subject: Revocable Transfer-on Death Beneficiary Deed Legislation

Mr. Nathaniel Sterling
Executive Secretary of the California Law Revision Commission
4000 Middlefield Road, Room D-one
Palo Alto, CA 94303-4739

Re: AB 12, DeVore, Legislation for study of revocable beneficiary deeds for real property in California

Dear Mr. Sterling:

For the last three years I have volunteered as a California State Bar Emeritus Attorney with Contra Costa Senior Legal Services. I spend several days each month providing no cost legal advice at Senior Centers in Antioch, Walnut Creek and, more recently, Pleasant Hill, California.

Most of my time is spend with low income seniors. Some are fortunate to own a home. But many of the home-owners rely solely on social security checks to pay their remaining living expenses. Since their sole significant asset is often their home, it is understandable that such seniors would want to have a low cost way to leave that home to beneficiaries, often their children, when they pass away. Unfortunately, it is a real financial strain for many of these seniors to bear the expenses of putting their homes in a Living Trust to avoid the unnecessarily high costs of probate. A "few" hundred or a "few" thousand dollars is a lot of money to many seniors. Especially those who live on social security checks of less than one thousand dollars each month. And there are many!

As I understand it, AB 12 requires a study of whether there should be legislation enabling simple, revocable beneficiary deeds recognizing the transfer of homes on the death of the grantor, thus avoiding the need for probate or use of a living trust. I fully support such legislation. And I commend the efforts of those who have been actively pursuing such deeds, especially Emeritus Attorney Mary Pat Toups. When I heard of her work, I immediately appreciated that the proposed beneficiary deeds would satisfy a very real and long felt need for California seniors. The proposal for a simple, one page state-recognized beneficiary deed that we could use at the Senior centers and elsewhere would be a real benefit to California seniors.

There is no good reason to oppose such beneficiary deeds in California. I would expect some opposition from attorneys and others who may have vested interests in the status quo. But I think it can be pointed out that many of the people who would benefit from a simple State-approved deed, mostly seniors, probably could not afford their services anyhow.

I hope the California Law Revision Commission will give favorable support to revocable beneficiary deeds as soon as possible.

Sincerely,

James A. Giblin
Emeritus Attorney

TO: Nathaniel Sterling, CLRC Staff (By E-Mail and Regular Mail)

FROM: Charlotte K. Ito
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Date: May 18, 2006

Re: Revocable Transfer on Death Deeds

ISSUE:

Should the revocable transfer on death (TOD) deed apply to properties held in joint tenancy with rights of survivorship ("JTWROS") or community property with rights of survivorship ("CPWROS")?

SECTION POSITION:

No, the revocable TOD deed should not be used for properties held in JTWROS or CPWROS.

EXECUTIVE COMMITTEE VOTE:

21 votes in favor of and 4 votes in opposition to a rule disallowing revocable TOD deed from applying to properties held in JTWROS or CPWROS.

ANALYSIS:

In the context of a JTWROS, the revocable TOD deed combines 2 legal actions, or steps, in 1 document: (1) severance of a present interest in joint tenancy upon recordation; and (2) testamentary transfer of the deceased joint tenant's interest upon his or her death. While seemingly expedient, combining these 2 steps creates complexity in determining the requisite capacity for the revocable TOD deed and managing the expectations of the surviving joint tenant.

As discussed in ExComm's April 5, 2006 memorandum, if the revocable TOD deed severs a JTWROS upon recordation, a present interest in property is affected so that DPCDA (the Due Process in Competence Act, Probate Code Sections 810-813) should apply. If the revocable TOD deed does not sever a JTWROS and the transfer occurs at death, the testamentary standard under Section 6100.5 should apply. Such a dual capacity standard, depending on the titling of the individual's property, fails to achieve the basic premise of the revocable TOD deed, simplicity.

If the dual capacity standard is rejected in favor of a single testamentary capacity standard, the revocable TOD deed would sever a JTWROS upon the death of the first to die instead of at the time of recordation. Under this scenario, a different problem is created with regard to the surviving joint tenant's expectation upon survivorship. If the deceased joint tenant's one-half interest is conveyed to a revocable TOD beneficiary upon death, the surviving joint tenant would become a tenant in common with the revocable TOD deed beneficiary. The surviving joint tenant likely would not have anticipated such a result. Situations could arise where the revocable TOD beneficiary could assert his or her rights in such a way to provoke conflict with the surviving joint tenant. ExComm believes the revocable TOD deed will thus create a trap for married individuals who believe it to be a true will substitute post-death, that is, that the revocable TOD deed conveyance will occur at the death of the second spouse to die, not the first.

If, however, the deceased joint tenant's one-half interest is not conveyed at his or her death, the surviving joint tenant could give the entire property to someone other than the revocable TOD deed beneficiary designated by the deceased joint tenant. The deceased joint tenant's intent and actions to transfer his or her interest to his chosen beneficiary would therefore fail. ExComm echoed the CLRC staff concern that allowing for a revocable TOD deed override without severance of the joint tenancy at recordation would preserve the TOD transferor's right to take all the property by survivorship but eliminates the other joint tenant's opportunity to take all of the property by survivorship.

