

Memorandum 2006-30

**Beneficiary Deeds (Draft of Tentative Recommendation)**

Attached to this memorandum for Commission review and approval is a staff draft tentative recommendation on the *Revocable Transfer on Death (TOD) Deed*. This memorandum addresses a few issues in the draft.

Also attached to this memorandum are the following communications we have received on this matter. They are also discussed in the memorandum.

*Exhibit p.*

- Mary Pat Toups, Laguna Woods (7/10/06) .....1
- Craig C. Page, California Land Title Association (7/14/06) .....3

ISSUES INVOLVING REVOCABLE TOD DEED

**Interest in Real Property**

At the June 2006 meeting the Commission asked the staff to investigate possible application of the draft statute to an interest in real property such as a license to maintain and use a cabin in a national forest.

There are many varieties of less than fee interest that could be relevant here. Examples include use and occupancy permits, leases, licenses, easements, and extraction and removal rights (such as oil and gas, minerals, timber, grazing). These property interests or contract rights may relate to private land as well as to public land (whether state or federal).

The key considerations for purposes of passage of these interests by revocable TOD deed are (1) whether the interest is a recordable interest in real property (since the revocable TOD deed scheme is based on recordation) and (2) whether the interest by its nature or terms is transmissible on the death of the interest holder. If both those conditions are satisfied, **the staff sees no reason why the interest should not in theory be subject to transmission by revocable TOD deed.**

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

The variety and circumstances of these less than fee interests make it impossible to attempt to draft for individual types. We treat the matter generically in the staff draft tentative recommendation:

**§ 5610. “Real property” defined**

5610. “Real property” means the fee or an interest in real property. The term includes but is not limited to any 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.

(c) An easement, license, permit, or other right in property to the extent the right is both (1) a recordable interest in property and (2) transferable on death of the owner of the right.

**Comment.** Section 5610 supplements the definitions of property and real property found in Sections 62 (“property” means anything that may be the subject of ownership and includes any interest in real property) and 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.

Subdivision (c) would apply to such an interest as a use or occupancy permit or an extraction or removal right (e.g., oil and gas, minerals, timber, or grazing). A property interest under subdivision (c) may relate to private land as well as to public land (whether state or federal). If the interest is both recordable and transferable at death, by will or otherwise, the interest may be the subject of a revocable TOD deed.

**Recordation Requirement**

Craig Page of the California Land Title Association notes that CLTA does not believe that the adoption of the revocable TOD deed necessarily represents good public policy for Californians. However, if we go forward, CLTA believes very strongly that the revocable TOD deed must be recorded before the transferor’s death to be valid:

While some transferors might want to “hide” the fact that they have a TOD deed ready to be recorded from spouses or other family members, the CLTA believes that the mischief this “secret” deed can have on potential heirs, title companies, lenders, and innocent buyers rules a floating recordation time (i.e. recordation within seven days of the death of the transferor) as infeasible. Thus, the title industry feels very strongly about such a recordation requirement.

Exhibit p. 5.

**The staff draft tentative recommendation includes such a requirement.** See Section 5626(a) (“A revocable transfer on death deed is not effective unless the deed is recorded before the transferor’s death.”)

### **Effect of Revocable TOD Deed on Joint Tenancy**

Mr. Page notes that the issues involving the effect of a revocable TOD deed on joint tenancy create some concern among title professionals. He raises the question whether it is intended that executing and recording a revocable TOD deed have a present effect on the joint tenancy? He notes the problems that could occur if recordation of the deed has the effect of severing the joint tenancy, including the question of whether revocation of the deed revives the joint tenancy, and whether the deed passes an interest in the property acquired by right of survivorship after recordation of the deed.

The staff’s initial thought in this project was that recordation of the revocable TOD deed should sever the joint tenancy. But after reflecting on issues of the type raised by Mr. Page, the Commission concluded that severance should only occur if the joint tenant dies with the revocable TOD deed in effect and unrevoked. **The staff draft tentative recommendation addresses these points:**

#### **§ 5664. Joint tenancy property**

5664. If a revocable transfer on death deed is made by an owner of property held in joint tenancy:

(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 revocable transfer on death deed and not by right of survivorship pursuant to the joint tenancy.

**Comment.** Section 5664 addresses the conflict between a revocable TOD deed and an earlier joint tenancy in the property, where fewer than all joint tenants join in the revocable TOD deed. In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660 (conflicting dispositive instruments). If all joint tenants join in the revocable TOD deed, the disposition of the property is governed by Section 5662 (co-owned property).

Because a revocable TOD deed is revocable until the transferor’s death, execution and recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when the transferor dies with the revocable TOD deed still in effect. If another joint tenant predeceases the transferor, the transferor takes the other joint tenant’s interest by right of survivorship, and the combined interest passes pursuant to the revocable TOD deed. See Section 5652(a) (transferor’s entire interest in property passes at death).

## **Effect of Revocable TOD Deed on CPWROS**

Mr. Page notes problems similar to those raised above about joint tenancy with respect to community property with right of survivorship (CPWROS). He also notes the special circumstance of community property, which requires the joinder or written consent of both spouses to a gift of community property, and the anomaly that the revocable TOD deed would enable either spouse acting alone to destroy the survivorship right of the other spouse in CPWROS, effective on the death of that spouse. See Exhibit p. 4.

The law treats CPWROS like joint tenancy with respect to the survivorship right of the spouses, and creates an exception to the ordinary community property rules for severance of the survivorship right between the spouse. See Civ. Code § 682.1(a) (“Prior to the death of either spouse, the right of survivorship may be terminated by the same procedures by which a joint tenancy may be severed.”)

**The staff draft tentative recommendation addresses these points:**

### **§ 5666. Community property**

5666. (a) A revocable transfer on death deed of community property made without the joinder of the transferor’s spouse is effective only as to the transferor’s one-half interest in the property.

(b) A revocable transfer on death deed of community property with right of survivorship made without the joinder of the transferor’s spouse is governed by the rules applicable to property held in joint tenancy under Section 5664.

**Comment.** Subdivision (a) of Section 5666 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 revocable TOD deed of community property made with the joinder 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 transferor terminates the survivorship right in community property with right of survivorship. See Section 5664 (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.”)

## Simultaneous Death Issues

Mr. Page notes the added complexity of the interaction of the revocable TOD deed with joint tenancy or CPWROS where the parties are spouses who die simultaneously. Exhibit p. 4.

The Commission has previously concluded that the simultaneous death provisions of the Probate Code would apply by their terms to a revocable TOD deed without need for modification. See, e.g., Prob. Code §§ 220 (“if the title to property or the devolution of property depends on the priority of death and it cannot be established by clear and convincing evidence that one of the persons survived the other, the property of each person shall be administered or distributed, or otherwise dealt with, as if that person had survived the other”); 222(a) (if “the right of a beneficiary to succeed to any interest in the property is conditional upon surviving another person and it cannot be established by clear and convincing evidence that the beneficiary survived the other person, the beneficiary is deemed not to have survived the other person”).

With respect to joint tenancy property, each joint tenant’s proportionate interest in the property is dealt with under the simultaneous death act as if that joint tenant had survived. Prob. Code § 223. The simultaneous death act includes no special provisions relating to CPWROS, but presumably the joint tenancy rule would apply under the Civil Code Section 682.1 catchall that CPWROS “shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy.”

Thus in the case of a simultaneous death of spouses who hold joint tenancy property or CPWROS property, their simultaneous deaths would cause the interest of each to pass separately under the dispositive plan of each. If each spouse had made a revocable TOD deed to a different beneficiary, the share of each spouse would pass to that spouse’s beneficiary. If one spouse had made a revocable TOD deed and the other had not, the share of the one would pass to the beneficiary and the share of the other would pass under the other’s will or by intestacy. If both spouses had joined in a revocable TOD deed, the share of each would pass to the common beneficiary.

The staff agrees with Mr. Page that the interaction of three different laws — joint tenancy or community property law, simultaneous death law, and revocable TOD deed law — is complex. The staff thinks it would be helpful to explain that interaction in the revocable TOD deed law. **We would add the**

**following material to the Comments to Sections 5664 (joint tenancy) and 5666 (community property):**

**§ 5664. Joint tenancy property**

**Comment.** Section 5664 addresses the conflict between a revocable TOD deed and an earlier joint tenancy in the property, where fewer than all joint tenants join in the revocable TOD deed. In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660 (conflicting dispositive instruments). If all joint tenants join in the revocable TOD deed, the disposition of the property is governed by Section 5662 (co-owned property).

Because a revocable TOD deed is revocable until the transferor's death, execution and recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when the transferor dies with the revocable TOD deed still in effect. If another joint tenant predeceases the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the combined interest passes pursuant to the revocable TOD deed. See Section 5652(a) (transferor's entire interest in property passes at death).

In the case of simultaneous death, Section 223 (joint tenants) controls. The proportionate interest of each joint tenant passes under the revocable TOD deed or other dispositive instrument of that joint tenant.

**§ 5666. Community property**

**Comment.** Subdivision (a) of Section 5666 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 of the person's spouse. Cf. Section 100 (one-half of community property belongs to decedent). A revocable TOD deed of community property made with the joinder 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 transferor terminates the survivorship right in community property with right of survivorship. See Section 5664 (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.") In the case of simultaneous death, Section 223 (joint tenants) controls. See Civ. Code § 682.1. The one-half interest of each spouse passes under the revocable TOD deed or other dispositive instrument of that spouse.

## **Spousal Consent to Revocable TOD Deed**

Mr. Page asks how the proposed legislation would be reconciled with conflicting provisions of Probate Code Section 5010 et seq. Those provisions govern spousal consent to a nonprobate transfer of community property. Under those provisions, a spouse's nonprobate transfer of community property (such as a revocable TOD deed of community property) made without the joinder or written consent of the other spouse only passes the one-half interest of the executing spouse.

The Commission's intent has been that those general provisions would apply to a revocable TOD deed of community property just as they apply to any type of nonprobate transfer of community property. The Comment to Section 5666 (community property), set out above, makes this point.

Should we state explicitly in the statute that the general provisions governing a nonprobate transfer of community property apply to a revocable TOD deed? There are many general provisions of law that are similarly situated — they would apply to a revocable TOD deed by their own terms, and we have not felt the need to say that explicitly in the revocable TOD deed draft statute. See, e.g., Prob. Code § 21101 et seq. (rules of construction of wills, trusts, and other instruments). We do refer to these provisions occasionally in the Comments, as we have done with the nonprobate transfer of community property provisions.

Although the staff does not think it is necessary to add a provision to the revocable TOD deed statute cross-referencing the nonprobate transfer of community property provisions, the fact that Mr. Page has raised the question suggests that the interrelation of these statutes is not self-evident. **Perhaps it would be useful to add to the revocable TOD deed statute a catch-all along the following lines:**

### **§ 5604. Effect of other law**

5604. (a) Nothing in this part affects the application of any other statute governing a nonprobate transfer on death to a revocable transfer on death deed, including but not limited to any of the following provisions that by its terms or intent applies to a nonprobate transfer on death:

(1) Division 2 (commencing with Section 100) (general provisions).

(2) Part 1 (commencing with Section 5000) of this division (provisions relating to effect of death).

(3) Division 10 (commencing with 20100) (proration of taxes).

(4) Division 11 (commencing with Section 21101) (construction of wills, trusts, and other instruments).

(b) Notwithstanding subdivision (a), a provision of another statute governing a nonprobate transfer on death does not apply to a revocable transfer on death deed to the extent this part provides a contrary rule.

**Comment.** Section 5604 makes clear that the revocable TOD deed law is supplemented by general statutory provisions governing a nonprobate transfer. The specific cross references in this section are illustrative and not exclusive. General provisions referenced in this section include effect of death on community property, establishing and reporting fact of death, simultaneous death, effect of homicide or abuse, disclaimer, provisions relating to effect of death, nonprobate transfers of community property, nonprobate transfer to former spouse, proration of taxes, rules for interpretation of instruments, and limitations on transfers to drafters.

This part may in some instances limit the effect of a provision otherwise applicable to a nonprobate transfer on death. See, e.g., Section 5620 & Comment (capacity to make deed).

Subdivision (b) is critical. As Mr. Page correctly points out, the revocable TOD deed statute may in some instances differ from the general rules. One instance is highlighted in the Comment — the capacity required for a revocable TOD deed differs from the general capacity standard in the Probate Code.

The provisions governing spousal consent to a nonprobate transfer of community property are self-adjusting. Those provisions are subject to “a contrary state statute specially applicable to the instrument under which the nonprobate transfer is made.” Prob. Code § 5011(b).

Is there in fact a conflict between the spousal consent statute and the staff draft revocable TOD deed statute? Not yet; the Commission has deferred decision on the consequences where both spouses have joined in a revocable TOD deed. The nonprobate transfer of community property statute is a complete set of provisions governing such issues. See Prob. Code §§ 5010-5032. The general provisions could in fact differ from the specific rules applicable to a revocable TOD deed, as Mr. Page suggests, depending on the Commission’s ultimate decisions after reviewing comments on the tentative recommendation.

One issue is perhaps worth addressing now. The general nonprobate transfer of community property statute speaks in terms of **written consent** of a spouse to nonprobate transfer of community property. Written consent includes joinder. Prob. Code § 5010.



We have written the revocable TOD deed draft to refer to the **joinder** of a spouse in a deed of community property and have omitted reference to written consent. See Prob. Code § 5666 (community property). Our theory is that the revocable TOD deed is a special instance. Clear, simple, and problem-free transfer of community property on death can only be achieved if both spouses join in the revocable TOD deed. A written consent, which is likely to be an off-record document, would not accomplish that.

**A different rule would be possible.** We could provide that written consent is sufficient to allow the entire community property to pass under the revocable TOD deed. A court order would be necessary to confirm that the entire community property, and not just the 50% interest of the spouse executing the revocable TOD deed, passes to the beneficiary. The need for a court order would defeat a key purpose of using a revocable TOD deed in the first place. But it would help effectuate the intent of the parties.

### **Statutory Forms**

Mr. Page indicates that, while the California Land Title Association does not currently favor adoption of revocable TOD deed legislation, they strongly recommend that if we proceed we should create a standardized form:

If such a form were created for TODDs, it should be drafted to (1) Use easy to understand language void of legalese so that unsophisticated grantors fully understand choices they are making; (2) Provide for “check off” boxes that clearly set forth the intent of the grantor in the vesting of title; (3) Display a prominent title at the head of the document that reads “Transfer on Death Deed” so that it can easily be found in a title search; and (4) Clearly tells the transferor that it **MUST** be recorded **PRIOR** to his or her death to be valid.

Exhibit p. 5.

The statutory form in the staff draft tentative recommendation we believe would achieve these objectives in a straightforward and simple manner. See Section 5642 (statutory form revocable TOD deed). The statutory form is hazy on details involving multiple ownership and the effect of revocation by, or death of, one but not all multiple owners, because the Commission has deferred decision on key issues in this area. See Section 5662 & Note (co-owned property).

Mr. Page suggests that an all purpose statutory form could be developed that incorporates the most popular choices a transferor would be likely to make. That could be done with the cooperation of the title industry and proponents of the

revocable TOD deed. The staff guesses that Mr. Page is correct that we could devise a reasonably user friendly form with the cooperation of interested parties. **We would attempt to do this after the Commission has decided the remaining issues relating to multiple ownership.**

## EXPERIENCE IN OTHER JURISDICTIONS

### Reports of Practitioner Experience

The State Bar Trusts & Estates Section has forwarded us information they have collected concerning experience with TOD deeds in other jurisdictions. The information is summarized below. **We have incorporated this information in the staff draft tentative recommendation.**

#### *Arkansas*

Feedback from Arkansas is that the law at this stage is new and untested.

#### *Missouri*

Missouri has the most experience, since its statute has been in effect for 15 years. Sample comments of Missouri trusts and estates counsel include:

- Missouri's statute is excellent.
- There has been little litigation so far.
- The experience has been very positive. An estimated 350,000 beneficiary deeds are now of record. Title issues have not been a problem. There are no reports of overreaching or undue influence. "The ability to draft beneficiary deeds has been a nice addition to Missouri estate planner's arsenal of tools."
- Missouri's experience has been very positive. The law provides a mechanism for satisfying creditor claims.

#### *Utah*

The matter is under review by Utah trusts and estates counsel. They are using the Colorado statute as a principal model. Legislation is planned for next year.

#### *Wisconsin*

Wisconsin has this year enacted TOD deed legislation. The Wisconsin statute is similar to other existing TOD deed statutes. It is new and the Wisconsin bar has no experience with it.

## **Common Law Deeds**

We have been informed that Maryland and the District of Columbia have revocable TOD deeds as a matter of common law. We have not been able to collect any information about how these deeds work, or experience under them. Presumably they are comparable to California's "revocable deed" or to the "Lady Bird deed" or "enhanced life estate" recognized in some other jurisdictions and discussed in the preliminary part of the staff draft tentative recommendation.

## **National Conference of Commissioners on Uniform State Laws**

The National Conference of Commissioners on Uniform State Laws plans to draft uniform revocable TOD deed legislation. They do not yet have a schedule, but in the normal course of events NCCUSL would not be able to finalize such legislation before summer 2008, at the earliest. The California Law Revision Commission's report is due to the Legislature by January 1, 2007.

### **ADVANTAGES AND DISADVANTAGES OF REVOCABLE TOD DEED**

#### **Potential for Abuse of Instrument**

At the June meeting the Commission discussed the potential for abuse of the revocable TOD deed to commit fraud against a real property transferor.

Mary Pat Toups has written to catalog the prevalent devices for real estate fraud. Exhibit pp. 1-2. She indicates that (1) the quitclaim deed is the fastest and easiest way to implement a real estate fraud. Other scams she describes include (2) predatory mortgage lending, (3) the "Loved One Trust" scam, and (4) the "Add My Name to the Deed" scam.

Ms. Toups believes the revocable TOD deed will help protect the homeowner because a thief does not want to wait until the death of the homeowner in order to steal the money.

#### **Privacy of Transfer**

One of the arguments that has been made in favor of the revocable TOD deed as a means of preventing abuse is that it must be recorded, which exposes it to public scrutiny, unlike a will or trust which need not be recorded. But Mr. Page points out that a transfer of real estate in trust must be recorded, otherwise a title company may require a probate deed or court order. "If a newly recorded deed

(or a court order) formally transferring the title to the trustee is required by a title company, then there may not be as much privacy as supposed.” Exhibit p. 3.

**The staff agrees with this analysis, and has reviewed the staff draft tentative recommendation to ensure consistency with it.** We do note, however, that while a transfer of real property to the trustee of a trust should be recorded, the dispositive terms of the trust need not be recorded. Those privacy aspects of the trust device are real.

### **Position of CLTA**

Mr. Page notes that the California Land Title Association is not convinced of the need for revocable TOD deed legislation:

To date, CLTA remains unconvinced that the creation of a TODD makes sense in California given the numerous issues raised by CLTA in this and earlier correspondence as well as other issues raised by practitioners from the State Bar. It is our opinion that enhanced education and outreach to seniors and unsophisticated transferors about how to use existing conveyancing documents would be a preferable option to the creation of TODDs in California.

Exhibit pp. 4-5.

The staff believes this is a significant concern, since the entire revocable TOD deed mechanism relies on the title industry to give practical confirmation of passage of title to the beneficiary and a subsequent bona fide purchaser or encumbrancer for value. Our effort has been to resolve the types of issues that have been raised by CLTA, the bar, and others. But if that has not been satisfactorily accomplished, the concept of the revocable TOD deed is at risk.

The staff believes that the attached staff draft tentative recommendation, together with the additional refinements proposed in this memorandum, satisfactorily addresses the issues. **We can test this theory by circulating the tentative recommendation to CLTA, the bar, and others for review and comment.**

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary

# MARY PAT TOUPS

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Date: July 10, 2006

To: California Law Revision Commission

From: Mary Pat Toups *Mary Pat Toups*

Re: Real Estate Scams in California

Law Revision Commission  
RECEIVED

JUL 13 2006

File: \_\_\_\_\_

At the meeting on June 22, 2006 Commissioner David Huebner asked about real estate frauds. My answer was incomplete. Therefore I write.

I indicated Quit Claim Deeds were the fastest and easiest way to implement a real estate fraud. The representative of the California Land Title Association agreed.

Another popular real estate scam is Predatory Mortgage Lending. Attached is information published by the Department of Corporations in their "Fraud Educator and Consumer Resource Guide" publication. These schemes are perpetrated mostly on minority and elderly homeowners.

The Real Estate Scam that offends me the most is the Loved One Trust Scam, perpetrated by the loved ones of the elderly homeowner. Bad Loved One persuades Dear Old Mom to sign a Trust, naming Bad Loved One as Trustee. The Trustee then transfers the home into the Trust, promising Dear Old Mom that she will remain in her home as long as she lives. Trustee sells the home, moving Dear Old Mom into an Assisted Living Facility, which she hates. Then Trustee transfers the profit from the sale of the home into Trustee's personal bank account, and disappears. Since Trusts are a secret no one else knows what is going on. When the remaining Loved Ones finally realize what has happened, they could file a lawsuit. Such lawsuits are very, very expensive, and many Loved Ones do not have the assets, or incomes, to file such a lawsuit. However, our courts are full of Contested Trusts lawsuits.

Frequently Loved Ones persuade the elderly homeowner to add their names to title of the home, which prevents the homeowner from accessing a Reversible Mortgage, and subjects the homeowner to Liens related to the Loves Ones, and possible losing the home. This "Add My Name to the Deed" Scam happens all the time, because the heirs convince the homeowner that Probate must be avoided.