ExComm debated these issues at great length over 3 meetings, and this fact alone indicates that these issues are too complex for a layperson to handle without assistance of legal counsel. ExComm concluded that these complexities were due, in large part, by the attempt to combine 2 steps in 1 legal transaction. If an individual holding property in JTWROS desires to use the revocable TOD deed, he or she should sever the joint tenancy first and then execute the revocable TOD deed. The revocable TOD deed will apply to non-jointly held property. Keeping the 2 steps separate obviates having a dual capacity standard for the revocable TOD deed depending on how title is held and clarifies the surviving joint tenant's expectations on survivorship upon death.

This analysis applies to property held in CPWROS. If the revocable TOD deed does not apply to JTWROS or CPWROS, it would apply mainly to single individuals, generally, elderly unmarried persons whose primary asset is his or her house, the individuals who sought to have this form of property transfer enacted.

cc: Tracy M. Potts, Chair, State Bar Trusts & Estates Executive Committee
John A. Hartog, Vice-Chair, State Bar Trusts & Estates Executive Committee
Christopher M. Moore, Co-Chair, CLRC Subcommittee
James B. MacDonald, Vice Chair, Estate Planning Subcommittee

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May 2006

Further comments on the discussions regarding transfer on death deeds

What follows are the personal opinions of the writer, not necessarily those of the Senior Legal Hotline or Legal Services of Northern California. But the issues have been discussed among various advocates at SLH and others in the senior legal services community.

1. I believe the allowance of a seven-day (or any) grace period for recording a TOD deed after the death of the grantor would be inadvisable, even if applied only to a deed executed within three days (or some short period) before death.

Deathbed estate planning is never a recommended choice and is rife with potential for abuse and undue influence. Nevertheless, at times it happens, of course. The analogy cited in the discussion (Memorandum 2006-16, page 9) is severance of a joint tenancy deed. That may or may not be a good idea, but even if so, there's a clear distinction between it and TOD deeds.

Joint tenancy is an extremely convenient and common way of holding title to property, usually from the moment of acquisition – and its impact on contrary testamentary intent as expressed in a will or trust is frequently and dramatically misunderstood. Clients of ours are frequently incredulous when we explain that a JT with right of survivorship prevails over even an explicit bequest in a will or trust. A deathbed severance could well have drastic consequences and may therefore be a justified response to the sudden realization of this reality and perhaps should therefore be permitted,

The whole idea of a TOD deed, on the other hand, is to engage proactively and consciously in advance planning, after the initial acquisition of a subject property and consistent with clear testamentary choices. We expect that the vast majority of people who use it will understand its straightforward operation. A deathbed realization that an existing TOD deed – or lack of one -- is contrary to one's wishes is therefore far less likely to occur.

Moreover, since a TOD deed is mostly meant to be a substitute for a will or trust, a means to avoid the probate requirements of the former and the complexities of the latter, a property owner conscious of his or her imminent death and maintaining testamentary capacity – but worried that a weekend or a holiday or a transportation difficulty will foil the effectiveness of a TOD deed – has alternatives: A simple will or a codicil, or even a trust prepared quickly by an attorney, need not be recorded to take effect. The fact that probate may not be avoided after all, or that the attorney fees for a quickie trust would be higher than for a TOD deed, is a relatively small price to pay.

The advantage of disallowing recordation of a TOD deed after death is avoidance of the possibility that the instrument's simplicity, appropriate under other circumstances, could facilitate abuse or undue influence in a deathbed situation.

2. Though I see the merits of both positions, I still think that an earlier recording requirement is advisable. Something like "within six months of execution or before death, whichever comes first"

would strike a reasonable balance between the desire for privacy and the advantages of exposing potential abuse by creating a public record that could be checked by someone who suspects undue influence on a grantor.

The argument has been and surely will be raised again that the simplicity of TOD deeds' execution makes them likely tools for greedy abusers. I don't believe that would be true to a large degree. Someone intent on abuse will find a way; the most common we see is fraudulent use of a good old grant or quitclaim deed, under false pretenses – and there is no early recording requirement for those.

Nevertheless, I suggest that the option of an early recording requirement at least be held in reserve as a suggestion to legislators when they are crafting the final bill. If nothing else, it could be useful as a compromise if the abuse argument gives rise to significant opposition to the creation of statutory TOD deeds.

To answer the main objection: When privacy is paramount to a property owner considering a TOD deed, other fine options, a traditional will or revocable trust, exist. They need not be recorded.