The Revocable Transfer-on-Death Deed will protect the homeowner, because most thieves do not want to have to wait until the death of the Homeowner in order steal the money. Since this new Deed must be recorded, this will prevent the popular "Loved One Trust Scam", and the "Add My Name to the Deed Scam".

# Fraud Educator and Consumer Resource Guide



2. **Mortgage Fraud:** Predatory mortgage lending involves a wide array of abusive practices and usually takes place in the sub-prime market, targeting borrowers with weak or blemished credit records. The most common lending abuse includes excessive fees, abusive prepayment penalties, loan flipping, and other inappropriate practices. In addition, foreclosure schemes are on the rise in which the perpetrator misleads the homeowner into believing that they can save their home in exchange for a transfer of deed and up-front fees. The perpetrator profits from these schemes by re-mortgaging the property or pocketing fees paid by the homeowner. In 2006, the DOC, as part of a California task force comprised of local district attorneys and the Office of the Attorney General, filed a judgment against a major sub-prime lender to resolve predatory lending allegations against the company. This legal action will provide consumers \$295 million in restitution and requires sweeping reform of the firm's business practices.



**California Land  
Title Association**

July 14, 2006

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Law Revision Commission  
RECEIVED

JUL 17 2006

File: \_\_\_\_\_

**RE: STUDY L-3032**  
***Memorandum 2006-19, Beneficiary Deeds (Discussion of Issues)***

Dear Nat:

On behalf of the California Land Title Association (CLTA), which represents the title insurance industry in California, I would like to forward some questions and concerns expressed by title companies in regards to the CLRC's study on the beneficiary deed issue after reviewing the above referenced memorandum.

Your latest draft comments and analysis have resulted in several questions being raised by some of our member companies. While I am hesitant to forward an analysis that includes numerous questions without suggested answers, in the interest of time, I am forwarding all of the those questions and comments below:

**Transfers into Trusts Will Require a Deed or Court Order:**

On page 5 of the Memo, near the bottom of the page, is a comment about privacy and transferring property using an instrument that does not require recording such as a will or a trust. We agree about the will, although later a title company might require a court order to transfer the title on the record.

However, if property is transferred into a trust, (a) it must be transferred to a trustee of the trust, and (2) that deed must be recorded before the death of the trustor otherwise title passes automatically to the heirs and devisees, subject to the administration of the Estate. Although some people want to rely upon the Heggstad Case for the proposition that a conveyance to the trustee is not necessary and it is sufficient to have a declaration that the owner holds property in trust as the trustee, a title company may require a deed or court order.

If a newly recorded deed (or a court order) formally transferring the title to the trustee is required by a title company, then there may not be as much privacy as supposed.

**Joint Tenancy Vesting under a TODD:**

The discussion about Joint Tenancy on page 10 of the CLRC report creates some concern among title professionals and this interpretation could create some interesting situations.

For example, the CLRC memo does not discuss any immediate effect on the joint tenancy by the signing and recording of a TODD deed, apparently assuming that since the TODD deed only becomes effective upon the death of the grantor, there is no present effect. Was this the CLRC staff conclusion?

As you are aware, joint tenancy has the four unities of title, and the right of survivorship. The right of survivorship under a joint tenancy has now been changed when the TODD deed records. Is this right of survivorship a mere expectancy of joint tenancy?

Even if it is, either joint tenant could sever the joint tenancy by a non-TODD to themselves, which would make them a tenant in common with the other vestee(s). One could make an argument that the unities of time and interest have been affected because the vestee joint tenant has signed a deed which will absolutely convey their interest in the future unless revoked prior to death. Then, what if the vestee joint tenant revokes the TODD? Are the four unities still in place with the other joint tenants and the right of survivorship is revived?

Other potential problems arise. Let's assume that only one joint tenant signs and records a TODD to her favorite niece. At the time, she only had a one half interest. Then the other joint tenant dies and she now has a 100 percent interest. Then she dies. Does the grantee of the TODD get the 100 percent interest?

### **Community Property with Right of Survivorship Issues:**

Similar problems and questions arise under a vesting of community property with right of survivorship (CPWROS). Consider the scenario, husband and wife as joint tenants or CPWROS both give TODDs to Sam and Sally (children). Since CPWROS is to be treated essentially the same as joint tenancy, the same argument could be made about destroying the unities of time and interest.

Community property does have a difference in that neither the husband nor the wife can unilaterally change the status of title without the consent of the other spouse. Neither spouse can give a non-TODD to themselves or someone else in an attempt to change the status of community property without the written consent of the other spouse or by court order.

Usually, the status is changed at the time of dissolution, either by the court or by property settlement agreement. Hence, the TODD gives the power to either or both, husband and wife, to destroy the right of survivorship to the other spouse. The only problem is, they have to die to enforce it.

### **Simultaneous Death of Spouses and Probate Code Conflicts:**

When considering the different scenarios above, throw into this mix the possibility of simultaneous death of husband and wife. Obviously, the answers to the questions above must be considered in a simultaneous death analysis as well where individual fact patterns complicate the issue even more.

Also, just to throw out some Code Sections, how would the proposed new TODD legislation be reconciled with conflicting provisions of Probate Code 5010, et. seq?

### **Creating Statutory Forms of TODDs and a Clear Recordation Requirement:**

To date, CLTA remains unconvinced that the creation of a TODD makes sense in California given the numerous issues raised by CLTA in this and earlier correspondence as well as other



issues raised by practitioners from the State Bar. It is our opinion that enhanced education and outreach to seniors and unsophisticated transferors about how to use existing conveyancing documents would be a preferable option to the creation of TODDs in California.

**Statutory form:** However, if the CLRC's "final" report recommends the adoption of a TODD in this state, the CLTA would strongly recommend that the CLRC create a standardized, statutory TODD form. The easiest example of an analogous statutory form that comes to mind is the "Uniform Statutory Form Power of Attorney" created by the CLRC (Probate Code 4400) some years ago.

If such a form were created for TODDs, it should be drafted to (1) Use easy to understand language void of legalese so that unsophisticated grantors fully understand choices they are making; (2) Provide for "check off" boxes that clearly set forth the intent of the grantor in the vesting of title; (3) Display a prominent title at the head of the document that reads "Transfer on Death Deed" so that it can easily be found in a title search; and (4) Clearly tells the transferor that it **MUST** be recorded **PRIOR** to his or her death to be valid.

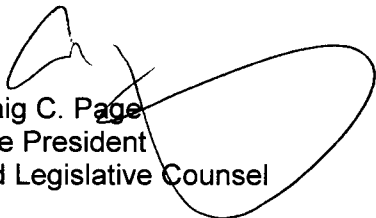
The CLTA had contemplated the creation of five or six statutory TODDs, but has concluded that it would be preferable to incorporate all TODD options onto one form but use layperson language to lay out the various options they have. Obviously, the TODD statutory form should be designed in cooperation with the title industry and proponents of the TODD who claim to be aware of the most popular choices transferors would be making if they had the TODD form available to them today.

**Recordation prior to death must be required:** In addition, the CLTA believes very strongly that the TODD form **MUST** be recorded prior to the death of the transferor to be valid. Such a requirement is in keeping with well established real property laws that require recordation of documents (such as deeds) in order to impart constructive notice and protect bona fide purchasers and encumbrancers (lenders).

While some transferors might want to "hide" the fact that they have a TODD ready to be recorded from spouses or other family members, the CLTA believes that the mischief this "secret" deed can have on potential heirs, title companies, lenders, and innocent buyers rules a floating recordation time (i.e. recordation within seven days of the death of the transferor) as infeasible. Thus, the title industry feels very strongly about such a recordation requirement.

Again, the CLTA does not believe that the adoption of a TODD necessarily represents good public policy for Californians. However if the CLRC is going to recommend adoption of a TODD, then the recordation requirement should be incorporated into any final report.

Respectfully,

  
Craig C. Page  
Vice President  
and Legislative Counsel

cc: Charlotte Ito, Executive Comm. Of the State Bar Trusts & Estates Section  
Larry Doyle, State Bar of California

# CALIFORNIA LAW REVISION COMMISSION

**STAFF DRAFT**

TENTATIVE RECOMMENDATION

Revocable Transfer on Death (TOD) Deed

[Date To Be Determined]

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

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN \_\_\_\_\_.

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

California Law Revision Commission

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## SUMMARY OF TENTATIVE RECOMMENDATION

In this recommendation the Law Revision Commission analyzes the revocable transfer on death deed (revocable TOD deed), or beneficiary deed as it is known in some jurisdictions, for possible adoption in California. The revocable TOD deed transfers real property to a named beneficiary on the death of the owner without probate; it is revocable until that time.

The recommendation includes a comparison of existing real property donative transfer devices under California law. The recommendation includes a review of experience in the nine jurisdictions that have enacted revocable TOD deed legislation. The recommendation also addresses in depth the legal incidents of the revocable TOD deed.

The Commission finds that existing real property donative transfer devices do not serve the same function as the revocable TOD deed. Experience with the revocable TOD deed is generally favorable in other jurisdictions. After weighing the advantages and disadvantages of the revocable TOD deed, the Commission concludes that revocable TOD deed legislation would be beneficial in California.

The Commission solicits public comment on the tentative recommendation.

The recommendation was prepared pursuant to Chapter 422 of the Statutes of 2005.

REVOCABLE TRANSFER ON DEATH (TOD)  
DEED

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1

## BACKGROUND

2 **Charge from Legislature**

3 The Legislature has directed the Law Revision Commission to conduct a study  
4 to determine whether legislation establishing a beneficiary deed should be enacted  
5 in California.<sup>1</sup>

6 “Beneficiary deed” is the term used in several jurisdictions that have adopted the  
7 concept that an owner of real property may deed the property to a named  
8 beneficiary, the transfer to become operative on the owner’s death and is  
9 revocable until then. The effect of the deed is to pass the property directly to the  
10 beneficiary without probate on the death of the owner.

11 The Legislature has identified specific issues for the Commission to address in  
12 the study. They are:<sup>2</sup>

13 (1) Whether and when a beneficiary deed would be the most appropriate  
14 nonprobate transfer mechanism to use, if a beneficiary deed should be recorded or  
15 held by the grantor or grantee until the time of death, and, if not recorded, whether  
16 a potential for fraud is created.

17 (2) What effect the recordation of a beneficiary deed would have on the  
18 transferor’s property rights after recordation.

19 (3) How a transferor may exert his or her property rights in the event of a  
20 dispute with the beneficiary.

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

25 (5) The tax implications of a beneficiary deed for the transferor, the transferee,  
26 and the general public as a result of the nonprobate transfer, including whether the  
27 property would be reassessed and if tax burdens would shift or decrease.

28 The Commission has identified many other issues that must be addressed to enable  
29 it to make an informed recommendation to the Legislature. This study addresses  
30 all the issues.

31 The Legislature’s charge includes the direction that the Commission review the  
32 statutes of other states that establish a beneficiary deed as a means of conveying  
33 real property through a nonprobate transfer.<sup>3</sup> Nine jurisdictions now authorize a

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1 See AB 12 (DeVore), enacted as 2005 Cal. Stat. ch. 422. The Commission’s report on the matter is due on or before January 1, 2007.

2 2005 Cal. Stat. ch. 422 § 1(b).

3 2005 Cal. Stat. ch. 422 § 1(a).



1 beneficiary deed.<sup>4</sup> This study draws upon those statutes and experience under  
2 them.

### 3 **Terminology**

4 Of the nine jurisdictions that have legislation of this type, five use the term  
5 “beneficiary deed”<sup>5</sup> and four use the term “transfer on death deed”.<sup>6</sup>

6 Much of this study is addressed to the question of what rights are retained by the  
7 transferor and what rights are transferred to the beneficiary by a beneficiary deed  
8 that remains revocable and does not become effective until the transferor’s death.

9 Confusion about the legal effect of this type of deed stems in part from use of  
10 the name “beneficiary deed”. The term seems to imply that the named beneficiary  
11 has an interest in the property as a result of recordation of the deed, whereas the  
12 thrust of this study is that no such interest is created.<sup>7</sup>

13 Some of the confusion occasionally experienced concerning the effect of the  
14 deed would be dispelled by use of “revocable transfer on death” terminology,  
15 regardless of the awkwardness of the phrase. This study adopts revocable transfer  
16 on death terminology. “Revocable transfer on death deed” is more descriptive of  
17 the nature of the transfer device than “beneficiary deed”; the device may also be  
18 referred to as a “revocable TOD deed”.

## 19 **EXISTING DEVICES**

### 20 **Overview**

21 A number of options are available under existing California law for passing real  
22 property to a beneficiary at death. The major devices are:

- 23 • Lifetime Deed
- 24 • Will or Intestate Succession
- 25 • Intervivos Trust
- 26 • Joint Tenancy
- 27 • Community Property

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4 The jurisdictions are Arizona, Arkansas, Colorado, Kansas, Missouri, New Mexico, Nevada, Ohio, and Wisconsin.

5 Arizona, Arkansas, Colorado, Missouri, and Nevada.

6 Kansas, New Mexico, Ohio, and Wisconsin.

7 See, e.g., Kirtland and Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law 118, 119 (March 2005):

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

- 1 • Intervivos Transfer with Reserved Life Estate
- 2 • Revocable Deed
- 3 • Conveyance Pursuant to Nonprobate Transfer

4 “If we were concerned to complete a taxonomy of will substitutes, we could  
5 lengthen our list to include devices that are scorned by lawyers and financial  
6 intermediaries but that still attract laymen. A substantial case law chronicles  
7 laymen’s quixotic attempts to achieve will-like results by manipulating the  
8 contingent estates and delivery rules of the law of deeds. The gift *causa mortis* is a  
9 transparent will substitute, but it can be messy to prove, and it is difficult to keep  
10 in force because of the rule that it self-destructs on the donor’s return to health.  
11 These and other stray dogs of the American law of gratuitous transfers populate  
12 the law school casebooks but have not been quantitatively important in the  
13 nonprobate revolution.”<sup>8</sup>

14 This study reviews a few key considerations relating to each major device,  
15 including ownership rights, revocability, cost and ease of transmission, privacy,  
16 creditor rights, taxes, and Medi-Cal eligibility and reimbursement. The objective is  
17 to determine whether the revocable TOD deed fills a need not filled by other real  
18 property donative transfer devices.

19 For the purpose of this study:

20 “*Ownership Rights*” refers to the ownership interest retained by the transferor  
21 during life. Some transfer devices allow a transferor to retain full ownership rights  
22 during life; others transfer incidents of ownership immediately.

23 “*Revocability*” of the device refers to the owner’s ability to make a change to  
24 the beneficiary designation, or to revoke the property disposition, so long as the  
25 owner retains legal capacity. Some transfer devices are revocable, others are  
26 irrevocable.

27 “*Cost and Ease of Transmission*” associated with a particular device refers to  
28 implementation of the transfer of the real property to the beneficiary. The various  
29 devices invoke widely disparate procedures and costs. Some involve recordation  
30 of an affidavit of death; other require judicial action.

31 “*Privacy*” refers to the ability of the transferor to avoid public scrutiny of the  
32 transfer. Some types of transfer at death require public court proceedings; others  
33 are private and free of public scrutiny. In any event, a real property transfer must  
34 ultimately be recorded and become a public record in order to be fully effectual.

35 A transferor may not wish to alert a potential beneficiary to the transferor’s  
36 estate plan. Whether it is sound estate planning not to notify a beneficiary or  
37 publicize the transfer is another matter. A beneficiary that is aware of the  
38 transferor’s intentions and actions can take steps to implement the transfer in a  
39 timely manner. There also may be some benefit from the publicity attendant on a  
40 transfer — for example, fraud, duress, or undue influence may be exposed.

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<sup>8</sup> Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1115 (1984).

1 “*Creditor Rights*” addresses the fact that some types of transfer devices subject  
2 the property to the transferor’s creditors. Creditor rights are not recognized  
3 against many nonprobate transfer techniques, or the law governing them may be  
4 unclear. While that may be advantageous to a nonprobate transfer beneficiary, it is  
5 questionable whether it represents sound public policy.

6 The ability of the beneficiary’s creditors to reach the beneficiary’s expectancy  
7 interest in property that is the subject of a donative transfer likewise varies with  
8 the type of transfer. A creditor may have an immediate right to reach the asset in  
9 some cases; in other cases the creditor must wait until the transferor’s death.

10 “*Taxes*” are the estate tax, generation skipping transfer tax, gift tax, income tax,  
11 and property tax.<sup>9</sup> Depending on the particular transfer device, the property may  
12 or may not remain part of the transferor’s taxable estate for estate tax and  
13 generation skipping transfer tax purposes.<sup>10</sup> Property that passes from a transferor  
14 at death may receive a new basis (often stepped up) for income tax purposes.

15 With respect to property tax, real property passing from a transferor is  
16 reassessed when a “change in ownership” occurs. Special rules apply if the  
17 property passes to a spouse or domestic partner or is a personal residence passing  
18 to a child. The time when a change in ownership, and reassessment, occurs  
19 depends on the type of transfer used.

20 “*Medi-Cal Eligibility and Reimbursement*” refers to the fact that a transferor’s  
21 objective in making a transfer of real property may be to reduce assets in order to  
22 achieve Medi-Cal eligibility, as well as to as to remove the property from the  
23 transferor’s estate so that it will be immune from the state’s claim for  
24 reimbursement of benefits provided to the transferor.<sup>11</sup>

## 25 **Lifetime Deed**

26 A transferor may make a quick, inexpensive, and effective transfer of real  
27 property by the simple device of a lifetime deed of the property to the beneficiary,  
28 while retaining possession and control of the property until death.

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9 The state inheritance tax was repealed in 1982, and was replaced by a state pick up tax equal to the amount of the federal estate tax credit.

10 The federal taxation system is currently in flux. Under the Economic Growth and Tax Relief Reconciliation Act of 2001, the taxable estate exclusion increases steadily to \$3.5 million in 2009, and the estate tax and generation skipping transfer tax are repealed in 2010. The repeal sunsets in 2011 and a taxable estate exclusion of \$1 million is revived. Meanwhile the gift tax exclusion amount holds steady at \$1 million. Congress has considered, but not yet adopted, proposals to make the repeal permanent. For purposes of analysis, this recommendation assumes that the repeal will sunset in 2011.

11 Such a transfer may cause the transferor to lose Medi-Cal eligibility for a period of time. The decedent’s principal residence is an exempt asset for Medi-Cal eligibility purposes, but may nonetheless be subject to the state’s claim for reimbursement after the decedent’s death.

The state may obtain reimbursement for the value of services provided to a Medi-Cal recipient from the recipient’s “estate”. The term is broadly defined, and includes property that passes to a beneficiary at the decedent’s death through a variety of devices, including joint tenancy, survivorship, living trust, “or other arrangement.” See 42 USC § 1396p(b)(4); see also Welf. & Inst. Code § 14009.5 (property of decedent passing by distribution or survival).

1 That option has its limitations. An outright transfer of property during life is  
2 irrevocable and it puts the owner's control and use of the property at risk if the  
3 transferee becomes abusive — asserting a right to possession or borrowing on the  
4 equity or transferring it to others. The lifetime deed leaves the property subject to  
5 enforcement for the transferee's unrelated debts; it is impossible for the owner to  
6 use the equity for the owner's own benefit, through a reverse mortgage, for  
7 instance; and it can cause unfavorable tax consequences for the transferee.

8 The transferor may attempt to avoid some of the adverse consequences of a  
9 lifetime deed by holding it unrecorded with other estate planning instruments, or  
10 by giving it to the beneficiary with instructions to record it after the transferor's  
11 death. These techniques may have unpredictable consequences.

- 12 • *Ownership Rights.* The transferor retains no ownership rights, and is at the  
13 sufferance of the beneficiary.
- 14 • *Revocability.* Irrevocable.
- 15 • *Cost and Ease of Transmission.* Simple and efficient.
- 16 • *Privacy.* Public record of transfer.
- 17 • *Creditor Rights.* Creditors of transferor may not reach property. Creditors  
18 of beneficiary may reach property.
- 19 • *Taxes.* Subject to gift tax and not part of transferor's taxable estate.
- 20 • *Medi-Cal Eligibility and Reimbursement.* Property not in transferor's  
21 estate for eligibility determination but transfer may affect eligibility.

## 22 **Will or Intestate Succession**

23 A transferor may transfer property at death by will or intestate succession. A  
24 will passes no interest in property until the transferor's death, and is revocable and  
25 may be changed up to the moment of death.

26 The property passes by operation of law at the transferor's death. It is subject to  
27 probate administration. The personal representative deeds the property to  
28 distributees pursuant to court order.

## 29 ***Probate Administration***

30 Probate administration involves determination of heirs or devisees and  
31 settlement of debts and taxes. Court supervision is involved, and the procedure  
32 provides a forum in case of a dispute. Probate administration includes family  
33 protections to ensure that the transferor's family is not left destitute, such as the  
34 family allowance and the probate homestead. Because probate administration is a  
35 judicial proceeding all acts and records are public. Probate fees include filing fees,  
36 personal representative and legal fees, and probate referee fees.

37 A probate estate can seldom be closed more quickly than six months after the  
38 transferor's death. Even for a routine estate, nine months may be more typical.

39 The cost of probate administration is based on the value of the estate. A probate  
40 referee values the estate (for which the referee receives a commission plus

1 expenses). The personal representative is entitled to compensation on a sliding  
2 scale, starting at 4% on the first \$100,000, going down to 1% of amounts between  
3 \$1 million and \$10 million, and allowing smaller percentages for larger estates.  
4 The estate attorney's compensation for ordinary services is on the same scale as  
5 the personal representative's. There are also filing fees and other costs. A  
6 reasonable estimate is that combined fees for a routine \$400,000 estate are about  
7 \$23,000.

8 Costs can be reduced, and administration expedited, in a routine estate by use of  
9 "independent administration" procedures. These procedures involve limited court  
10 supervision. However, there is an irreducible minimum time required for notice to  
11 creditors and processing of claims in probate administration.

12 Probate administration is similar in effect to a bankruptcy proceeding. It  
13 discharges the transferor's debts and allows property to pass to beneficiaries free  
14 of creditor claims. The same cannot be said of small estate procedures.

#### 15 *Small Estate Procedures*

16 If the transferor's estate, or real property in it, is of relatively small value, it may  
17 pass by will or intestate succession without probate administration:

- 18 • In the case of an estate having a gross value under \$100,000, the  
19 beneficiary may obtain a court order determining that the beneficiary has  
20 succeeded to the property. The proceeding may not be brought before 40  
21 days have elapsed since the transferor's death. The beneficiary is liable for  
22 the transferor's debts, not exceeding the value of the property received.
- 23 • In the case of real property valued at \$20,000 or less, the beneficiary may  
24 file and record an affidavit of succession. The beneficiary must wait at  
25 least six months after the transferor's death before using this procedure,  
26 and the beneficiary remains personally liable for the transferor's debts  
27 (limited to the value of the property and any income and interest generated  
28 by it).

29 These devices are of little use for passing real property such as a family home  
30 cheaply and expeditiously, since California real estate values have inflated in  
31 many cases beyond the statutory limits.

- 32 • *Ownership Rights.* The transferor retains full ownership rights.
- 33 • *Revocability.* The transferor may change or revoke disposition.
- 34 • *Cost and Ease of Transmission.* Costly and time consuming, except for  
35 small estate.
- 36 • *Privacy.* Privacy before death, publicity after death.
- 37 • *Creditor Rights.* Creditors of transferor may reach property in probate but  
38 are precluded after probate, unless small estate procedures are used.  
39 Creditors of beneficiary have no access to property until distribution.
- 40 • *Taxes.* Property is part of taxable estate. Beneficiary receives new tax  
41 basis.

- 1           • *Medi-Cal Eligibility and Reimbursement*. Property remains in transferor's  
2           estate for eligibility determination, and is subject to reimbursement claim  
3           of state.

4   **Intervivos Trust**

5       There was a time when a will and probate was the standard means of passing  
6       property at death, but that is no longer the case. The instrument of choice for an  
7       estate planner today is the intervivos trust.

8       The concept of the living trust was popularized in the 1960's with the  
9       publication of Dacey, *How to Avoid Probate* (1965). Under a Dacey Trust a settlor  
10      would put all of the settlor's property into a revocable trust with the settlor as  
11      trustee. The settlor would have full use of the property during the settlor's life. On  
12      the settlor's death, the successor trustee would simply convey the property to the  
13      beneficiary designated in the trust.

14      The technique was viewed as an antidote to the delay and expense of probate.  
15      During the 1960's that was perhaps a more significant issue than it is today, with  
16      the advent of independent administration and other techniques that have helped  
17      speed up the probate process and have limited its cost.

18      The intervivos trust is now commonplace and trust instruments are more  
19      sophisticated. One complaint about the trust as a device for transferring property at  
20      death is that a lawyer-drawn trust can be lengthy and costly. Self help books and  
21      software are available for the do it yourselfer; however, these may require some  
22      sophistication. An inexpensive trust prepared by a "trust mill" often will be  
23      inappropriate for the particular individual and may be used as a loss leader for sale  
24      of other products to the consumer such as insurance.

25      The expense of a trust may be significantly less than the expense of probate  
26      administration. A trust provides a more expeditious means of transferring property  
27      at death than a will or intestate succession.

28      There are drawbacks to use of an intervivos trust. Family protections such as the  
29      probate homestead are unavailable to dependents of the transferor. The  
30      transferor's creditors may be able to reach the property if the estate is insufficient.  
31      California law allows the trustee to conduct an optional creditor claims procedure,  
32      parallel to the procedure available in a probate proceeding, enabling the trustee to  
33      cut off creditor claims.

34      Often a trust is unfunded, i.e., the settlor fails to convey the property to the  
35      trustee. The trustee (or successor trustee) must be the owner of the property in  
36      order to make an effective conveyance of the property to the named beneficiary  
37      after the transferor's death. There is case law in California to the effect that real  
38      property may pass under a trust instrument even though the settlor has not  
39      executed a deed in favor of the trustee.<sup>12</sup> Whether a title company would insure  
40      title in such a case without a court determination of rights is questionable.

---

12 See Estate of Heggstad, 16 CA 4th 943, 20 CR 2d 433 (1993).

1 Trust property is included in the decedent's taxable estate for estate tax  
2 purposes. The beneficiary gets an adjusted basis because the property is  
3 considered as having been acquired from a decedent. Though technically the  
4 transferor is not the owner of property transferred in trust, the transferor is  
5 considered the owner for estate tax purposes because the transferor retains  
6 revocation rights. Similarly, transfer of real property into trust does not trigger a  
7 property tax reassessment; that occurs only on distribution from the trust.

- 8 • *Ownership Rights.* The transferor retains possession of the property  
9 although technically the ownership rights are now in the trustee. The  
10 transferor ordinarily acts as trustee.
- 11 • *Revocability.* The transferor may change or revoke the disposition.
- 12 • *Cost and Ease of Transmission.* Low cost both to create and implement a  
13 trust.
- 14 • *Privacy.* Can be kept private before death, but better practice and economy  
15 requires recordation of transfer during life (though not distribution scheme  
16 of trust instrument), and failure to record transfer of real property in trust  
17 necessitates court order to implement.
- 18 • *Creditor Rights.* Creditors of transferor may reach property during  
19 transferor's life; after death they may reach property to extent estate is  
20 inadequate. Procedure is available to flush out creditor claims after death.  
21 Creditors of beneficiary have no access to property until distribution,  
22 subject to spendthrift limitations.
- 23 • *Taxes.* Property is part of taxable estate. Beneficiary receives new tax  
24 basis. Creation of trust does not trigger reassessment.
- 25 • *Medi-Cal Eligibility and Reimbursement.* Property is considered part of  
26 transferor's estate for eligibility determination, and is subject to  
27 reimbursement claim of state.

## 28 **Joint Tenancy**

29 A classical way to pass real property to a beneficiary on death outside of  
30 property is through joint tenancy. That is a form of joint ownership of property,  
31 consisting of equal and undivided interests of the joint tenants during life. After  
32 death the surviving joint tenant acquires ownership of the whole by right of  
33 survivorship. The surviving joint tenant records an affidavit of death in order to  
34 establish ownership.

35 Joint tenancy is problematic in a number of respects. Because it creates a present  
36 interest in the beneficiary, the beneficiary has immediate ownership rights. The  
37 gift is irrevocable and not subject to change by the transferor. The beneficiary may  
38 have different ideas about use of the property, or may seek partition. The

1 beneficiary can encumber or sell the beneficiary's interest, and that interest is  
2 subject to claims of creditors.<sup>13</sup>

3 Creation of a joint tenancy is a gift of a present interest, and therefore may  
4 trigger a gift tax. At the transferor's death, the transferor's proportionate interest is  
5 included in the transferor's estate; the beneficiary receives an adjusted basis for  
6 the transferor's share.

- 7 • *Ownership Rights.* Immediate transfer of property interest.
- 8 • *Revocability.* Irrevocable.
- 9 • *Cost and Ease of Transmission.* Simple and economical.
- 10 • *Privacy.* Recordation of the deed is not necessary to create joint tenancy,  
11 but is at risk of intervening interests if unrecorded.
- 12 • *Creditor Rights.* Beneficiary's creditors may reach beneficiary's share  
13 during life. On death of transferor, transferor's creditors lose rights against  
14 the property.
- 15 • *Taxes.* Taxable as gift on creation; includable in the transferor's estate;  
16 new income tax basis on transferor's share.
- 17 • *Medi-Cal Eligibility and Reimbursement.* May cause loss of eligibility,  
18 and fractional interest remains subject to state reimbursement.

### 19 **Community Property**

20 The principal focus of this analysis is transfer of real property to the next  
21 generation or to a third party. Therefore passage of community property to the  
22 surviving spouse on the death of the transferor is described only briefly.

23 Either spouse has the right of testamentary disposition of one half the  
24 community property; absent a will the transferor's share passes to the surviving  
25 spouse. Community property receives favorable tax treatment. Effectuating the  
26 transfer is relatively efficient.

27 A new title form is authorized by statute — “community property with right of  
28 survivorship”. It is intended that the new title form will combine the best attributes  
29 of community property and joint tenancy for passing property to the surviving  
30 spouse. Community property with right of survivorship is not subject to  
31 testamentary disposition, and its passage may be confirmed to the surviving  
32 spouse under the joint tenancy affidavit procedure. It is intended that the property  
33 will receive the double step up in tax basis that is a characteristic of community  
34 property, although federal treatment of the new form is not yet clear.

- 35 • *Ownership Rights.* Joint control. Limited to spouses and domestic  
36 partners.
- 37 • *Revocability.* Transferor may revoke community property with right of  
38 survivorship and dispose of interest by will.

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13 On the other hand, when the decedent dies, the beneficiary takes the decedent's interest free of claims of the decedent's creditors.



- 1 • *Cost and Ease of Transmission.* Inexpensive and efficient.
- 2 • *Privacy.* Community property with right of survivorship must be recorded
- 3 before death; confirmation by recorded affidavit after death.
- 4 • *Creditor Rights.* Creditors of either spouse may reach entire property
- 5 before or after death.
- 6 • *Taxes.* Favorable tax treatment for both transferor and beneficiary.
- 7 • *Medi-Cal Eligibility and Reimbursement.* Interspousal transfer does not
- 8 affect eligibility. No reimbursement claim against surviving spouse during
- 9 survivor's life.

#### 10 **Intervivos Transfer with Reserved Life Estate**

11 A technique that has been used to pass property at death outside probate but that  
12 is not common is an intervivos transfer of the property to the beneficiary with the  
13 transferor reserving a life estate. On the transferor's death, the life tenancy interest  
14 is cleared by recordation of an affidavit of death.

15 Splitting title in this way may be problematic. Experience shows that conflicts  
16 may arise between the life tenancy and the remainder interest. Creditors of the  
17 remainder beneficiary may be able to reach the remainder interest, and perhaps  
18 force partition. Rights of the transferor's creditors against the property are  
19 terminated by the transferor's death. For tax purposes, the property is included in  
20 the transferor's estate.

21 This device is apparently effective to transfer property without affecting Medi-  
22 Cal eligibility, and without subjecting the property in the hands of the beneficiary  
23 to Medi-Cal reimbursement.

- 24 • *Ownership Rights.* Transferor retains possession during life, but there are
- 25 difficult issues concerning waste and the like.
- 26 • *Revocability.* Irrevocable.
- 27 • *Cost and Ease of Transmission.* Simple and cost effective.
- 28 • *Privacy.* Transfer must be recorded to be fully effective.
- 29 • *Creditor Rights.* Remainder interest subject to beneficiary's creditors.
- 30 Death of the transferor terminates rights of creditors of the transferor.
- 31 • *Taxes.* Taxable in same manner as estate property.
- 32 • *Medi-Cal Eligibility and Reimbursement.* Apparently will preserve Medi-
- 33 Cal eligibility and will not subject the beneficiary to reimbursement
- 34 liability.

#### 35 **Revocable Deed**

##### 36 *California Law*

37 A revocable deed is a grant of real property subject to a life estate, with a  
38 reserved power of revocation. The revocable deed was validated by the California

1 Supreme Court in the 1914 case of *Tennant v. John Tennant Memorial Home*.<sup>14</sup> In  
2 that case the grantor gave a revocable deed and did not exercise the power of  
3 revocation during her life; the beneficiary took the property on the grantor's death.  
4 Both the grantor's estate and her heirs sued to recover the property; the beneficiary  
5 resisted on the ground that the deed made an effective nonprobate transfer of the  
6 property. The court held in favor of the beneficiary:<sup>15</sup>

7 [The grantor] did then, in fact and in law, convey to the grantee the future estate  
8 which, at her death, became an estate in possession, to said grantee. The deed was  
9 not the same, in effect, as a will. It passed a present interest in the remainder,  
10 upon the contingency that the grantor should not, during her life, convey to  
11 another, or revoke the deed. The will would have had no such effect. The  
12 contingencies did not happen, hence the estate is now absolute.

13 The revocable deed has remained in use in California. In the 2002 case of *Bonta*  
14 *v. Burke*,<sup>16</sup> for example, a Medi-Cal recipient executed a fee simple grant deed of  
15 her house to her daughters, but retained a life estate in the property and the right to  
16 revoke the remainder interest. The apparent intent was to reduce the grantor's  
17 assets for qualification purposes but at the same time retain a beneficial interest in  
18 the property and dispositional flexibility until death. On the death of the Medi-Cal  
19 recipient, the state Director of Health Services filed a reimbursement claim against  
20 the beneficiaries of the real property conveyed to them. The *Bonta* court held that  
21 the revocable deed used in that case falls within the ambit of property that passes  
22 at the transferor's death for Medi-Cal purposes:<sup>17</sup>

23 We conclude that Smith [the Medi-Cal recipient] retained a significant "interest  
24 in property" until her death. As a life tenant she retained not only the enjoyment  
25 of the property but also, as the holder of the right to revoke the remainder, the  
26 unbridled power to divest her daughters of any interest whatsoever. As a  
27 consequence, the property had no value to them until Smith died. Consistent with  
28 the legislative policy of reaching assets not irrevocably transferred to  
29 beneficiaries, Smith's interest in the real property passed to her daughters at the  
30 time of her death, who took it by survival. The Department, therefore, is entitled  
31 to recover from the recipients of her property the cost of the medical services  
32 rendered to Smith. She received the services she needed during her lifetime and  
33 the State is entitled to reimbursement after her death.

34 This is a complex type of transfer that is relatively unknown. There may be  
35 conflict between the life estate and contingent remainder. A transferor would be  
36 ill-advised to try this without benefit of counsel. There may be self-help forms that  
37 could make this an effectual nonprobate transfer device.

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14 167 Cal. 570, 140 P. 242 (1914).

15 167 Cal. at 579, 140 P. at 247.

16 8 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

17 98 Cal. App. 4th at 794, 120 Cal. Rptr. 2d at 77.

1 **Other Jurisdictions**

2 Some other jurisdictions recognize the revocable deed as an “enhanced life  
3 estate” or as a “Lady Bird Deed.”<sup>18</sup> The deed takes the form of a quitclaim to a  
4 named beneficiary, reserving to the owner an “enhanced” life estate that includes  
5 the power to dispose of the property. If the owner transfers the property during life  
6 to another person, the transfer prevails over the claim of the quitclaim beneficiary.  
7 If there is no lifetime transfer, the property passes at death to the quitclaim  
8 beneficiary free of probate.

9 This type of nonprobate transfer of real property has been validated in  
10 Michigan.<sup>19</sup> Under the Estate and Protected Individuals Code of Michigan the  
11 transfer enables the grantor to retain control over transfer of the property during  
12 life but avoids probate on the death of the grantor.<sup>20</sup>

13 It has been said that in Florida the enhanced life estate is used, rather than other  
14 forms of nonprobate transfer, because the transfer does not impact the transferor’s  
15 Medicaid eligibility and the property is exempt from Medicaid recoupment and  
16 other claims against the transferor.<sup>21</sup> That would be different from the result in  
17 California.

- 18 • *Ownership Rights.* Owner retains control; may also be free of control by  
19 contingent remainder.
- 20 • *Revocability.* Owner may revoke transfer and execute transfer to new  
21 beneficiaries.
- 22 • *Cost and Ease of Transmission.* Simple and cost effective.
- 23 • *Privacy.* Recordation before death apparently not necessary, but subject to  
24 intervening interests.
- 25 • *Creditor Rights.* Life estate subject to transferor’s creditors during life;  
26 partition possible.
- 27 • *Taxes.* Includable in transferor’s estate.
- 28 • *Medi-Cal Eligibility and Reimbursement.* Does not affect eligibility, but  
29 remainder interest subject to reimbursement.

30 **Conveyance Pursuant to Nonprobate Transfer**

31 It is possible that California law already authorizes a direct conveyance of real  
32 property effective on death. The general nonprobate transfer law states:<sup>22</sup>

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18 It is said Texas law recognizes this type of deed, and that President Lyndon B. Johnson once used it to convey property to his wife Lady Bird.

19 See Opinion of Michigan Probate Court for the County of Wayne, In the Matter of the Estate of Dolores Ann Davis, Case No. 2004-684984 (March 29, 2005); noted in 18 Quinipiac Prob. L. J. 247 (2005).

20 See Calhoun County Courts, EPIC Questions and Answers, <<http://courts.co.calhoun.mi.us/epic0459.htm>> (“The grantor may want to make it clear that the power to convey includes the power to sell, gift, mortgage, lease and otherwise dispose of the property.” ).

21 Florida Guardianship Practice § 2.23 (4th ed. 2003).

22 Prob. Code § 5000(a) (emphases added).

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

9 The statute appears to address primarily an instrument in which the property  
10 being transferred is under the control of a third person — insurance proceeds,  
11 account, pension plan, trust, and the like — instances where a beneficiary  
12 designation has classically been recognized and effectuated by the person holding  
13 the asset. However, Probate Code Section 5000 as drafted is broader than that, and  
14 it specifically refers to a conveyance and deed of gift.

15 The general nonprobate transfer statute is drawn from the Uniform Probate  
16 Code. The Law Revision Commission’s Comment to it impliedly recognizes  
17 application of the provision to a real property transfer.<sup>23</sup>

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23 The Commission Comment states:

The phrase “or other written instrument of a similar nature” has been substituted in subdivision (a) of Section 5000 for the language “or any other written instrument effective as a contract, gift, conveyance, or trust” (which was found in the introductory portion of subdivision (a) of Section 160 of the repealed Probate Code). The Supreme Court of Washington read the replaced language to relieve against the delivery requirement of the law of deeds. See *In re Estate of O’Brien*, 109 Wash.2d 913, 749 P.2d 154 (1988). The substitution of the language in subdivision (a) makes clear that Section 5000 does not have this effect. See *First Nat’l Bank of Minot v. Bloom*, 264 N.W.2d 208, 212 (N.D.1978), in which the Supreme Court of North Dakota held that “nothing in ... the Uniform Probate Code [provision] eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another.”

The *O’Brien* case disapproved in the Comment involved unconditional deeds of real property executed by the donor to a named beneficiary (her daughter). The donor kept possession of the property throughout her life, and held the deeds undelivered in a safe deposit box with the intent to pass the property to her daughter at her death. The Washington court held that under the Uniform Act, delivery of the deeds was unnecessary and the donor’s intent to make a nonprobate transfer on death was effectuated.

The Comment’s disapproval of *O’Brien* goes only to the delivery requirement, not the ability to make a nonprobate conveyance of real property effective at death. The dissenters in *O’Brien* make this point. “The majority’s conclusion that the deeds meet the legal requirements of delivery should have ended the matter as a valid deed is effective to pass an interest at death. The majority, however, goes on to hold that these undelivered deeds effectively passed title to Robinson by operation of [the nonprobate transfer statute].” 109 Wash.2d at 921, 749 P.2d at 158.

The Comment cites with approval the *Bloom* case, which holds on similar facts that the nonprobate transfer statute does not validate an undelivered deed. “There is nothing in that section of the Uniform Probate Code or any other section of the Century Code which eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another. In this case, we have upheld the finding of the district court that there was no actual or constructive delivery of the deed, and therefore the deed is not effective.” 264 N.W.2d at 212 (citations omitted).

Prof. McCouch observes that “The fundamental problem is that the catch-all clause does not define its own scope with any precision. Indeed, it cannot do so if it is to remain sufficiently flexible to embrace new and evolving will substitutes. Although the UPC official comment expressly approves *Bloom* and disapproves *O’Brien*, it fails to identify any additional transactions that the revised statute is intended to

1 Prof. McCouch suggests that the general nonprobate transfer law could be  
2 improved by specifying formalities in the case of a nonprobate transfer of real  
3 property:<sup>24</sup>

4 The UPC drafters might consider authorizing a form of deed that would transfer  
5 real property at the owner's death, relying on the recording system as a substitute  
6 for probate formalities. Under such a statute, an owner would be able to execute  
7 and record a deed which expressly conveys real property at death and has no  
8 effect on legal ownership or control during the owner's life. Mechanically, such a  
9 deathtime transfer is just as simple as a conventional joint tenancy or a lifetime  
10 conveyance with retained life estate. It also raises no greater danger of fraud or  
11 mistake than any other beneficiary designation. To preserve the integrity of the  
12 recording system, however, the owner should be required to comply with the  
13 recording formalities in exercising any retained power of appointment under a  
14 recorded deed.

15 The Commission cannot evaluate this device, assuming it is available in  
16 California, because none of its attributes has been defined or tested. In fact, the  
17 specification and evaluation of the attributes of a revocable transfer on death deed  
18 is the subject of this study.