3. I believe that a court contest of the validity of a TOD deed should be allowed before death, once it is recorded. I disagree with those who say the matter would not be ripe – but why not allow that question to be decided by the first case that goes up to the appellate level. A declaratory judgment that a recorded TOD deed is void due, say, to fraud or undue influence, could serve to pre-empt much more complex litigation in the test case and in countless subsequent ones. Better to raise questions early on, while the grantor and/or other witnesses may still be able to testify to her or his capacity upon execution. If such contests are disallowed, post-death challenges would likely be even more complicated by the involvement of multiple parties – rival heirs under competing instruments, BFPs of the property, etc. If a TOD deed is questionable due to alleged incapacity at the time of its execution, the sooner the better to settle the matter, when other evidence is more fresh and available.

4. I favor permitting limited bifurcation of title with use of a TOD deed, in one particular form. I envision an arrangement that would be frequently sought by likely users of the tool: A property owner, likely a partner in a second (or more) marriage with children from an earlier union, wishes to grant a life estate to his or her spouse (who is not a joint owner of the property) but to leave the remainder interest to the children. Yet, this person might not want to make such an act irrevocable, which is typically the case with a life estate deed. The second marriage may disintegrate down the road, after all.

A person in this scenario may prefer a TOD deed for all the usual reasons – simplicity, revocability and probate avoidance. A license to use it in this way can be narrowly drawn to encompass a division solely between life and remainder interests without opening the door to other, more complicated dissections of title.

5. At the April meeting, the issue arose of whether a TOD deed executed by two (or, conceivably, more) joint tenants would effect a transfer upon the death of the first grantor with regard to the first grantor's share, thereby effecting a severance of the joint tenancy, or only upon the death of the second joint tenant. Consistent with its consensus that a TOD deed executed by only one joint tenant effects such a severance upon the death of the JT, the commission majority seemed to favor the first option – severance and transfer of his or her share upon the death of the first of two or more joint tenant grantors.

I'm troubled by this outcome. In the vast majority of instances, this issue would arise in joint tenancies (or with property held as community property with right of survivorship, which should be treated the same for this purpose) created when spouses or domestic partners acquired their residence jointly. The expectation in such a case is that the surviving spouse or partner will have the full rights to the property after the first one's death, as long as s/he wants and to use however s/he wants.

Realistically, despite what we may want in a perfect world, many people of limited means will use TOD deeds without benefit of expert legal advice. At the risk of appearing to contradict my assessment in comment 1, above, this is one exceptional instance in which I believe the implications of a TOD deed may easily be misunderstood and if so, would therefore frustrate the normal expectation of full survivorship rights in joint tenancy.

If the TOD deed takes effect upon the death of the first joint tenant, its beneficiary would immediately become a tenant in common with the surviving former joint tenant, who will likely have no equitable interest in the property. The former joint tenant's stake in the property during her or his remaining years would be vulnerable to the new co-owner's debts; a refinance on terms available to low income seniors may be unavailable, as would a reverse mortgage that might be the only way s/he could afford to remain in the home. A reassessment for property tax purpose might occur, straining the survivor's resources. In the worst cases (and we have seen these), the new co-owner could turn into an abuser whose co-ownership rights force the senior out of the home.

I would therefore prefer to see the statute say that a TOD deed executed together by joint tenants (or by co-owners as CPWROS) would by default affect a transfer only upon the death of the last executing JT. An optional provision could permit the JTs to choose the other course if they wished.

Alternatively, at very least, if the April meeting majority view remains as the default, an optional provision could be written into the model deed alerting joint tenants to the consequence and permitting them to dictate instead that the transfer would take effect only upon the death of the last of them.

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:	3467B-Bahia Blanca West
	Mary Pat Toups	Laguna Woods, CA, 92637
2.	Barbara Recchi	952 Hawthorne Dr.
	Barbara Recchi	Rodeo, Ca. 94572
3.	Danielle Andrews	456 Wilson Ave.
	Danielle Andrews	Vallejo, Ca. 94590
4.	M. Carolyn Kenkamp	1516 Cedar St
	M. Carolyn Kenkamp	Berkeley, CA 94703
5.	Dari M. McGill	10 Brodia ct.
	Dari m. mcGill	Martinez, CA 94553
6.	Wendy S Taylor	135 Weatherly Ct
	Wendy Taylor	Brentwood, CA 94513
7.	LENNIE GITKEITH	PO Box 6424
	Lennie Gitkeith	NAPA, CA 94581
8.	ELIKUTZE	71 Lurline St.
	[illegible]	Vallejo, CA 94591
9.	[illegible]	[illegible]
10.	Jackie Schlemmer	646 26th St.
	Jackie Schlemmer	Richmond CA 94804

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The first name is to be used as an example.

	NAME:	ADDRESS
1.	JOAN BOWEN Joan Bowen	18901 Leona Lane Pine Grove, CA 95665
2.	Beverly Boriolo Beverly Boriolo	17770 Latrobe Rd Plymouth, CA 95669
3.		
4.		
5.		
6.		
7.		
8.		
9.		
10.		