## 19 NATURE OF REVOCABLE TRANSFER ON DEATH DEED

### 20 **Jurisdictions that Recognize Revocable TOD Deed**

21 Nine jurisdictions now authorize a revocable transfer on death deed (or  
22 beneficiary deed as it is referred to in five of these jurisdictions). They are, in  
23 order of enactment:

24 Missouri (1989)<sup>25</sup>

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validate." McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1135-36 (citations omitted).

Presumably, in either of these cases, if a real property deed conditioned to take effect at the donor's death had been delivered to the beneficiary, it would have been effective under the general nonprobate transfer statute. Michigan, for example, has the same language in its Estates and Protected Persons Code (EPIC). Michigan recognizes as valid a real property deed that provides a conveyance on death pursuant to the general nonprobate transfer statute. See Calhoun County Courts, *EPIC Questions and Answers*, <<http://courts.co.calhoun.mi.us/epic0220.htm>>.

The Michigan panel advises caution in the use of this device:

MCL 700.6101 should be used with caution because of the ramifications of the transaction. A deed transferring real estate on death is not a revocable transaction. The original owner cannot reclaim the property or cancel the designation. The original owner can no longer convey or mortgage the property without the consent of the designated taker on death. The execution and delivery (recording) of the deed has income, estate and gift tax implications which are beyond the scope of this panel. The transaction may also have implications for Medicaid purposes such as whether the real estate continues to be an exempt asset.

24 *Id.* at 1143 (citations omitted). As Professor McCouch suggested, the National Conference of Commissioners on Uniform State Laws at its 2006 conference decided to convene a drafting committee for the purpose of developing uniform revocable TOD deed legislation.

- 1 Kansas (1997)<sup>26</sup>
- 2 Ohio (2000)<sup>27</sup>
- 3 Arizona (2001)<sup>28</sup>
- 4 New Mexico (2001)<sup>29</sup>
- 5 Nevada (2003)<sup>30</sup>
- 6 Colorado (2004)<sup>31</sup>
- 7 Arkansas (2005)<sup>32</sup>
- 8 Wisconsin (2006)<sup>33</sup>

9 **Operation of Revocable TOD Deed**

10 The revocable TOD deed is a deed of real property that designates a beneficiary  
11 to which the property will pass on the transferor's death. The general operation of  
12 this device is subject to some variation among the jurisdictions that have enacted  
13 it. Generally speaking:

- 14 • The deed must state prominently that no interest in the property is  
15 conveyed until the transferor's death. The deed need not be delivered to  
16 the beneficiary. The deed must be recorded before death to be effective  
17 as a transfer, and the property passes to the beneficiary outside of  
18 probate. Until that time the deed can be revoked, and a new revocable  
19 TOD deed executed to a different beneficiary. A beneficiary has no  
20 present interest in the property, which remains within the transferor's  
21 absolute possession and control.
- 22 • The transfer on death is not affected by the transferor's will. But if the  
23 beneficiary fails to survive the transferor, the property passes through  
24 the transferor's estate.
- 25 • The property is subject to creditor claims against the transferor. A  
26 secured obligation is enforceable against the property.
- 27 • The property is taxable in the same manner as property in the decedent's  
28 estate. The Medicaid consequences vary from jurisdiction to  
29 jurisdiction.
- 30 • To effectuate the transfer, the beneficiary records a death certificate.

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25 Mo. Rev. Stat. § 461.025.

26 Kan. Stat. Ann. § 59-3501.

27 Ohio Rev. Code Ann. § 5302.22.

28 Ariz. Rev. Stat. § 33-405.

29 N.M. Stat. Ann. § 45-6-401.

30 Nev. Rev. Stat. § 111.109.

31 Colo. Rev. Stat. § 15-15-401.

32 Ark. Code Ann. § 18-12-608.

33 Wisc. Stat. § 705.15.

1 **Experience in Other Jurisdictions**

2 Experience with the revocable TOD deed in other jurisdictions is compiled  
3 here.<sup>34</sup>

4 **Missouri (1989)**

5 The Missouri statute has been in effect since 1989 and is the only statute under  
6 which there is substantial experience.<sup>35</sup> The beneficiary deed is widely used and  
7 has become routine in Missouri. The most recent reliable estimate is that there are  
8 some 350,000 beneficiary deeds currently of record in Missouri.

9 An estate planning attorney typically uses the beneficiary deed in a smaller  
10 estate. However, an attorney that does sophisticated estate planning may use a  
11 beneficiary deed on occasion, particularly where the client wishes to hold the main  
12 residence in joint tenancy outside a living trust. The beneficiary deed has been felt  
13 to be a useful addition to the Missouri estate planner's arsenal of tools.

14 The Missouri statute provides the formalities and rules necessary to make an  
15 effective transfer outside of probate, and addresses many topics concerning the  
16 effect of the transfer.<sup>36</sup> When the beneficiary deed legislation was first enacted,  
17 title insurers were apprehensive about it. However, the concerns never  
18 materialized and now a title company will insure a beneficiary deed title as a  
19 matter of course.

20 There has been relatively little litigation over the device. There are no reports of  
21 abuses of the device. The consensus of practitioners is that experience with it is  
22 positive.

23 **Kansas (1997)**

24 The Kansas statute was designed to aid elder law practitioners and clients in  
25 providing an alternative to a will or nonprobate device such as a trust. It was felt  
26 that clear statutory language would enable clients and practitioners to feel safe that

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34 The compilation is based on a review of the legal literature, together with information received from stakeholders within the jurisdiction.

35 There have been a few cases under the Missouri statute. *Estate of Dugger*, 110 S.W. 3d 423 (2003), involved a beneficiary deed that was executed but unrecorded at the grantor's death. This was not a valid nonprobate transfer under the statute, which requires that the deed be recorded before death as a formality that takes the place of the delivery requirement.

*Pippin v. Pippin*, 154 S.W. 3d 376 (2004), involved a beneficiary deed that did not expressly state it was to become effective on the death of the owner. The deed said it was to become effective on the last to die of joint grantors. The court held the deed was not a valid nonprobate transfer under the statute, which requires a statement in the deed that it is effective on the death of the owner. (The dissent would have effectuated the deed, based on the clear intent of the grantor.) *Pippin* caused some consternation in practice; attorneys were advised to review previously executed deeds due to the possibility they could fail under the *Pippin* test, and to execute new deeds that included the magic words. Meanwhile, it legislative action appears to have cured the problem.

36 See Missouri Estate Planning, Will Drafting and Estate Administration Forms § 3.7 (2005).

1 if the deed were formed according to the statute there would be no problems in its  
2 operation.

3 The Kansas bar appears to find the revocable transfer on death deed preferable  
4 to joint tenancy as a means of transferring property at death without probate:<sup>37</sup>

5 A better alternative in many situations for transferring an interest in real estate a  
6 death and avoiding probate is titling the real estate in transfer-on-death. A  
7 transfer-on-death deed will transfer ownership of the interest upon the death of the  
8 owner. The grantee designation may be changed or revoked at any time during the  
9 life of the owner without the consent of the grantee.

10 The Kansas bar also has catalogued perceived advantages and disadvantages of the  
11 revocable transfer on death deed:<sup>38</sup>

12 The fact that a grantee beneficiary or beneficiaries has no ownership in the  
13 property during the lifetime of the record owner affords the following advantages  
14 that are not available under joint tenancy ownership.

- 15 • The owner does not need to have the signature of the beneficiary.
- 16 • The property is not subject to the grantee beneficiary's debts.
- 17 • The property is not subject to the rights of the grantee beneficiary's  
18 spouse.
- 19 • The property is not affected by the incapacity of the grantee beneficiary  
20 or the grantee beneficiary's spouse.
- 21 • The grantee beneficiary does not need to know about the beneficiary  
22 designation.
- 23 • The designation does not disqualify the owner for Medicaid.
- 24 • The designation can be revoked without the signature of the grantee  
25 beneficiary.
- 26 • A new designation can be executed without having to revoke the old  
27 one.
- 28 • The owner can pass property to a trust under the beneficiary  
29 designation.
- 30 • The designation is a will substitute and avoids probate.

31 This is a relatively new law and there have been no reported cases. Some of the  
32 disadvantages of using a transfer-on-death deed are:

- 33 • What happens to the contents of the home and items of personalty?
- 34 • Who is going to pay the bills?
- 35 • If there are minors, a conservator must be appointed to manage or sell  
36 the property.

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37 Kansas Real Estate Practice and Procedure Handbook § 3.18 (KS Bar Ass'n 1999). See also Kansas Long Term Care Handbook § 1.48 (KS Bar Ass'n 2001) ("This new law is an estate planning tool solving the problem of transferring real estate without probate and without the pitfalls of joint tenancy.")

38 Kansas Long-Term Care Handbook § 1.48 (KS Bar Assn. 2001).



- 1 • If one of the grantee beneficiaries is incapacitated with no agent under a
- 2 financial durable power of attorney, a conservator must be appointed to
- 3 manage or sell the property.
- 4 • The real estate is subject to Estate Recovery.

5 No matter how real estate is passed, it may be subject to estate tax, and it is

6 taken subject to any mortgages and liens on the property.

7 **Ohio (2000)**

8 The revocable transfer on death deed appears to be used and useful in Ohio. It

9 has been said that it “adds to the arsenal” of methods to avoid probate. The “most

10 important advantage of a transfer-on-death (TOD) deed is that the beneficiary or

11 beneficiaries have no interest in the property during the lifetime of the owner of

12 the interest.”<sup>39</sup> The formalities must be complied with, however, and the transfer

13 fails if the transferor fails to record the deed before death.<sup>40</sup> It has been suggested

14 that one of the advantages of the device in Ohio is that it ensures continuing title

15 insurance coverage, unlike some other lifetime estate planning transfers such as a

16 spousal transfer or a transfer in trust.<sup>41</sup>

17 **Arizona (2001)**

18 The estate planning bar in Arizona appears to find that the device fills a need:<sup>42</sup>

19 The beneficiary deed is an ideal tool for the married couple or person with a

20 simple, modest-sized estate. This typically would involve someone whose

21 primary asset is a paid-off home. The modest size of the estate usually does not

22 warrant the expense of a revocable trust. Because the equity in the home will

23 likely exceed \$50,000, a probate proceeding would normally have to be

24 commenced upon the death of the owner because the \$50,000 limitation for real

25 property affidavits has been exceeded. The good news is that the probate process

26 can now be avoided through the use of this new deed.

27 Practitioners have noted problems. If the transferor is a joint tenant, the survivor

28 may undo the beneficiary deed. There are technical requirements for recordation.

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39 1 Baldwin’s Oh. Prac. Merrick-Rippner Prob. L. § 14:20 (2005).

40 In re Estate of Scott, 164 Ohio App. 3d 464, 842 N.E. 2d 1071 (2005).

41 Bidar, *One Step Forward and Two Steps Back?*, 13 Prob. L. J. of Ohio 61 (Jan./Feb. 2003) (“By using this form of ownership, both the tax planning and probate avoidance objectives are achieved, while title insurance coverage is preserved because the original insured remains the owner after the conveyance.”)

42 Murphy, *Drafting the New Beneficiary Deed*, 38 Arizona Attorney 30, 31 (June 2002) (footnote omitted). See also Ciupak and Forest, *Beneficiary Deeds: Potential & Problems*, Arizona Journal of Real Estate & Business p. 37 (Oct. 2001):

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.

1 An improperly drafted deed or one that does not conform to all of the legal  
2 requirements may create problems that are not discovered for quite some time,  
3 when it may be too late to correct them.

4 Title companies have also been concerned. The Land Title Association of  
5 Arizona notes the following issues under the Arizona statute, as originally enacted:

- 6 • Beneficiaries unaware that they need to record a death certificate.
- 7 • The consequences if the beneficiary predeceases the transferor.
- 8 • The effect of a conveyance or encumbrance by the transferor after  
9 recordation of a beneficiary deed.
- 10 • Whether notice of the beneficiary deed must be given to the beneficiary.
- 11 • The effect of a beneficiary deed on property held in joint tenancy.
- 12 • How to designate successor beneficiaries.
- 13 • The effect of a deed to a class, such as heirs, rather than to a named  
14 beneficiary.
- 15 • Whether a transfer to a beneficiary who is married requires any special  
16 community property waiver.
- 17 • Can the beneficiary be an entity?
- 18 • How do multiple grantees hold title if the transferor fails to specify?

19 These issues were all either cured by 2002 legislation or are addressed by pending  
20 legislation.<sup>43</sup>

21 *New Mexico (2001)*

22 The revocable TOD deed appears to be functioning reasonably well in New  
23 Mexico. Experienced New Mexico title insurers confirm this; the one problem  
24 they identify is that the beneficiary's rights are subject to the statutory widow's  
25 allowance and the statutory children's allowance, both provided by New Mexico's  
26 probate law.

27 Other issues that have surfaced in connection with the New Mexico statute  
28 include questions about what interests the beneficiary takes "subject to", the  
29 authority of the transferor's agent, the priority of an encumbrance imposed after  
30 recordation of a revocable TOD deed and before the transferor's death,  
31 inappropriate use of a warranty deed, and notification of the tax assessor.

32 If the revocable TOD beneficiary wants to sell or mortgage the property after the  
33 transferor's death, the title company will ask that a probate of the transferor's  
34 estate be opened, if one is not already open, and a release obtained from the  
35 personal representative.

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43 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."

1 Experts caution that a revocable transfer on death deed must be drafted and  
2 recorded properly under the New Mexico statute. Adverse experience has been  
3 reported where the deed was unrecorded at the transferor's death. Having an  
4 attorney draft the deed is wise, and coordinating with an estate plan is also  
5 important.<sup>44</sup> Nonetheless, many people execute revocable TOD deeds without  
6 advice of counsel, using the statutory form which is available from forms  
7 publishers through stationery stores.

8 *Nevada (2003)*

9 Preliminary indications from Nevada are that the device is infrequently used.  
10 Most owners of real property have other assets as well, and for that purpose a trust  
11 is the preferred device for disposing of the entire estate.

12 *Colorado (2004)*

13 The Colorado statute apparently replaces an older transfer on death deed statute  
14 that had left many questions unanswered. The Colorado Bankers Association  
15 worked with the Colorado Bar Association to address concerns of financial  
16 institutions in formulating the new 2004 beneficiary deed legislation. The issues  
17 were worked out satisfactorily, and the statute now appears to be operating  
18 smoothly.

19 There is some indication from the practicing bar that the new statute, because it  
20 answers many questions, will pave the way for increased use of the beneficiary  
21 deed. It is believed that it will help avoid the need to probate a smaller estate that  
22 includes real property.

23 *Arkansas (2005)*

24 Practitioners appear to be unfamiliar with the new device.<sup>45</sup> The deed is  
25 untested.

26 *Wisconsin (2006)*

27 Wisconsin's TOD deed legislation is new. It is similar to other existing TOD  
28 deed statutes. There is no experience yet under the statute.

29 LEGAL INCIDENTS OF REVOCABLE TOD DEED

30 If revocable TOD deed legislation were enacted in California, what would it  
31 look like? How would it operate in practice? What would be its effect on the rights  
32 of the owner, beneficiaries, family members, creditors, third party transferees?  
33 How would it affect taxes and Medi-Cal? Would there be a statutory form? These

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44 See Rudd, *Ask the Probate Judge – Transfer on Death Deeds*, Albuquerque Journal (2/27/2003). See also Senior Citizens' Law Office of Albuquerque, New Mexico, on line advice.

45 The Arkansas Law Review has not yet published anything concerning it.

1 questions are addressed in detail below to enable an informed determination of the  
2 merits of the revocable TOD deed and whether it provides a useful alternative to  
3 other means of donative transfer of real property.<sup>46</sup>

#### 4 Operational Issues

##### 5 **Capacity**

6 The revocable TOD deed is a will substitute. The legal capacity to make a will is  
7 a lower standard than the legal capacity to make a real property transfer.

8 To make a will, the decedent must understand the nature of the act, the nature of  
9 the property, and the decedent's relationship to family members and others.<sup>47</sup> To  
10 make a real property transfer, the transferor must have the capacity to contract;  
11 that requires that the transferor understand the rights, duties, and responsibilities  
12 created by the act being performed, the probable consequences of the act for the  
13 transferor and other persons affected by it, and the significant risks, benefits, and  
14 reasonable alternatives to the act.<sup>48</sup> There is some indication in the case law that to  
15 made a gift deed, the transferor need only have testamentary capacity, not  
16 contractual capacity.<sup>49</sup>

17 None of the nine revocable TOD deed jurisdictions addresses the capacity issue.  
18 Presumably in those jurisdictions it will be the higher contract standard that  
19 prevails.

20 A person who does not have contractual capacity may be susceptible to fraud,  
21 duress, and undue influence. That danger is addressed somewhat, in the will  
22 context, by the requirement that the instrument be witnessed. A real property deed,  
23 on the other hand, is not ordinarily witnessed. The authenticity of the deed is  
24 protected by the notarization requirement.

25 If a decedent's will is challenged for lack of testamentary capacity, that issue is  
26 resolved in a probate proceeding, before property is transferred to the beneficiary.  
27 In the case of a revocable TOD deed, the property passes directly to the  
28 beneficiary; any challenge to the transfer is retroactive. A post transfer challenge  
29 is sufficient in the case of a real property transfer, since real property is immobile.

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46 The analysis does not separately address the interrelation of the issues with the domestic partnership laws. Its application to domestic partnership is important because it is likely that the revocable TOD deed would become a commonly used vehicle (preferable to joint tenancy) for use by domestic partners. However, the statutes governing property rights of registered domestic partners make those rights equivalent to the rights of spouses. See, e.g., Fam. Code § 297.5. To the extent a revocable TOD deed statute protects interests of a spouse, for example an omitted spouse or community property rights in a revocable TOD deed transfer, the statute would protect the interests of a registered domestic partner. To the extent a revocable TOD deed statute deals with the rights of a former spouse, for example an ex-spouse named as a beneficiary, the statute would deal with the rights of a former registered domestic partner.

47 Prob. Code § 6100.5.

48 Prob. Code § 812.

49 Goldman v. Goldman, 116 Cal. App. 2d 227, 253 P. 2d 474 (1953).

1 The revocable TOD deed, like a will, is a donative transfer of property that takes  
2 effect on death and is revocable by the transferor until then. For that reason,  
3 testamentary capacity should be sufficient to enable execution of a revocable TOD  
4 deed. The possibility of fraud, duress, or undue influence are controlled by  
5 execution formalities and the availability of a post death challenge.

#### 6 **Execution of Deed**

7 Most states require that a revocable TOD deed be signed, dated, and  
8 acknowledged by the record owner. These execution requirements are  
9 straightforward and appropriate.

10 Most statutes state explicitly that the deed need not be supported by  
11 consideration. Such a provision is probably unnecessary in California, where that  
12 is already the general rule.<sup>50</sup>

13 Although the revocable TOD deed is a will substitute, no state requires that it be  
14 witnessed. In California a witness is not required for any of the authorized types of  
15 nonprobate transfer — e.g., creation of a trust or designation of a pay on death  
16 beneficiary for an insurance policy, pension plan, securities account, or account in  
17 a financial institution.<sup>51</sup> Many of the authorized nonprobate transfer instruments  
18 involve a third party intermediary that oversees the execution of a real property  
19 deed. To some extent, acknowledgment before a notary serves a similar function  
20 with respect to a real property deed.<sup>52</sup>

#### 21 **Delivery**

22 Ordinarily an executed deed of real property is not effective unless delivered to  
23 the transferee, but it is unclear whether this requirement would apply to a  
24 revocable TOD deed.<sup>53</sup> The only states that address the delivery question directly  
25 are Missouri and Ohio. Their statutes provide explicitly that delivery is not  
26 required.<sup>54</sup>

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50 See, e.g., Civ. Code § 1040.

51 Prob. Code § 5000.

52 However, a notary has no responsibility to assess the capacity of the decedent or the possibility of fraud, duress, or undue influence. One reason for requiring that a will be witnessed is that it may help impress on the decedent the significance of the act. Appearance before a notary would achieve a similar effect with respect to execution of a revocable TOD deed. A witness is not required for an outright gift of real property, which may have a greater impact on the decedent than a revocable gift effective at death.

53 In Arizona, title companies have expressed concern about whether they may insure title based on an undelivered revocable TOD deed. The Arizona statute is silent on the matter. Although the statute's silence may indicate that delivery is unnecessary, practitioners advise that the better course of action is to have the deed delivered to the beneficiary, who should sign and notarize it. That is apparently standard conveyancing practice in that state.

54 See Estate of Dugger, 110 S.W. 3d 423, 428 (2003) (“The requirement that the [beneficiary] deed be recorded before death is the formality that takes the place of the delivery requirement.”).

1 The Missouri analysis appears sound. Delivery helps ensure that the transfer is  
2 intentional. A person who executes a deed but never delivers it may have decided  
3 against the transfer. But assuming a revocable TOD deed must be recorded before  
4 the transferor’s death to be effective, then delivery to the beneficiary should not be  
5 necessary.<sup>55</sup>

6 The Law Revision Commission’s Comment to Probate Code Section 5000 —  
7 the general nonprobate transfer statute — might be read to suggest that the  
8 delivery requirement of the law of deeds is applicable.<sup>56</sup> Revocable TOD deed  
9 legislation should negate such an implication.

10 **Acceptance**

11 Every state that has enacted revocable TOD deed legislation provides that the  
12 signature, consent, or agreement of, or notice to, the beneficiary is not required for  
13 any purpose during the life of the owner. Such a provision is perhaps necessary  
14 due to the common law of deeds requirement of acceptance, although in California  
15 acceptance is presumed if the deed is beneficial to the transferee. Acceptance  
16 during the transferor’s life cannot be required in any event, since delivery is not  
17 required.

18 The beneficiary may disclaim, if appropriate, after the transferor’s death.<sup>57</sup>

19 **Recordation**

20 A transferor may execute a revocable TOD deed but hold it unrecorded for any  
21 number of reasons, including reluctance to publicize it, uncertainty, a change of  
22 mind, or simple disorganization or forgetfulness. Every state that has revocable  
23 TOD deed legislation requires that the deed be recorded before the death of the  
24 owner in the county where the real property is located.<sup>58</sup>

25 The recording requirement may frustrate the transferor’s intent where the  
26 transferor fails to act diligently. Experience in other jurisdictions suggests that the  
27 transferor’s neglect is a problem.<sup>59</sup> Practitioners in Arizona have cautioned that the  
28 attorney drafting the deed should assume the obligation of recording it.<sup>60</sup>

29 The effect of failure to record the deed during the transferor’s life is that the  
30 deed is ineffective. Presumably the property will then pass under the transferor’s  
31 will, or by intestacy. None of the expected nonprobate transfer benefits will be

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55 See discussion of “Recordation” below.

56 See discussion of “Conveyance Pursuant to Nonprobate Transfer” above.

57 See discussion of “Disclaimer” below.

58 The original Nevada statute did not require recordation, but it has been since amended to require it.

59 The *Dugger* case in Missouri and the *Scott* case in Ohio illustrate the point. See “Experience in Other Jurisdictions” above.

60 However, these deeds may be executed without advice of counsel.

1 realized, and a person other than the intended beneficiary may receive the  
2 property.

3 A revocable TOD deed should be ineffective unless recorded before the  
4 transferor's death. If the deed is not recorded during the transferor's life, there  
5 may be no assurance that the transferor intended to go through with the transfer. It  
6 is said that recordation prevents surprise through a "pocket deed". It has also been  
7 argued that the requirement that recordation be accomplished before death limits  
8 the possibility of undue influence or a "deathbed transfer".<sup>61</sup>

9 Recordation cannot eliminate the possibility of fraud, duress, or undue  
10 influence. But it can minimize it by allowing fewer opportunities for manipulation.  
11 Particularly if delivery is not required for an effective transfer, the formality of  
12 recordation during the transferor's life will help ensure that the transferor's intent  
13 is effectuated.

14 The transferor may well not want to publicize the donative transfer. There may  
15 be issues among potential heirs about who should get the property. There may be a  
16 concern that a beneficiary who learns of the deed will become idle. But these  
17 concerns are overridden by the certainty of intention conferred by the act of  
18 recordation.

19 The Commission has also considered a possible requirement that a revocable  
20 TOD deed must be recorded within a short time after execution, for example 30 or  
21 60 days. Considerations include:

- 22 • Prompt recordation could help expose fraud or undue influence before the  
23 transferor dies. But it could also frustrate the transferor's desire to  
24 maintain the privacy of the disposition.
- 25 • Prompt recordation would be evidence of the transferor's intent. However,  
26 it could frustrate the intent of a transferor who desires to pass the property  
27 to the beneficiary but is physically unable to record the instrument within  
28 the required period.
- 29 • A prompt recordation requirement could invalidate an apparently validly  
30 recorded revocable TOD deed, surprising interested persons. That could  
31 be addressed to some extent a prominent warning on the revocable TOD  
32 deed form that the deed must be recorded within the prescribed period.
- 33 • A prompt recordation requirement could help ensure that the revocable  
34 TOD deed is in fact recorded before the transferor's death, helping to  
35 ameliorate the problem that could occur if the transferor holds off for  
36 privacy reasons until it is too late.

37 **The Commission solicits comment on the question whether recordation of a**  
38 **revocable TOD deed should be required within a short time after execution.**

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

1 **Battle of Recorded Deeds**

2 A transferor may execute a sequence of deeds, in favor of different beneficiaries.  
3 Since a TOD deed is revocable, the later deed should have the effect of revoking  
4 the earlier deed. But an earlier executed deed may in fact be recorded later.

5 Most jurisdictions seem to provide that the last executed deed, not the last  
6 recorded, controls. There is some ambiguity in the drafting of the statutes.

7 Arizona provides the opposite rule — “If an owner executes and records more  
8 than one TOD deed concerning the same real property, the last beneficiary deed  
9 that is recorded before the owner’s death is the effective beneficiary deed.”<sup>62</sup> This  
10 provision assumes the owner, rather than the beneficiary, records the deed.<sup>63</sup>  
11 Wisconsin also provides that the last recorded prevails.<sup>64</sup>

12 The Commission believes the majority rule is the better rule — the last executed  
13 of the recorded deeds should prevail. That will help prevent fraud.

14 Although recordation of a later deed revokes an earlier deed, is the earlier deed  
15 revived by revocation of the later deed? In some instances the transferor might  
16 have wanted to revive an earlier deed, in other instances, not. The safer rule is that  
17 the earlier deed is revoked (not revocable) by the subsequent deed.

18 **Effect of Other Instruments**

19 Property that is the subject of a revocable TOD deed may be the subject of  
20 another dispositive instrument that is intended to take effect on the decedent’s  
21 death. For example, the decedent’s will may purport to dispose of the property, or  
22 the decedent’s trust, or the property itself may be held in joint tenancy form, or in  
23 community property form with or without right of survivorship. Such conflicts are  
24 inevitable.

25 **Testamentary Disposition**

26 Most jurisdictions provide that a revocable TOD deed cannot be revoked or  
27 changed by will. The remainder are silent on the issue.

28 A significant problem with allowing a will to override a revocable TOD deed is  
29 that it undermines the certainty of the deed. A title company will not insure title  
30 absent an order of the probate court determining that there is no valid will  
31 providing for a different disposition.<sup>65</sup>

32 The majority rule is appropriate, and a revocable TOD deed should prevail over  
33 a will.

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62 Ariz. Rev. Stat. § 33-405(G).

63 The water is muddied by the fact that often the beneficiary will be acting at the transferor’s direction and as the transferor’s agent.

64 Wisc. Stat. § 705.15(3).

65 See, e.g., McCouch, *id.* at 1146-1147, 1149 (“In the absence of an express provision, however, a statutory presumption against amendment or revocation by will may be justified to preserve the autonomy of nonprobate transfers and avoid unnecessary entanglement with the probate system.”)



1 ***Trust***

2 In case of a conflict between a revocable TOD deed and a trust affecting the  
3 same property, the considerations are somewhat different from those relating to a  
4 will. A will is unrecorded. A transfer of property in trust may be recorded.

5 The primacy of the recorded instrument should be the determining factor. As  
6 between a recorded revocable TOD deed and an unrecorded transfer in trust, the  
7 revocable TOD deed should prevail. As between a recorded revocable TOD deed  
8 and a recorded transfer in trust, the later executed instrument should prevail. But,  
9 if the trust is irrevocable, a later executed revocable TOD deed should have no  
10 effect on it.

11 ***Joint Tenancy***

12 If property is held in joint tenancy form, a revocable TOD deed of the property  
13 raises the question whether the property passes by right of survivorship to the  
14 surviving joint tenant or by revocable TOD deed to the named beneficiary. The  
15 answer may depend on whether the revocable TOD deed was joined in by the  
16 surviving joint tenant.<sup>66</sup>

17 The revocable TOD deed can be viewed an effort to achieve the advantageous  
18 dispositional aspects of joint tenancy (simple and inexpensive passage of property  
19 to the survivor outside of probate) without its adverse lifetime consequences  
20 (creation of present interest in joint tenant).

21 Under joint tenancy law, a joint tenant may sever the joint tenancy right of  
22 survivorship and make a disposition of the joint tenant's interest to a person other  
23 than the surviving joint tenant.<sup>67</sup> There is no reason why a joint tenant, acting  
24 alone, should not be able to sever a joint tenancy by a revocable TOD deed of that  
25 joint tenant's interest in the property.

26 This result appears to be unique among jurisdictions that have enacted revocable  
27 TOD deed legislation. Arizona, Arkansas, and Colorado, for example, make clear  
28 that a joint tenant may execute a revocable TOD deed without approval of other  
29 joint tenants, but the revocable TOD deed is effective only if the transferor  
30 survives all other joint tenants. In no case do these jurisdictions provide that a  
31 beneficiary takes an interest over a surviving joint tenant.

32 ***Community Property***

33 Spouses have an equal and undivided interest in community property, and equal  
34 rights of management and control. However, neither spouse may make a gift of  
35 community property without the consent of the other spouse, nor may either make  
36 a conveyance of community real property without the joinder of the other. That

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66 For analysis of the situation where all joint tenants join in a revocable TOD deed, see "Multiple Owners" below.

67 A severance can be effectuated by a transfer of a joint tenant's interest, or simply by recordation of an instrument severing the joint tenancy. Civ. Code § 683.2.

1 does not preclude a spouse from disposing of that spouse's 50% interest in  
2 community property by will or nonprobate transfer.<sup>68</sup> A spouse may make a  
3 nonprobate transfer of the entire community interest in a piece of property with the  
4 joinder or written consent of the other spouse.<sup>69</sup> Absent a disposition by will or  
5 nonprobate transfer, community property passes to the surviving spouse by right  
6 of survivorship.

7 If a revocable TOD deed were authorized, it is likely that in many cases both  
8 spouses would join in a revocable TOD deed of community property to a child or  
9 other person. This type of transfer would be consistent with existing laws  
10 governing passage of community property.

11 In theory, there would not be a problem with a spouse disposing of that spouse's  
12 50% share of community property by revocable TOD deed, just as the spouse may  
13 dispose of that spouse's 50% share by will or nonprobate transfer. However, the  
14 community property statutes require the joinder or consent of the other spouse for  
15 a lifetime gift or conveyance of community property. Because the revocable TOD  
16 deed must be recorded during life, those statutes could be read to apply. Revocable  
17 TOD deed legislation should make clear that a revocable TOD deed executed by  
18 one spouse acting alone is effective to transfer that spouse's 50% interest in  
19 community property at death.

20 Community property with right of survivorship (CPWROS) is a new form of  
21 title created in 2000. Unlike ordinary community property, by agreement of the  
22 spouses CPWROS may not be disposed of by will but "shall, upon the death of  
23 one of the spouses, pass to the survivor, without administration, pursuant to the  
24 terms of the instrument, subject to the same procedures, as property held in joint  
25 tenancy."<sup>70</sup> CPWROS is apparently effective without recordation. CPWROS title  
26 is revocable by either spouse acting alone, in which case the property reverts to  
27 ordinary community property subject to ordinary means of testamentary and  
28 nontestamentary disposition. The CPWROS statute indicates that termination of  
29 the right of survivorship may be accomplished pursuant to the same procedures by  
30 which a joint tenancy may be severed.<sup>71</sup> Recordation of a revocable TOD deed  
31 should terminate the survivorship right in CPWROS property just as it does in  
32 joint tenancy property.

### 33 **Effectuation of Transfer**

34 Unlike other nonprobate transfer mechanisms, the revocable TOD deed employs  
35 no third party intermediary such as a financial institution, broker, or insurance  
36 company to transfer the property to the beneficiary after the transferor's death.

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68 See, e.g., *Estate of Miramontes-Najera*, 118 Cal. App. 4th 750, 13 Cal. Rptr. 3d 240 (2004).

69 Prob. Code §§ 5010-5032.

70 Civ. Code § 682.1.

71 Civ. Code § 682.1(a).

1 The conveyance of title to the beneficiary is self-executing on the transferor's  
2 death.

3 As a practical matter more is required to effectuate the revocable TOD deed  
4 transfer. A beneficiary that seeks to encumber the property, or sell it, may  
5 encounter resistance absent some assurance that the transferor has in fact died, that  
6 the revocable TOD deed was validly executed, that there are no other claims  
7 against the property, and the like. Because there is no probate proceeding, there is  
8 no definitive determination of these matters. The mechanism of title insurance is  
9 necessary to make the revocable TOD deed operate efficiently as intended.

10 Passage of property by revocable TOD deed is analogous to passage of property  
11 by right of survivorship pursuant to a joint tenancy or community property. In  
12 those circumstances, the beneficiary records an affidavit of death together with a  
13 certified copy of the death certificate. The procedure is authorized by statute, and  
14 it is standard practice for a title insurer to act in reliance on it.<sup>72</sup>

15 Under legislation enacted in 2001, dissolution or annulment of a marriage  
16 operates as a severance of joint tenancy or CPWROS of the spouses.<sup>73</sup> The law  
17 provides for an affidavit of facts on which a third person may rely, and protects the  
18 rights of a bona fide purchaser or encumbrancer that acts in reliance on the  
19 affidavit.<sup>74</sup>

20 The same procedures applicable to joint tenancy or CPWROS should be made  
21 applicable to effectuate a transfer of property that passes under a revocable TOD  
22 deed. That also appears to be the process used in other jurisdictions that have  
23 enacted revocable TOD deed legislation.<sup>75</sup>

#### 24 **Contest**

25 Because the revocable TOD deed operates automatically outside probate, there  
26 is no opportunity for a claimant to the property to contest the transfer before the  
27 property passes to the beneficiary by operation of law. Standard nonprobate  
28 transfer practice is to make the transfer of property quick, simple, and efficient. If  
29 there is a contrary claim, that is sorted out later, but does not ordinarily interfere  
30 with the effort to effectuate the transaction.<sup>76</sup> A disappointed claimant's remedy is  
31 against the beneficiary, not against the property.

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72 Cf. Prob. Code §§ 210-212. This procedure applies equally well to passage of community property with right of survivorship; the statute specifically provides that the property passes to the survivor "subject to the same procedures, as property held in joint tenancy." Civ. Code § 682.1(a).

73 Prob. Code § 5601.

74 Prob. Code §§ 5601(c), 5602.

75 See Murphy, *Drafting the New Beneficiary Deed*, 38 Arizona Attorney 30, 31 (June 2002):

The emerging consensus is to use something akin to the termination-of-joint-tenancy form used upon the death of a joint tenant. The form should be signed by the beneficiary stating that the sole or last surviving owner has died and that the beneficiary now accepts ownership of the property.

76 These general principles are stated in California's nonprobate transfer law. See Prob. Code § 5003.

1 ***Proceedings***

2 The jurisdictions that have enacted revocable TOD deed legislation generally do  
3 not address a challenge to the transfer. They apparently leave the logistics to  
4 general law. The Colorado statute specifies a statute of limitations — the right of  
5 an heir, devisee, or personal representative to recover property or its value from  
6 the beneficiary is barred three years after the owner’s death, or one year after  
7 recordation of a certificate of death, except in the case of fraud.<sup>77</sup> Missouri  
8 provides somewhat more guidance. Fraud, duress, or undue influence voids a  
9 beneficiary designation and may be judicially determined on petition of an  
10 interested person in a proceeding in which a jury trial is available and in which the  
11 relief awarded may be mitigated as the trier of fact determines that justice  
12 requires.<sup>78</sup> Property wrongfully received by the beneficiary, or its value, is subject  
13 to restitution.<sup>79</sup>

14 The core procedural issues are the grounds for a contest, nature of the  
15 proceeding, venue, pleadings, statute of limitations, and remedies. The  
16 Commission recommends use of the existing Probate Code Section 850 procedure  
17 providing for court resolution of a disputed conveyance or transfer of property  
18 involving a decedent.<sup>80</sup> An interested person may petition the court for relief,  
19 serving each person that claims an interest in or has title to or possession of the  
20 property. The court may grant appropriate relief, including an order that authorizes  
21 or directs the person having title to or possession of the property to execute a  
22 conveyance or transfer to the person entitled. This is an established and reasonably  
23 expeditious procedure that is readily adaptable as a means to contest passage of  
24 title pursuant to a revocable TOD deed.

25 ***Grounds for Contest***

26 The revocable TOD deed device is not known to the law in California.  
27 Presumably common law principles of fraud, mistake, duress, and undue influence  
28 would apply to the revocable TOD deed as they would to any other deed of gift or  
29 transfer. Missouri law makes clear that these principles apply to a nonprobate  
30 transfer. California revocable TOD legislation should include a comparable  
31 provision.<sup>81</sup>

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77 Colo. Rev. Stat. § 15-15-411.

78 Mo. Rev. Stat. § 461.054.

79 Mo. Rev. Stat. § 461.067.

80 See Prob. Code §§ 850-859.

81 Cf. Prob. Code § 5015 (“Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a written consent to a provision for a nonprobate transfer of community property on death.”)

1 **Statute of Limitations**

2 A contest should be brought within a reasonably short period after the  
3 transferor's death. Otherwise the property will be unmarketable until the statute of  
4 limitations runs. To the extent the beneficiary's title may be voided by court order,  
5 a title company will not be willing to issue title insurance.

6 The remedies available in a challenge to a revocable TOD deed should be  
7 limited, depending on the timing of the challenge. If the challenge is brought and a  
8 lis pendens recorded within 40 days after the transferor's death, the available  
9 remedies should include revocation of the transfer. This is analogous to the 40 day  
10 limitation applicable in small estate collection.<sup>82</sup>

11 **Rights of Transferor**

12 **Ownership Interest Retained**

13 A revocable TOD deed is not effective until the transferor's death and the  
14 transferor retains full ownership rights until death. That is the rule in every  
15 jurisdiction that has revocable TOD deed legislation, and it is central to the  
16 determination of the rights of the transferor, the beneficiary, and third persons,  
17 including creditors.

18 A corollary of the principle that a transferor who executes a revocable TOD  
19 deed retains full rights in the property during life is that the beneficiary has no  
20 rights until the transferor's death. Arizona and New Mexico have experienced  
21 problems such that a transferor must revoke a revocable TOD deed in order to  
22 refinance or sell the property. That should not be necessary if the law makes clear  
23 that the beneficiary has no right until the transferor's death.<sup>83</sup>

24 **Revocability**

25 A key incident of retained ownership by a transferor during life is the right to  
26 revoke the TOD deed. Every jurisdiction that has enacted TOD deed legislation  
27 has made the deed revocable.

28 Revocability renders the TOD deed ambulatory. The transferor may make  
29 changes, or make a different disposition of the property, at any time before death.

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82 See, e.g., Prob. Code §§ 13100 (collection or transfer of personal property by affidavit if 40 days have elapsed since death of decedent), 13151 (petition for court order determining succession to property if 40 days have elapsed since death of decedent), 13540 (right of surviving spouse to dispose of property after 40 days from death of spouse).

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

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

1 The revocability of the deed reinforces the concept that a designated beneficiary  
2 has no interest in the property until the deed is finalized by the transferor’s death.<sup>84</sup>

3 Revocation implies modification. Revocable TOD legislation should not invite a  
4 modifying instrument, since a modifying instrument will create constructional  
5 problems. The better approach is for the transferor to record a new revocable TOD  
6 deed that revokes the earlier deed.

7 The TOD deed should be revocable notwithstanding language within the deed  
8 itself purporting to make it irrevocable.<sup>85</sup> An irrevocable TOD deed would be  
9 litigation breeding and implicate rights in the beneficiary. The owner may have a  
10 contractual or court-ordered obligation to transfer the property to the beneficiary.  
11 In the analogous situation of a joint will, a disposition inconsistent with an  
12 “irrevocable” devise is ordinarily recognized, but a suit in equity is required to  
13 enforce the contractual commitment.

#### 14 *Revocation Procedure*

15 The enabling legislation for this study asks:<sup>86</sup>

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

20 A number of the states with revocable TOD deed legislation address the  
21 revocation procedure expressly. Arizona, Arkansas, Colorado, and Kansas all  
22 provide that a revocation must be executed by the transferor, must identify the  
23 property and otherwise comply with the general requirements for a recorded  
24 instrument, and must be recorded in the county in which the real property is  
25 situated before the transferor’s death. Several states add the probably unnecessary  
26 but perhaps helpful remark that “The joinder, signature, consent, agreement of, or  
27 notice to, the grantee-beneficiary is not required for the revocation to be  
28 effective.” Presumably the transferor may act through an agent.<sup>87</sup>

29 Three states prescribe a statutory form that may be used for revocation of a TOD  
30 deed.<sup>88</sup>

31 California revocable TOD deed legislation should provide that revocation may  
32 be achieved by recordation of an instrument that cancels or revokes the TOD deed.

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84 Because the TOD deed is revocable, the property is considered part of the transferor’s estate for estate tax purposes. See discussion of “Estate Tax and Generation Skipping Transfer Tax” below.

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

86 2005 Cal. Stat. ch. 422 § 1(b)(4).

87 Revocation by the transferor’s agent under a power of attorney must be properly authorized under Probate Code Section 4264. That provision should be revised to cover a revocable TOD deed.

88 See discussion of “Statutory Forms” below.

1 A purported revocation should be ineffective unless executed by a transferor  
2 having legal capacity and recorded before the transferor’s death.<sup>89</sup>

3 *Acts that Cause Revocation*

4 The law should recognize other acts that cause or have the effect of revocation  
5 of a TOD deed. These include changing a beneficiary designation or making a  
6 subsequent conveyance of the property.<sup>90</sup>

7 *Change of Beneficiary.* The mechanism by which the transferor makes a change  
8 of beneficiary varies among the jurisdictions. A number of jurisdictions provide  
9 that the transferor may change the beneficiary designation by recordation of a  
10 subsequent instrument that has the effect of a revocation of the previous  
11 instrument.<sup>91</sup> In Kansas, the statutory revocable TOD deed form makes clear that a  
12 new deed revokes a previous beneficiary designation.<sup>92</sup>

13 New Mexico provides that recordation of a subsequent revocable TOD  
14 beneficiary designation revokes a previous beneficiary designation “to the extent  
15 there is a conflict between the two designations.”<sup>93</sup> The Commission believes such  
16 a qualification is inadvisable. It would generate interpretive questions about  
17 whether the subsequent beneficiary designation conflicts with the earlier one or is  
18 simply an effort to create a co-ownership interest. California should follow the  
19 lead of jurisdictions that provide a subsequent revocable TOD deed revokes an  
20 earlier one for the same property.

21 *Subsequent Conveyance.* The revocable TOD deed statutes generally make clear  
22 that a subsequent conveyance of the property acts as a revocation of a TOD deed.<sup>94</sup>  
23 The basic principle of these statutes is correct, but revocation should not be

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89 If the transferor becomes incapacitated, the revocable TOD deed would become irrevocable as a practical matter.

90 The effect of a subsequent will or trust on a revocable TOD deed is dealt with in “Effect of Other Instruments” above. The effect of dissolution of the transferor’s marriage to the TOD beneficiary is dealt with in “Who May Be a Beneficiary” below.

91 Colorado, Kansas, New Mexico, Ohio, and Wisconsin among them. See, e.g., Colo. Rev. Stat. § 115-15-405(2) (“A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner’s interest in the described real property.”).

92 Kan. Stat. Ann. § 59-3502 (“This transfer on death deed is revocable. It does not transfer any ownership until the death of the owner. It revokes all prior beneficiary designations by this owner for this interest in real estate.”).

93 N.M. Stat. Ann. § 45-6-401(E).

94 See, e.g., Mo. Rev. Stat. § 461.033 (“A transfer during the owner’s lifetime of the owner’s interest in the property, with or without consideration, terminates the beneficiary designation with respect to the property transferred.”); see also Nev. Rev. Stat. § 111.109(4).

1 accomplished by an off-record instrument.<sup>95</sup> A subsequent conveyance must be  
2 recorded before the transferor's death if it is to override a revocable TOD deed.

3 **Multiple Owners**

4 Multiple ownership of property creates special challenges for the revocable  
5 TOD deed. Issues concerning execution of a deed by one co-owner without the  
6 joinder of others are complex.<sup>96</sup>

7 The revocable TOD deed law should be clear that all co-owners may join in a  
8 revocable TOD deed of their property. However, a joint revocable TOD deed  
9 raises issues with respect to revocability and other exercise of ownership rights  
10 during the lives of the co-owners as well as during the period between the deaths  
11 of the co-owners.

12 Suppose both spouses join in a revocable TOD deed of their community  
13 property or joint tenancy property, naming their child as beneficiary. Suppose  
14 further that after the first spouse dies the survivor remarries and wishes to revoke  
15 the revocable TOD deed and make a disposition of the property to the new spouse.  
16 Is that permissible? Or should the survivor be allowed to revoke only as to the  
17 survivor's interest? Or should a jointly executed TOD deed become irrevocable?

18 A number of jurisdictions have tried to deal with these issues. Under the law of  
19 Arizona, Arkansas, and Nevada, any co-owner may revoke a revocable TOD deed  
20 joined in by all, unless the co-owners hold the property as joint tenants or  
21 community property with right of survivorship (or tenancy by the entireties in  
22 Arkansas), in which case the revocation is effective only if joined in by all co-  
23 owners or by the last to die of the co-owners. Missouri offers a compromise — a  
24 revocation or change of a beneficiary designation involving property of joint  
25 owners may only be made with the agreement of all owners then living.

26 Those approaches complicate ownership rights until the death of the last of the  
27 surviving owners, and create possible unfairness to beneficiaries of the first to die  
28 of the co-owners. An alternative would be to pass an interest to the revocable TOD  
29 beneficiary immediately on death of a co-owner, and allow revocation of the  
30 revocable TOD deed as to the surviving co-owner's interest.<sup>97</sup>

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95 That would undermine the efficacy of the revocable TOD deed by making it impossible for a beneficiary to obtain title insurance.

96 See discussion of "Joint Tenancy" and "Community Property" above. In addition, an owner of property as a tenant in common should be able to make a revocable TOD deed of that owner's interest in the property without the joinder of other cotenants.

97 The effect of such a provision would be that the surviving co-owner becomes a co-owner with the TOD beneficiary of the first to die. That would perhaps diminish the attractiveness of the revocable TOD deed for some people.



1 General principles of California law govern a nonprobate transfer of community  
2 property with the joinder or written consent of spouses.<sup>98</sup> Whether these principles  
3 are appropriately applied to a revocable TOD deed is not clear.

4 **The Commission solicits public comment as to the appropriate**  
5 **consequences where co-owners jointly execute a revocable TOD deed.**

6 Alternatives include:

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

#### 16 **Subsequent Incapacity of Owner**

17 What should be the authority of a conservator, or an agent under a durable  
18 power of attorney, to deal with the property or even revoke a revocable TOD deed  
19 following the incapacity of the owner?

20 A revocable TOD deed would not create any special problems that do not  
21 already exist with respect to any other estate planning instrument of a conservatee,  
22 including a nonprobate transfer instrument. Under general principles of substituted  
23 judgment, the conservatee's estate plan must be taken into account, and notice  
24 must be given to a beneficiary.<sup>99</sup>

25 California law precludes an agent under a durable power of attorney from  
26 making, amending, or revoking the principal's will.<sup>100</sup> The law allows an agent to  
27 create, modify, or revoke the principal's trust, make or revoke a gift of the  
28 principal's property, create or change survivorship interests in the principal's  
29 property, and designate or change a beneficiary to receive property on the  
30 principal's death, provided that the principal expressly authorizes the act in the  
31 power of attorney.<sup>101</sup> That would appear to cover revocation of a revocable TOD  
32 deed as well, but the power of attorney law should be revised to make the  
33 coverage explicit.

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98 Prob. Code §§ 5010-5032.

99 See, e.g., Prob. Code §§ 2580-2586.

100 Prob. Code § 4265.

101 Prob. Code § 4264. With respect to possible self dealing by the TOD transferor's agent, see "Evaluation of Revocable TOD Deed" below.

1 The jurisdictions that have enacted revocable TOD legislation do not deal with  
2 these issues, except for Missouri. The Missouri statute appears to be generally  
3 consistent with California law on this matter.<sup>102</sup>

4 **Ownership Interest Conveyed**

5 Generally a revocable TOD deed transfers the owner’s entire interest in the  
6 property, although some jurisdictions appear to allow an owner to transfer less  
7 than all of the ownership interest. The Commission believes such flexibility would  
8 be inadvisable. It creates constructional, as well as procedural, problems.<sup>103</sup>

9 The revocable TOD deed should pass all of the transferor’s interest in the real  
10 property that is the subject of the deed. That will facilitate the transfer. The  
11 revocable TOD deed is in essence a quitclaim by the transferor. A deed that  
12 purports to transfer some but not all of the transferor’s interest in the property  
13 should be void and the property should instead pass under another instrument such  
14 as a will or trust, or by intestacy to the transferor’s heirs.

15 Property passes under a revocable TOD deed subject to any limitations on the  
16 transferor’s interest of record at the time of the transferor’s death. Every  
17 jurisdiction that has revocable TOD deed legislation makes that rule clear.<sup>104</sup>

18 **Common Interest Development**

19 The revocable TOD deed transfers “real property” on the death of the transferor.  
20 That should include a unit in a common interest development.<sup>105</sup>

21 An ownership interest in a common interest development consists of an  
22 exclusive right of occupancy of a portion of a real property development, coupled  
23 with an undivided interest in the common area or membership in an association  
24 that owns the common area. A common interest development can take various  
25 forms, including a community apartment, condominium, planned development, or  
26 stock cooperative.<sup>106</sup> All of these interests, including membership in an association

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102 Mo. Rev. Stat. § 461.035.

103 For example, a revocable TOD deed that passes a partial interest to a beneficiary may become entangled with a probate of the remainder of the interest that passes under the residuary clause of the transferor’s will.

104 A few jurisdictions also subject the revocable TOD deed to off-record limitations. See, e.g., Ariz. Rev. Stat. § 33-405(H) (“This section does not invalidate any deed otherwise effective by law to convey title to the interests and estates provided in the deed that is not recorded until after the death of the owner.”); Colo. Rev. Stat. § 15-15-407(3) (giving effect to an instrument unrecorded at the transferor’s death, so long as the instrument is recorded within four months after death). The Commission does not recommend adoption of a rule that recognizes a limitation not of record; that would hinder the insurability and efficacy of a revocable TOD deed title.

105 The Commission estimates that common interest developments constitute 25% of California’s housing stock. See *Common Interest Development Ombudsperson*, 35 Cal. L. Revision Comm’n Reports (2005) (available from the Commission, [www.clrc.ca.gov](http://www.clrc.ca.gov)).

106 Civ. Code §§ 1351-1352.

1 or ownership of a share in a stock cooperative, are defined as real property under  
2 common interest development law.<sup>107</sup>

### 3 Rights of Beneficiary

#### 4 **Revocable TOD Deed Creates No Beneficiary Rights Until Transferor's Death**

5 Execution and recordation of a revocable TOD deed creates no rights in the  
6 beneficiary; the deed remains subject to modification or revocation by the  
7 transferor at any time before death. Lack of clarity on this point may have caused  
8 confusion in some jurisdictions.<sup>108</sup> Revocable TOD deed legislation should make  
9 clear that the revocable TOD deed creates no rights in the beneficiary during the  
10 transferor's life.

#### 11 **Who May Be a Beneficiary**

12 There are limitations on who may be a revocable TOD deed beneficiary.

#### 13 ***Drafter of Revocable TOD Deed***

14 Probate Code Section 21350 provides that an instrument is not valid to make a  
15 donative transfer to the drafter of the instrument or another related person.<sup>109</sup> This  
16 provision is self executing and would apply to the drafter of a revocable TOD deed  
17 as well as to any other donative transfer.

#### 18 ***Ex-Spouse***

19 The statutes of other jurisdictions generally do not deal with the effect of  
20 dissolution of marriage on a revocable TOD deed. Arkansas provides that in the  
21 event of a divorce, the revocable TOD deed is treated as a revocable trust. In  
22 Missouri, divorce revokes a nonprobate transfer generally.<sup>110</sup>

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107 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 C. Sproul & K. Rosenberry, *Advising California Common Interest Communities* § 1.12, at 14 (Cal. Cont. Ed. Bar, 2005).

108 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).

109 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.

110 See. Mo. Rev. Stat. § 461.051.

1 California law, like that of Missouri, deals with the effect of dissolution of  
2 marriage on a nonprobate transfer generally.<sup>111</sup> Under the California scheme a  
3 nonprobate transfer fails if, at the time of the transferor’s death, the beneficiary is  
4 not the transferor’s surviving spouse. This rule may be overridden by clear and  
5 convincing evidence that the transferor intended to preserve the nonprobate  
6 transfer to the former spouse. Property that fails to pass to the nonprobate transfer  
7 beneficiary because of dissolution of the marriage passes in the same manner as if  
8 the named beneficiary had predeceased the transferor.<sup>112</sup>

9 One difficulty with application of these provisions to a revocable TOD deed is  
10 that they bring into play off-record information — whether the beneficiary is the  
11 spouse of the transferor, and whether the parties are still married at the time of the  
12 transferor’s death. The statute addresses these concerns by (1) protecting a bona  
13 fide purchaser or encumbrancer that lacks knowledge of the failure of a  
14 nonprobate transfer under the statute and (2) providing for a recorded affidavit of  
15 facts on which a bona fide purchaser or encumbrancer may rely.

16 Whether that scheme would by its terms apply to a revocable TOD deed is  
17 slightly ambiguous.<sup>113</sup> Revocable TOD deed legislation should make clear that the  
18 general statute covers a revocable TOD deed.

#### 19 *Automatic Temporary Restraining Order*

20 A marital dissolution summons includes an automatic temporary restraining  
21 order (ATRO) that precludes either party from creating a nonprobate transfer or  
22 modifying a nonprobate transfer in a manner that affects the disposition of  
23 property subject to the transfer, without the written consent of the other party or an  
24 order of court.<sup>114</sup> That restraint does not preclude revocation of a nonprobate  
25 transfer, provided that notice of the change is filed and served on the other party  
26 before the change takes effect.<sup>115</sup> This provision should state clearly that it applies  
27 to a revocable TOD deed that names a spouse as beneficiary.

28 The ATRO has the potential to disrupt the operation of a revocable TOD deed  
29 due to the fact that it is an off-record restraint on transfer of the property. The  
30 statute accommodates this by protecting a bona fide purchaser or encumbrancer  
31 for value.<sup>116</sup>

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111 See Prob. Code §§ 5600-5604.

112 See discussion of “Failure to Survive and Lapse” below.

113 See Prob. Code § 5600(e) (“nonprobate transfer” defined).

114 Fam. Code § 2040(a)(4).

115 Fam. Code § 2040(b)(2).

116 Fam. Code § 2041.

1 **Trust**

2 A few state statutes include a provision to the effect that, “A transfer on death  
3 deed may be used to transfer an interest in real property to the trustee of a trust  
4 even if the trust is revocable.” Such a provision would not technically be necessary  
5 in California.<sup>117</sup> However, due to possible confusion of a revocable TOD deed  
6 beneficiary with a trust beneficiary,<sup>118</sup> such a provision would be useful.<sup>119</sup>

7 **Homicide**

8 A beneficiary is not entitled to receive property from a decedent if the  
9 beneficiary “feloniously and intentionally” kills the decedent.<sup>120</sup> This rule could  
10 impair the efficacy of a transfer under a revocable TOD deed by making the right  
11 of a beneficiary subject to an off-record factual determination (conviction of  
12 homicide). The general statute addresses such concerns by protecting a bona fide  
13 purchaser of the property.<sup>121</sup>

14 If property fails to pass to a beneficiary under the homicide rule the beneficiary  
15 is treated as having predeceased the transferor.<sup>122</sup> This provision is derived from  
16 the Uniform Probate Code, but may be problematic in some circumstances.<sup>123</sup>

17 **Minor or Incapacitated Person**

18 It is possible the transferor could name as revocable TOD deed beneficiary a  
19 minor child or an adult who otherwise lacks capacity at the time of the transferor’s  
20 death. That is not a problem. The general California statutes on appointment of a  
21 guardian or conservator to manage property for a minor or otherwise incapacitated  
22 person are adequate to handle the situation, just as they handle any other form of  
23 transfer to such a person.

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117 See, e.g., Prob. Code § 56 (“person” includes trust).

118 See Prob. Code § 24 (“beneficiary”, as it relates to a trust, means a person who has a present or future interest, vested or contingent).

119 General rules of construction would be applicable in the case of a trust that is revoked before the transferor’s death. See Prob. Code § 21111 (failure of transfer).

120 Prob. Code §§ 250-258. These provisions would apply to a revocable 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”).

121 See Prob. Code § 255. This provision of existing law is inadequate for a revocable 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. The Commission would supplement it by a general provision in any revocable TOD deed statute. See “Rights of Third Party Transferee” below.

122 Prob. Code § 250(b).

123 See McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1164-1168 (1993). See “Failure to Survive and Lapse” below.

1 **Failure to Survive and Lapse**

2 Under general principles of California law a beneficiary must survive the  
3 transferor in order to take.<sup>124</sup> If the beneficiary fails to survive, the disposition of  
4 the property may depend on whether the transferor has named an alternate  
5 beneficiary and on anti-lapse principles.

6 *Alternate Beneficiary*

7 The transferor may wish to specify an alternate beneficiary in the event the  
8 named beneficiary fails to survive the transferor. A number of states recognize this  
9 option for a revocable TOD transferor. Reports of experience with this procedure  
10 under Arizona law indicate that it is satisfactory, and title companies approve of it.  
11 That would also be the result under general California rules of construction.<sup>125</sup>

12 *Antilapse*

13 If the transferor does not name an alternate beneficiary, general lapse (and  
14 antilapse) principles would come into play. The California antilapse statute  
15 provides that a gift to a predeceased transferee that is kindred of the transferor or  
16 of the transferor's spouse does not lapse but passes to the transferee's issue.<sup>126</sup>  
17 This provision would appropriately be applied to a revocable TOD deed.

18 Several states have specifically prohibited application of antilapse principles to a  
19 revocable TOD deed.<sup>127</sup> The rationale for the departure from general antilapse

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124 See Prob. Code § 21109.

125 See Prob. Code § 21111(a)(1) (failed transfer passes as provided in the instrument).

126 Prob. Code § 21110.

127 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.

1 principles is not clear.<sup>128</sup> Presumably it is to enable a title insurer to rely on the  
2 record.<sup>129</sup>

3 The Commission believes equity demands application of anti-lapse principles.  
4 These would apply by operation of law unless the transferor specifies another  
5 consequence in the deed.<sup>130</sup>

#### 6 **Deed Restrictions and Conditions**

7 Some jurisdictions allow a revocable TOD deed transferor to name a beneficiary  
8 to take on any specified condition.<sup>131</sup> Here is an example of a conditional transfer  
9 construed in a reported Missouri case:<sup>132</sup>

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

17 It is inadvisable to invite a revocable TOD transferor to address a condition  
18 other than survival. A conditional grant would complicate interpretation of the  
19 instrument, require reference to off-record information, and cause a title company  
20 to refuse to issue title insurance absent a court determination of ownership. Other  
21 instruments than the revocable TOD deed are available to a transferor who wishes  
22 to make a complex estate plan.

23 If the revocable TOD transferor nonetheless includes a restrictions or condition  
24 in a revocable TOD deed, the net result is likely to be that the instrument will

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128 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).

129 Under antilapse principles a beneficiary not specifically referred to in the deed may be entitled to the property.

130 See Prob. Code §§ 21101, 21110.

131 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.”)

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

1 require judicial construction and will not pass to the named beneficiary quickly,  
2 cheaply, or free of court involvement.

3 **Multiple Beneficiaries**

4 *Named Beneficiaries*

5 Every jurisdiction that has enacted revocable TOD deed legislation authorizes  
6 the transferor to name multiple beneficiaries, with<sup>133</sup> or without<sup>134</sup> detail as to the  
7 manner of tenure.<sup>135</sup> Only a few simple rules are necessary. The main issues are  
8 the manner of tenure among the named beneficiaries and the consequences of  
9 some but not all surviving the transferor.<sup>136</sup> The statute should make clear that a  
10 transferor may name more than one beneficiary of property and that unless the  
11 instrument otherwise provides, the beneficiaries take the property as tenants in  
12 common. If a named beneficiary fails to survive, that beneficiary's interest may  
13 terminate, or may go to that beneficiary's heirs, depending on application of  
14 antilapse principles.

15 *Class Gift*

16 A revocable TOD transferor may wish to make a class gift, for example “to my  
17 children” rather than naming individual beneficiaries. However, a title company  
18 cannot ascertain from the record who the actual beneficiaries of a class gift are.  
19 Moreover, a class gift generally is subject to more complex constructional issues  
20 than a gift to a named beneficiary.<sup>137</sup>

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133 See, e.g., Ariz. Rev. Stat. § 33-405(B) (“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.”)

134 See, e.g., Kan. Stat. Ann. § 59-3501(a) (emphasis added) (“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.”).

135 Missouri provides the most elaborate detail. See Mo. Rev. Stat. § 461.061 (“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. § 461.062(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.”).

136 Subordinate issues relate to rights among surviving beneficiaries — management rights, liability for taxes, right to partition, and the like. No special provisions are necessary. The rights of cotenants under a revocable TOD deed transfer would be no different from rights of cotenants who take by will, intestate succession, or trust.

137 For example, does a class gift to children include only children alive at the time the gift is made, or does it include afterborn children? Does it include an out of wedlock child, adopted child, step child, or child in



1 The various revocable TOD deed statutes appear not to permit a class gift, but  
2 rather require that a beneficiary be “named” or “identified in the deed by name”.  
3 Missouri alone among the states explicitly allows a class gift, and provides some  
4 rules of construction.<sup>138</sup>

5 A revocable TOD deed to a class is problematic because, in addition to  
6 constructional problems, it renders the property uninsurable until there is a court  
7 determination of class membership. A class gift results in delay, expense, and  
8 complication — the matters of concern that ordinarily prompt a transferor to use a  
9 revocable TOD deed in the first place.<sup>139</sup>

#### 10 *Divided Interests*

11 While a transferor should be able to transfer the property to multiple  
12 beneficiaries, the property should pass to the beneficiaries as an undivided interest.  
13 The transferor should not be permitted to divide the property into present and  
14 future interests, for example. That would generate questions of interpretation  
15 requiring a court order to confirm the specific interest acquired by each transferee.  
16 The revocable TOD deed should in essence be a quitclaim deed by the transferor.

17 Missouri law expressly allows the transferor to fractionate present and future  
18 interests in the property.<sup>140</sup> In one reported Missouri case, the transferor executed a  
19 beneficiary deed that conveyed a life estate in real property to the transferor’s  
20 spouse and a remainder in fee simple to the transferor’s son. The deed was  
21 challenged because it provided for transfer of the remainder on the death of the life  
22 tenant, not on the death of the transferor as required by the Missouri Nonprobate  
23 Transfers Law. The Missouri Court of Appeals, over a dissent, held that the  
24 beneficiary deed was ineffective.<sup>141</sup> The holding has been overturned by  
25 legislation.

26 A rule against fractionating interests could frustrate a transferor that wishes to  
27 pass a life estate to the surviving spouse and the remainder to children of a  
28 previous marriage. In that circumstance, however, a trust might be a preferable

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

138 Mo. Rev. Stat. § 461.059(2) (“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.”).

139 If a California revocable TOD deed transferor were nonetheless to make a class gift, general constructional rules would apply to it by operation of law. Prob. Code § 21101. 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).

140 Mo. Rev. Stat. §§ 461.003(12), 461.025(1).

141 Pippin v. Pippin, 154 S.W. 3d 376 (2004).

1 instrument, where conditions can be imposed and a trustee may serve as an  
2 intermediary.

3 **The Commission solicits comment on whether the transferor should be**  
4 **allowed to fractionate the interests that pass under a revocable TOD deed**  
5 **between a life estate and remainder interest.**

6 **Covenants and Warranties**

7 Although a revocable TOD deed is a real property deed, it is not generally  
8 thought to carry with it the implied covenants and warranties of a grant deed.<sup>142</sup>  
9 The revocable TOD deed is more akin to a quitclaim in that whatever interest the  
10 transferor has in the property is transferred to the beneficiary subject to all  
11 encumbrances. One state makes this explicit in its statute.<sup>143</sup>

12 Experience in other jurisdictions suggests that a transferor, acting without advice  
13 of counsel, may include “warranty” language into a revocable TOD deed.<sup>144</sup> The  
14 property should pass free of warranties and covenants and notwithstanding a  
15 provision otherwise in the revocable TOD deed.

16 **Proceeds of Property**

17 Property subject to a revocable TOD deed may no longer exist at the time of the  
18 transferor’s death, although there may be a fund representing the property.<sup>145</sup>  
19 Should the beneficiary be entitled to the fund? General principles of construction  
20 in California would address this question in some detail.<sup>146</sup>

21 **Disclaimer of Interest**

22 A revocable TOD deed beneficiary may not wish to receive the property.<sup>147</sup>  
23 Ordinarily, a beneficiary may avoid a donative transfer of property by executing a  
24 disclaimer.

25 California law includes detailed provisions governing the disclaimer, including  
26 manner of execution, time of execution, filing, and effect.<sup>148</sup> These provisions  
27 would apply to a revocable TOD deed beneficiary.<sup>149</sup>

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142 Typical implied covenants and warranties include title and freedom from encumbrance.

143 Colo. Rev. Stat. § 15-15-404(2) (“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.”)

144 The transferor evidently gets that language from the deed by which the transferor originally acquired the property.

145 For example, there may be insurance proceeds, an eminent domain award, sale proceeds, or the like.

146 See Prob. Code §§ 21133, 21134 (right of at-death transferee to proceeds of specific gift).

147 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.

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## 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, such as by a revocable TOD deed.

### **Possession of Family Dwelling and 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.<sup>150</sup> The probate court may also set apart a probate homestead for as long as the life of the surviving spouse or the minority of children.<sup>151</sup>

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

If the decedent’s personal representative claims the TOD family dwelling for the estate, the surviving spouse and minor children could retain temporary possession of the family dwelling pending a court order determining the claim. The ability to retain temporary possession would not affect the passage of title pursuant to the revocable TOD deed. No adjustment to the statute should be made for a revocable TOD deed.

The probate homestead likewise does not affect title to the property, though possession of the probate homestead may endure for many years. The probate homestead statute is limited by its terms to property passing by will or intestate succession.<sup>152</sup>

The existing statute should not be extended to property passing by a revocable TOD deed. The probate homestead statute requires further review in light of the contemporary use of a trust or other instrument that transfers property outside probate. The matter should not be addressed piecemeal in the context of the revocable TOD deed.

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148 See Prob. Code §§ 260-295. Under these provisions, the TOD beneficiary would be required to act within a “reasonable” time; 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.

149 Prob. Code § 267. The statute should be made explicit on this point.

150 Prob. Code § 6500.

151 Prob. Code §§ 6520, 6524.

152 Prob. Code § 6522(b).

1 **Omitted Spouse or Child**

2 A decedent who executes a will or trust before marriage or before the birth of a  
3 child may neglect to later change the instrument to reflect the change in family  
4 circumstances. The law protects an inadvertently omitted spouse or child by  
5 awarding that person the equivalent of an intestate taker's share of the decedent's  
6 probate or trust estate.<sup>153</sup>

7 The decedent's use of a nonprobate transfer instrument can effectively negate  
8 this scheme. Enactment of revocable TOD deed legislation could accentuate that  
9 result, since real property may be the decedent's major asset.

10 Professor McCouch argues that a nonprobate transfer of an individual asset,  
11 such as a revocable TOD deed of real property, should not be subject to omitted  
12 spouse and child protection:<sup>154</sup>

13 The provisions protecting an omitted spouse or child apply only to probate  
14 assets and operate essentially as constructional rules for wills. They take will  
15 substitutes into account solely for the purpose of determining whether a testator's  
16 failure to provide for a spouse or child in the will is intentional. In interpreting a  
17 will, which normally disposes of a decedent's residual property, it makes sense to  
18 inquire into the testator's overall dispositive plan. By contrast, the same inquiry  
19 with respect to each separate will substitute makes no sense as a practical matter.  
20 The [Uniform Probate Code] properly does not attempt to extend the provisions  
21 protecting an omitted spouse or child beyond the will context.

22 Missouri law states explicitly that, "No law intended to protect a spouse or child  
23 from unintentional disinheritance by the will of a testator shall apply to a  
24 nonprobate transfer."<sup>155</sup>

25 The Commission agrees that the omitted spouse and child provisions should not  
26 extend to a revocable TOD deed. Although something needs to be done with the  
27 family protection statutes in light of the nonprobate revolution, the problem should  
28 be addressed globally, not in the context of an individual type of nonprobate  
29 transfer instrument. That is particularly true where the nonprobate transfer  
30 instrument is a real property deed whose efficacy must depend on a clear  
31 statement of title in the record; the property should not be subjected to an off-  
32 record interest established by a court at a later time.

33 **Rights of Creditors**

34 Probate is essentially a bankruptcy process — the decedent's assets are  
35 collected, creditors notified and debts discharged, and the remainder is distributed  
36 to beneficiaries. The Probate Code includes detailed procedures for notifying

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153 See Prob. Code §§ 21600-21630.

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

155 Mo. Rev. Stat. § 461.059(1).

1 creditors, allowing or disallowing and prioritizing claims, and liquidating assets to  
2 pay debts.

3 A nonprobate transfer passes property outside the probate system. There is at  
4 present no consistent treatment of creditor rights for a nonprobate transfer in  
5 California. Each type of transfer is subject to unique rules.

6 For example, a surviving joint tenant takes the property free of the decedent's  
7 debts. Presumably the same principle would apply to the surviving spouse of  
8 community property with right of survivorship.<sup>156</sup> A trust estate is liable for debts  
9 to the extent the probate estate is inadequate.<sup>157</sup>

10 The law governing many types of nonprobate transfers is uncertain. The general  
11 California statute authorizing nonprobate transfers provides that "Nothing in this  
12 section limits the rights of creditors under any other law."<sup>158</sup> The same rule applies  
13 to securities that pass pursuant to a TOD security registration.<sup>159</sup> But there is no  
14 general state law governing rights of a creditor where a decedent's property passes  
15 outside of probate.

16 The State Bar Trusts & Estates Section observes with respect to the revocable  
17 TOD deed that, "An informal inquiry among attorneys around the country reveals  
18 that the treatment of creditors is a major issue, and a major area of differentiation  
19 among the states that have adopted some form of statute sanctioning beneficiary  
20 deeds."<sup>160</sup>

## 21 **Creditor Rights During Transferor's Life**

### 22 *Creditors of Transferor*

23 A TOD deed is revocable and ambulatory, like a will; it has no effect on the  
24 transferor's ownership interest or rights in the property until the transferor dies. As  
25 such, the rights of the transferor's creditors to reach the property are not affected  
26 by the deed. Revocable TOD deed legislation should make that explicit.

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156 However, there is some indication in the legislative history of the community property with right of survivorship statute that creditors would have the same rights against CPWROS as against ordinary community property.

157 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 transferor'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?

158 Prob. Code § 5000(c).

159 Prob. Code § 5509(b).

160 See Cal. State Bar Trust & Estates Section, *Letter re AB 12 (DeVore)* (4/26/05).

1 ***Creditors of Beneficiary***

2 A revocable TOD deed creates no present interest in the beneficiary and the  
3 beneficiary's creditors should acquire no access to the property during the  
4 transferor's life.<sup>161</sup> Revocable TOD deed legislation should make that principle  
5 explicit.

6 ***After-Acquired Title***

7 A revocable TOD deed beneficiary may attempt to make an encumbrance or  
8 transfer in anticipation of acquiring title. In that circumstance, the encumbrance or  
9 transfer would affect the property by operation of law when title is acquired.<sup>162</sup>

10 The beneficiary's acts would not affect rights of the transferor's creditors. A  
11 beneficiary may encumber or transfer only what the beneficiary ultimately  
12 receives from the transferor, subject to all the transferor's encumbrances and  
13 liabilities.

14 General principles adequately address any after-acquired title issues that may  
15 affect a revocable TOD deed.

16 ***Secured Creditors***

17 Questions have arisen concerning the effect of a revocable TOD deed on  
18 encumbered property. Must the trustee under a deed of trust notify the beneficiary  
19 of a trustee's sale? If the transferor wishes to refinance, must a quitclaim or  
20 subordination agreement be obtained from the beneficiary, or the revocable TOD  
21 deed revoked and re-recorded after imposition of the encumbrance?

22 Ohio addresses the matter explicitly:<sup>163</sup>

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

30 That level of statutory detail would not be necessary in California. The general  
31 principle that the deed is revocable and has no effect on the rights of the transferor  
32 or beneficiary should be adequate to handle these issues.

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161 One of the advantages of a revocable TOD deed over another form of nonprobate transfer such as joint tenancy is that joint tenancy 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.

162 See, e.g., Civ. Code §§ 2390 (mortgage), 1106 (transfer). That situation could occur where the beneficiary of a transferor 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).

163 Ohio Rev. Code Ann. § 5302.23(B)(7).

1 For the same reason, execution and recordation of a revocable TOD deed would  
2 not trigger an acceleration clause on a loan secured by the property, whether in a  
3 regular mortgage or in a reverse mortgage.<sup>164</sup> Revocable TOD deed legislation  
4 should reinforce the concept that execution and recordation of the deed do not  
5 constitute a transfer or conveyance of any right, title, or interest in the property  
6 until the transferor's death.

## 7 **Creditor Rights After Transferor's Death**

### 8 *Secured Creditors*

9 The beneficiary takes property under a revocable TOD deed subject to the  
10 transferor's encumbrances.<sup>165</sup> Execution and recordation of a revocable TOD deed  
11 does not trigger an acceleration clause, but passage of the property to the  
12 beneficiary on the transferor's death does. On transfer of the property to the  
13 beneficiary a secured creditor could take steps to enforce its security interest. The  
14 revocable TOD deed statute should include express language on the point.

### 15 *Unsecured Creditors*

16 The rights of an unsecured creditor of the transferor following the transferor's  
17 death are not clear. The property passes outside probate and its system for  
18 satisfying debts. Public policy should not enable a transferor to defeat creditors by  
19 the device of a revocable TOD transfer.

20 Possible approaches to protecting creditor rights, based on existing California  
21 models include:

- 22 • The property is liable to the extent the transferor's estate is inadequate.
- 23 • The property is subject to recapture by the transferor's estate to the extent  
24 the estate is inadequate.
- 25 • The beneficiary is liable to the extent of the value of the property.
- 26 • The liability of the property or beneficiary is limited to a pro rata share of  
27 the transferor's debts based on the value of the property.
- 28 • Liability is limited to the general one year period for claims against a  
29 decedent.

30 Colorado and New Mexico take the approach that, if the probate estate is  
31 insufficient to satisfy claims of creditors, the estate may recapture the property to  
32 satisfy the claims.<sup>166</sup> Colorado also allows the estate to assess the beneficiary for

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164 An acceleration clause on a reverse mortgage, as on a regular mortgage, would only be triggered by the death of the owner and the passage of title to the TOD deed beneficiary.

165 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 transferor's other assets but is a liability of the beneficiary. See Prob. Code § 21131 (no exoneration).

166 Colo. Rev. Stat. § 15-15-409; N.M. Stat. Ann. § 45-6-401(J).

1 the value of the property, as does Missouri. The Colorado assessment procedure is  
2 subject to a one-year limitation period, and permits the beneficiary to seek  
3 contribution from beneficiaries of other nonprobate transferees.<sup>167</sup> The Missouri  
4 assessment process is subject to an 18 month limitation period; all nonprobate  
5 transfer beneficiaries are assessed proportionately based on the value of property  
6 received.<sup>168</sup>

7 The Uniform Probate Code deals comprehensively with creditor rights in the  
8 event of a nonprobate transfer.<sup>169</sup> Under the Uniform Probate Code, if the probate  
9 estate is insufficient to cover debts of the transferor, beneficiaries of a nonprobate  
10 transfer are liable, not to exceed the value of the property transferred. The estate  
11 must first seek recovery from the transferor's revocable trust before proceeding  
12 against nonprobate transfer beneficiaries, pro rata. The statute of limitations for  
13 such a proceeding is one year after the transferor's death.

14 Ideally California law would deal comprehensively with creditor claims against  
15 nonprobate transfers. It is problematic to specify creditor rights against revocable  
16 TOD deed property or against the beneficiary when the law does not specify  
17 creditor rights against other nonprobate transfers. Ultimately California law should  
18 treat the matter comprehensively, as the Uniform Probate Code does.

19 Meanwhile, revocable TOD deed legislation should not be enacted without  
20 creditor protection. The Commission would follow the existing California model  
21 applicable to a successor who takes property of a decedent without probate under  
22 the affidavit procedure for real property of small value.<sup>170</sup> Under this model a  
23 beneficiary is personally liable for the transferor's unsecured debts, limited by the  
24 value of the property received, and subject to a one year statute of limitations.<sup>171</sup>  
25 The liability is enforceable against the beneficiary in a direct action by a creditor,  
26 or indirectly by the transferor's personal representative seeking restoration of the  
27 property or its value to the estate for the benefit of creditors. The beneficiary may  
28 avoid liability by restoring the property to the transferor's estate. The beneficiary  
29 may also avoid liability by disclaiming.<sup>172</sup>

### 30 Rights of Third Party Transferee

31 A third party that in good faith purchases or encumbers real property passing  
32 under a revocable TOD deed should take the property free of any adverse claims.  
33 Any other rule would make the property uninsurable and frustrate the purpose of  
34 the revocable TOD deed.

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167 Colo. Rev. Stat. §§ 15-15-409, 411.

168 Mo. Rev. Stat. § 461.300.

169 See UPC § 6-102 (1998 addition).

170 Prob. Code §§ 13200-13210.

171 See Code Civ. Proc. § 366.2.

172 See Prob. Code § 275.



1 The Missouri and Colorado statutes state this rule expressly.<sup>173</sup> California law  
2 should reinforce this basic principle.<sup>174</sup>

3 Taxation

4 **Gift Tax**

5 A revocable TOD deed has no present effect — the transferor retains full  
6 ownership rights and the beneficiary acquires no ownership rights. Gift tax  
7 liability arises only on a completed gift.<sup>175</sup> Execution and recordation of a  
8 revocable TOD deed would not be a taxable event for gift tax purposes.

9 **Estate Tax and Generation Skipping Transfer Tax**

10 The future of the estate tax and the generation skipping transfer tax is uncertain.  
11 Under existing federal law the estate tax exclusion amount is currently \$2 million.  
12 The exclusion amount increases to \$3.5 million in 2009, and the estate tax is  
13 eliminated completely in 2010. But the estate tax is reinstated in 2011 with an  
14 exclusion amount of \$1 million. Similarly the generation skipping transfer tax will  
15 be repealed in 2010 but reinstated in 2011 with a 55% rate.

16 Given the uncertainty over the future of the estate tax and the generation  
17 skipping transfer tax, this study proceeds on the assumption that these taxes will  
18 continue to exist in the future and will look something like the current taxes.

19 Property included in the decedent's gross estate for estate tax purposes includes  
20 property in which the decedent had a beneficial interest transferable at death.<sup>176</sup>  
21 That describes the revocable TOD deed. Property that passes by revocable TOD  
22 deed would be included in the transferor's taxable estate.

23 Similarly, a revocable TOD deed to a grandchild would be considered a taxable  
24 distribution on the transferor's death and subject to generation skipping transfer  
25 tax liability.<sup>177</sup>

26 Under the California law, proration of the estate tax is required "in the  
27 proportion that the value of the property received by each person interested in the  
28 estate bears to the total of all property received by all persons interested in the  
29 estate."<sup>178</sup> A revocable TOD deed beneficiary is a person interested in the estate  
30 for that purpose.<sup>179</sup>

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173 See Mo. Rev. Stat. § 461.067; Colo. Rev. Stat. § 15-15-410.

174 Cf. Prob. Code § 13203(a) (affidavit procedure for real property of small value).

175 Int. Rev. Reg. § 25.211-2.

176 Int. Rev. Code § 2033; Int. Rev. Reg. § 2033-1.

177 Int. Rev. Code §§ 2611-2613; Int. Rev. Reg. § 26.2612-1.

178 Prob. Code § 20111.

179 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

1 A similar rule applies to equitable proration of the generation skipping transfer  
2 tax.<sup>180</sup>

3 The beneficiary of a revocable TOD deed would be liable for a proportionate  
4 share of estate and generation skipping transfer taxes under these general  
5 provisions.

6 **Income Tax**

7 In California, real property passing under a revocable TOD deed would  
8 commonly have appreciated in value since the time of its acquisition by the  
9 transferor.

10 The basis of property acquired from a decedent is generally the fair market value  
11 of that property on the date of the decedent's death.<sup>181</sup> That results in a stepped up  
12 basis to the decedent's beneficiary. The increased value of the real property is  
13 recognized in the decedent's gross estate and recaptured through the estate tax.

14 Property is deemed to pass from a decedent if it is acquired by reason of death,  
15 form of ownership, or other condition and is required for that reason to be  
16 included in the decedent's gross estate.<sup>182</sup>

17 Under these principles, real property that passes to a beneficiary under a  
18 revocable TOD deed is entitled to a stepped up basis for income tax purposes, at  
19 least under the law as it exists now. But if the estate tax is permanently repealed,  
20 the beneficiary would not be entitled to an adjustment in basis. Instead, the  
21 beneficiary would receive the property with a carryover basis from the  
22 transferor.<sup>183</sup>

23 These rules are determined by federal law. It is unnecessary to adjust revocable  
24 TOD deed legislation to accommodate them.

25 **Property Tax**

26 One of the specific questions the Legislature has asked that this study address is  
27 whether property transferred by revocable TOD deed would be reassessed.<sup>184</sup>

28 Under California law a reassessment is triggered when there is a change in  
29 ownership. That occurs when there is "a transfer of a present interest in real  
30 property, including the beneficial use thereof, the value of which is substantially  
31 equal to the value of the interest."<sup>185</sup> The statutes identify transfers that are not a

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'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."

180 Prob. Code §§ 20211 (proration based on value of property), 20200(b) ("property" defined), 20200(c) ("transferee" defined).

181 Int. Rev. Code § 1014(a)(1).

182 Int. Rev. Code § 1014(b)(9).

183 Int. Rev. Code § 1015.

184 2005 Cal. Stat. ch. 422 § 1(b)(5).

185 Rev. & Tax. Code § 60.

1 change in ownership for reassessment purposes, including a transfer to a revocable  
2 trust, a transfer reserving a life estate, and a transfer in which proportional  
3 ownership interests remain the same before and after the transfer.<sup>186</sup>

4 Under these principles, execution and recordation of a revocable TOD deed  
5 would not constitute a change in ownership so as to trigger a reassessment. A  
6 change in ownership would occur on the transferor's death, when the beneficiary  
7 acquires the property. However, there are special exemptions for transfers between  
8 spouses and between registered domestic partners, as well as transfers from a  
9 parent to a child or grandchild.<sup>187</sup>

10 A transferee of real property is required to file a change in ownership statement  
11 within 150 days of the transferor's death.<sup>188</sup> Ordinarily the personal representative  
12 or trustee files a change in ownership statement on the decedent's death. Because a  
13 TOD transfer passes outside of probate and the beneficiary may be unaware of this  
14 obligation, revocable TOD deed legislation should highlight the duty.

#### 15 **Change of Tax Burdens**

16 The Legislature has asked the Commission whether tax burdens would shift or  
17 decrease as a result of revocable TOD deed legislation.<sup>189</sup>

18 Assuming that the revocable TOD deed has the basic attributes recommended in  
19 this study, the answer is "No". A transfer under a revocable TOD deed would be  
20 treated the same as a transfer under a will for tax purposes.

#### 21 **Medi-Cal Eligibility and Reimbursement**

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

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

31 A transfer or gift of real property is a technique commonly used to help a person  
32 achieve or maintain Medi-Cal eligibility. It is particularly favored by estate  
33 planners because that may put the property out of the transferor's estate and  
34 immunize it from the state's reimbursement claim. A transfer without  
35 consideration made in advance of the transferor's application for Medi-Cal

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186 Rev. & Tax. Code § 62.

187 See Rev. & Tax. Code §§ 62-63.

188 Rev. & Tax. Code § 480(b).

189 2005 Cal. Stat. ch. 422 § 1(b)(5).

1 benefits may cause a loss of eligibility for a period of time. Generally, a transfer of  
2 the family home, a transfer to a spouse or registered domestic partner, or a transfer  
3 to a disabled child is exempt.

4 A transfer occurs when a person’s control over an asset is relinquished or  
5 diminished. Because a revocable TOD deed does not affect the transferor’s control  
6 of the property, it would not be considered a transfer for Medi-Cal purposes. It  
7 would neither diminish the transferor’s assets for qualification purposes, not  
8 would it cause a loss of eligibility for Medi-Cal benefits.

9 On a Medi-Cal recipient’s death, the state has a claim for reimbursement against  
10 the decedent’s “estate” or against a recipient of the decedent’s property “by  
11 distribution or survival”.<sup>190</sup> For that purpose, the decedent’s estate includes  
12 property in which the decedent had any legal title or interest at the time of death  
13 including “assets conveyed to a survivor, heir, or assignee of the deceased  
14 individual through joint tenancy, tenancy in common, survivorship, life estate,  
15 living trust, or other arrangement.”<sup>191</sup> Under this standard, real property that a  
16 transferor gave by deed to the transferor’s children while reserving a life estate  
17 and the right to revoke the transfer has been held to be part of the transferor’s  
18 estate for reimbursement purposes.<sup>192</sup>

19 A revocable TOD deed would not operate to divest the transferor’s “Medi-Cal  
20 estate” of the property. On the transferor’s death, the property would be subject to  
21 the state’s Medi-Cal reimbursement claim. The Arkansas, Colorado, and Nevada  
22 revocable TOD deed laws make this rule explicit by statute. California law should  
23 do the same.

24 There is a three-year limitation period for recovery, running from the time the  
25 state is given written notice of the decedent’s death under Probate Code Section  
26 215. The beneficiary or person in possession of the decedent’s property must  
27 notify the Department of Health Services. That would be the revocable TOD deed  
28 beneficiary; revocable TOD deed legislation should state that clearly.

## 29 Implementation of Revocable TOD Deed

### 30 **Statutory Form**

31 Six of the nine states that have revocable TOD deed legislation prescribe a  
32 statutory form for creation of the deed. Three of those states also prescribe a form  
33 for revocation of a revocable TOD deed.

34 The statutory forms are typically “safe harbor forms” — a revocable TOD deed  
35 in substantially the prescribed form is sufficient. A few states appear to mandate

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190 Welf. & Inst. Code § 14009.5.

191 42 U.S.C. § 1396p(b)(4); Cal. Code Regs., tit. 22, § 50960(b)(1).

192 Bonta v. Burke, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

1 the statutory form — the revocable TOD deed must be in substantially the  
2 prescribed form.<sup>193</sup>

3 A statutory form has a number of attractions. It provides a model for a type of  
4 deed new to the law. It helps standardize usage.<sup>194</sup> It also serves an educational  
5 purpose by including language that describes the rights of the transferor and  
6 beneficiary under the deed.

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

14 Whether or not the statute prescribes a form, it is probable that forms publishers  
15 will provide both printed and electronic revocable TOD deed forms to consumers.  
16 If there is a statutory form, that is likely to serve as a basis for private forms.<sup>195</sup> A  
17 statutory form can thus serve as a model for best practices.

18 The Commission believes that revocable TOD deed legislation should include a  
19 model statutory form. That will be informative and help effectuate the transfer.

20 A transferor would still be able to make a revocable TOD deed without using the  
21 statutory form. However, the beneficiary might have trouble getting a title  
22 company to recognize a variant form, and a court order might be required to  
23 confirm title in the beneficiary.

#### 24 **Alternative Types of Transfer**

25 A simple revocable TOD deed statutory form, accompanied by a well articulated  
26 statute that lays out the incidents of the revocable TOD deed is likely to become  
27 the preferred means by which a decedent might transfer real property to a  
28 beneficiary effective on death. However, the law should be clear that the revocable  
29 TOD deed is not exclusive. For example, California law would continue to  
30 recognize the validity of a revocable transfer of property with a reserved life  
31 estate<sup>196</sup> or a variant type of nonprobate transfer under Probate Code Section 5000.  
32 Such a safety valve may be necessary to effectuate the transferor's intent in the  
33 case of a defectively executed revocable TOD deed.

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193 See the statutory forms prescribed by Kansas, New Mexico, and Ohio.

194 For example, it may deter a transferor from putting into the deed a special covenant, condition, or other unique language that would cause constructional problems.

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

196 *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914).

1 **Retroactivity**

2 Instruments purporting to be revocable TOD deeds exist and have been recorded  
3 in California, perhaps using a form deed from another jurisdiction. Revocable  
4 TOD deed legislation should deal with a preexisting instrument that purports to  
5 make a nonprobate transfer of real property effective on the death of the transferor.

6 If the instrument conforms to the requirements of the revocable TOD deed law,  
7 the instrument should be recognized as a revocable TOD deed under the law. That  
8 would clarify the rules applicable to the instrument.<sup>197</sup>

9 If the instrument does not conform to the requirements of the revocable TOD  
10 deed law, it may nonetheless still be a valid transfer on death under Probate Code  
11 Section 5000.<sup>198</sup> Such an instrument would be governed by the applicable law in  
12 effect at the time.<sup>199</sup>

13 **EVALUATION OF REVOCABLE TOD DEED**

14 **Adequacy of Other Instruments**

15 A revocable TOD deed passes real property to a beneficiary outside of probate.  
16 The argument typically made for it is that it is cheaper and quicker than probate  
17 and less expensive than a lawyer-prepared trust.

18 But are existing devices available under California law inadequate for that  
19 purpose? This study has surveyed the available transfer techniques, including a  
20 lifetime deed, a will or intestate succession, an intervivos trust, joint tenancy,  
21 community property (including community property with right of survivorship),  
22 intervivos transfer with reserved life estate, revocable deed, and conveyance  
23 pursuant to a nonprobate transfer.

24 The study catalogues the principal consequences of each device, including  
25 ownership rights, revocability, cost and ease of transmission, privacy, creditor  
26 rights, taxes, and Medi-Cal eligibility and reimbursement. Each device has a  
27 unique constellation of legal incidents that may perhaps make it more suitable for  
28 the circumstances of a particular transferor than another device.

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197 That approach would also be consistent with the general approach of the Probate Code 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).

198 See Prob. Code § 5000(a) (emphasis added):

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.

199 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).

1 It has been suggested that better educational opportunities for seniors and  
2 unsophisticated consumers on how best to achieve their goals would be a more  
3 effective means of helping transferors than creating a new form of title such as a  
4 revocable TOD deed. The revocable TOD deed may appear deceptively simple,  
5 yet cause problems not anticipated by a transferor who uses it.

6 While uninformed use of any of these instruments, including the revocable TOD  
7 deed, is inadvisable, that does not answer the question whether the revocable TOD  
8 deed serves a purpose not served by the other instruments. At the risk of  
9 oversimplifying, the Commission believes that each of these instruments has a few  
10 salient and distinguishing characteristics that make it less desirable than the  
11 revocable TOD deed in some circumstances:

- 12 • Lifetime deed — transferor immediately and irrevocably gives up  
13 ownership and control of the property.
- 14 • Will or intestate succession — cost and delay of probate significant.
- 15 • Intervivos trust — may be complex and expensive for transfer of a single  
16 piece of property.
- 17 • Joint tenancy — immediate transfer of undivided interest, subject to  
18 creditors of transferee.
- 19 • Community property — only available for transfer to surviving spouse or  
20 domestic partner, and requires shared concurrent ownership.
- 21 • Intervivos transfer with reserved life estate — irrevocable and subject to  
22 conflicts between present and future interest holders.
- 23 • Revocable deed — little known or understood.
- 24 • Conveyance pursuant to nonprobate transfer — not explicitly recognized  
25 by the law and no clear legal incidents established.

26 In summary the advantages the revocable TOD deed offers over other options  
27 include:

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

40 A revocable TOD deed cannot be processed the same way other nonprobate  
41 transfers are processed. Other forms of nonprobate transfer typically involve a

1 third party to effectuate the transfer or to issue new title — a bank, a transfer  
2 agent, a trustee. In a probate proceeding a court issues a decree of title, or a court  
3 appointed personal representative transfers title. To a significant extent the rights  
4 of a transferee under a revocable TOD deed must depend on the mechanism of  
5 title insurance. The Commission’s recommendations in this study are designed to  
6 make the transfer of real property under a revocable TOD deed insurable without  
7 the need for judicial proceedings.

8 **Need for the Device**

9 The Commission has received numerous communications that make the general  
10 point that a homeowner should be able to deed property directly to heirs without  
11 the expense of a trust or a probate proceeding, and they urge a favorable report to  
12 the Legislature on this matter. The authors of the communications argue that  
13 seniors on a limited income cannot afford legal services, and that enactment of  
14 revocable TOD deed legislation will not put estate planning and probate attorneys  
15 out of business. Points typically made in the communications urging adoption of  
16 the revocable TOD deed include:

- 17 • It is a straightforward, efficient, direct, private, and trouble-free way to  
18 transfer property to an heir.
- 19 • It avoids capital gains tax on transfer to a beneficiary.
- 20 • It avoids the cost of an attorney to prepare a will or trust.
- 21 • It avoids the cost and delay of a probate proceeding.
- 22 • This is a consumer-friendly device. Its low cost is important to a senior on  
23 a fixed income or a person of limited means who finds it difficult to pay  
24 for an attorney.
- 25 • The simplicity of a one page deed is preferable to the complexity of a  
26 multi-page trust document prepared by a lawyer that is difficult to  
27 understand.
- 28 • The opposition of probate attorneys to this device is self-serving; they  
29 stand to lose a source of income.
- 30 • If all of a person’s other property passes outside probate through  
31 beneficiary designations, why should it be necessary to have a probate  
32 proceeding for this one item?
- 33 • Why should Californians be denied a device that is available to residents  
34 of other states?

35 The Commission has received considerable input during this study from  
36 attorneys and agencies that provide senior legal services. Many of them make the  
37 point that their clients have limited resources and need a simple, understandable,  
38 and inexpensive device such as a revocable TOD deed that will enable them to  
39 pass their family home to their heirs. Sample quotations are reproduced below:



1 The proposal for a simple, one page state-recognized beneficiary deed that we  
2 could use at the Senior centers and elsewhere would be a real benefit to California  
3 seniors.<sup>200</sup>

4 Large portions of these citizens live on small pensions that leave them no  
5 discretionary funds for which to hire an attorney to draft a revocable trust to avoid  
6 probate. However, most, if not all, of these citizens wish to avoid the possibility  
7 of their estates being subjected to the probate court system where from \$11,000 to  
8 \$20,000 of their estate is eaten up in attorney's fees for simply passing a single  
9 family house to heirs.<sup>201</sup>

10 Over my 20 years in practice I have often seen expensive living trusts, bought  
11 from trust mills by senior clients. Some of the trusts were useless, and all of them  
12 cost the senior too much of his/her very limited resources. These elders simply  
13 wanted to pass their homes to their children outside of probate. If revocable  
14 transfer-on-death deeds had been available, all of those clients could have used  
15 that much simpler method, and would not have been such easy prey for the trust  
16 salespeople.<sup>202</sup>

17 Many senior citizens have little in liquid assets and most of their estate is in  
18 their residence. When they find out that they have to incur the expense and  
19 administrative burdens of a revocable trust, or subject their heirs to the cost and  
20 delays of probate they sometimes try to use other devices to pass on their  
21 property. One of the most frequent is to retitle their property in joint tenancy with  
22 the heirs. That is very risky since they subject the property to liabilities incurred  
23 by the joint tenants. Often they execute an undated quitclaim deed that is not  
24 recorded with the hope that it can be used to transfer the property after their death.  
25 In other situations they deed the property to the heirs and reserve a life estate.  
26 That creates complications because the transfer is not revocable. In addition it is  
27 difficult to deal with that situation when the life tenant is no longer capable of  
28 living on the property. Such devices also trigger elder abuse concerns when the  
29 relationship between the parties becomes strained.<sup>203</sup>

### 30 **Concern About Revocable TOD Deed Concept**

31 Professionals who would be in the position of implementing the revocable TOD  
32 deed, including attorneys, judges, lenders, and title companies, have expressed  
33 concerns. They have noted that the revocable TOD deed may lend itself to use by  
34 a real property owner without adequate counseling. While the revocable TOD

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200 James A. Giblin, emeritus attorney volunteering with Contra Costa Senior Legal Services.

201 Contra Costa County Advisory Council on Aging.

202 Sarah Shena, Kings/Tulare Area Agency on Aging. Ms. Shena 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."

203 John A. Cape, pro bono legal services volunteer.

1 deed is a way to cheaply and quickly transfer property, it is not necessarily the  
2 safest or most reliable method of accurately ensuring the transferor’s wishes are  
3 carried out as the transferor intended.

4 Historically, a “quick and easy” conveyancing document such as a quitclaim  
5 deed is often the instrument of choice of a perpetrator of fraud who preys on  
6 seniors and unsophisticated consumers. Because it is easy to use, cheap to record,  
7 and doesn’t require the use of an attorney or other third party intermediary, it  
8 facilitates fraud. The ease and simplicity of use associated with the revocable TOD  
9 deed suggest that it may lend itself to similar abuse.

10 Comments made by the professionals about the revocable TOD concept include:

- 11 • The revocable TOD deed would create and encourage an estate planning  
12 substitute that is likely to be a self-help device for the elderly, resulting in  
13 (1) inappropriate use where another device might be more suited to the  
14 transferor’s circumstances, (2) an increase in title problems caused by lay  
15 drafting and execution of the instrument, (3) susceptibility to elder abuse,  
16 and (4) avoidance of competent estate planning advice and assistance,  
17 resulting in adverse consequences. “It would create more opportunities  
18 than presently exist for non-lawyers to give inadequate or poor advice to  
19 persons wishing to avoid probate, and more opportunities for abusers to  
20 obtain title to property from the elderly, without the court overseeing the  
21 transfer.”<sup>204</sup>
- 22 • The privacy inherent in the revocable TOD deed “does not allow heirs at  
23 law or creditors to know real property has passed to named designees upon  
24 the death of a family member, and as a result the property may be sold or  
25 refinanced before possible abuse claims can be raised.”<sup>205</sup>
- 26 • The revocable TOD deed would add an ad hoc device to the proliferation  
27 of other types of estate planning mechanisms, particularly nonprobate  
28 transfers that are not controlled by a will or trust. “This proliferation  
29 results in confusion, inconsistency, litigation, and frustration for all  
30 involved. It makes it increasingly difficult to prepare estate plans for  
31 people and have any assurance that the plan will be consistently  
32 implemented by all the beneficiary choices that people make.”<sup>206</sup>
- 33 • The revocable TOD deed would be a new and untested estate planning  
34 device that is unnecessary because existing devices are available to  
35 achieve the same purpose.
- 36 • In states that have adopted the revocable TOD deed there has been  
37 confusion about rights as between the transferor and beneficiary during the  
38 transferor’s life.

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204 Sacramento County Bar Association.

205 State Bar Conference of Delegates, Resolutions Committee.

206 State Bar Trusts & Estates Section.

1 **Balancing Need Against Concerns**

2 The experience in states that have adopted revocable TOD deed legislation has  
3 been generally favorable, although there have been problems that have required  
4 corrective legislation. These types of problems can be resolved by clearly drafted  
5 legislation, and this study in large part attempts to do that.

6 The Commission disagrees with the argument that the revocable TOD deed is  
7 unnecessary because California already recognizes the functional equivalent — a  
8 revocable deed with reserved life estate — which has been the law for nearly a  
9 century.<sup>207</sup> That device is little known, and its legal effect and consequences are  
10 unclear. It would be preferable for the law to provide a simple, understandable  
11 device with clear rules, such as the revocable TOD deed, than to encourage people  
12 to rely on a shadowy device such the revocable deed with reserved life estate.

13 California law has allowed nonprobate transfer devices to proliferate without  
14 consistent standards or consistent consequences. At some point this area of law  
15 must be treated comprehensively. However, consideration of the revocable TOD  
16 deed concept should not be deferred until that can be done. It is not clear when  
17 such a comprehensive overview could happen. And to the extent appropriate and  
18 clearly expressed solutions for revocable TOD deed issues are developed, that will  
19 facilitate sensible treatment of nonprobate transfer issues generally by providing a  
20 model for guidance.

21 The probate system has due process protections built into it. It is designed to  
22 provide notice to the decedent's heirs and would be beneficiaries, and to provide  
23 them an opportunity to challenge the decedent's will or other dispositional plan, or  
24 lack of it. The privacy of a transfer by a revocable TOD deed, without notice to  
25 interested persons and an opportunity to intervene in the transfer, is to some extent  
26 troubling. But that is inherent in the concept of the nonprobate transfer. The  
27 revocable TOD deed has the safeguard that it must be recorded before the  
28 transferor's death to be effective. The law should include a moderate limitation  
29 period after the transferor's death during which a person wronged by the transfer  
30 could challenge it and, if not recapture the property, or at least be compensated by  
31 damages.

32 The most cautionary issues surrounding the revocable TOD deed relate to the  
33 likelihood of uninformed self-help use of the device, leading to adverse estate  
34 planning consequences for the transferor, improperly drafted instruments that  
35 defeat the transferor's intent, failure to make the required recordation, and  
36 manipulation and financial abuse against the transferor. The revocable TOD deed  
37 enables a seductively simple transfer of what could well be the transferor's major  
38 asset without any neutral guidance or assistance.

39 While the potential for misuse and abuse of the revocable TOD deed is real, the  
40 existence of the device will not generate problems that do not already exist if an

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207 See *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914).

1 individual is inclined to avoid counsel and to avoid probate.<sup>208</sup> An outright transfer  
2 of the property, or creation of a joint tenancy, is likely to be a greater source of  
3 problems than a revocable TOD deed. The revocable TOD deed is a relatively  
4 benign instrument. Unlike a standard deed, there is no immediate transfer of the  
5 property and the deed is revocable. Unlike a will that may remain private until the  
6 transferor's death, the required recording of the revocable TOD deed provides  
7 public exposure.

8 The problem of uninformed use of the revocable TOD deed can be addressed to  
9 some extent by a statutory deed form that is clear and informative to the transferor  
10 and beneficiary. Even with a statutory form, a person should seek competent  
11 advice before attempting to use a revocable TOD deed.

## 12 **Conclusion**

13 The nonprobate revolution has largely bypassed real property. Nearly all other  
14 significant assets, including life insurance, securities, bank accounts, and pension  
15 plans pass commonly by beneficiary designation outside the probate system. Real  
16 property is the last significant holdout, although substantial amounts of real  
17 property pass by right of survivorship under joint tenancy or community property  
18 or under a trust. It has been observed that ownership of real property is the factor  
19 most likely to determine whether a death will lead to a probate proceeding.<sup>209</sup>

20 California law does not adequately deal with the many types of nonprobate  
21 transfer and their consequences. Comprehensive treatment of the area is necessary,  
22 much as Missouri has done with its nonprobate transfer law and as the Uniform  
23 Probate Code has done with creditor rights issues. But the need for comprehensive  
24 treatment of nonprobate transfer law should not be cause for delay in considering  
25 the concept of the revocable TOD deed on its merits.

26 After having surveyed existing transfer devices and reviewed the experience in  
27 other jurisdictions, and after having considered the legal incidents of the revocable  
28 TOD deed, the Law Revision Commission recommends adoption of the device in  
29 California as prescribed in the "Proposed Legislation" below. The Commission  
30 solicits public comment on this recommendation. After reviewing public  
31 comment, the Commission will develop a final report on the matter for submission  
32 to the Legislature by January 1, 2007.

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208 "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 methods are there for the using." David Mandel, Senior Legal Hotline.

209 Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1119 (1984).

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

2 SEC. \_\_\_\_ Part 4 (commencing with Section 5600) of Division 5 of the Probate  
3 Code is repealed.

4 **Comment.** Former Sections 5600-5604 are continued without change, other than renumbering,  
5 in Chapter 3 (commencing with Section 5040) of Part 1. The sections are relocated to make room  
6 for new Part 4 (commencing with Section 5600), relating to the revocable TOD deed.

7 **Prob. Code §§ 5600-5696 (added). Revocable transfer on death deed**

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

10 PART 4. REVOCABLE TRANSFER ON DEATH  
11 DEED

12 CHAPTER 1. GENERAL PROVISIONS

13 Article 1. Preliminary Provisions

14 **§ 5600. Application of part**

15 5600. (a) This part applies to a revocable transfer on death deed made by a  
16 transferor who dies on or after January 1, 2008, whether the deed was executed or  
17 recorded before, on, or after January 1, 2008.

18 (b) Nothing in this part invalidates an otherwise valid transfer under Section  
19 5602.

20 **Comment.** Section 5600 implements the general rule that a new provision of the Probate Code  
21 applies retroactively. See Section 3. However, this part does not interfere with rights of a  
22 decedent's successors acquired by reason of the decedent's death before the operative date of this  
23 part. An instrument of a decedent who dies before the operative of this part, or an instrument of a  
24 decedent who dies after the operative date of this part that was not executed in compliance with  
25 this part, is governed by other law. See Sections 3(g) (application of old law), 5602 (effect on  
26 other forms of transfer).

27 **§ 5602. Effect on other forms of transfer**

28 5602. (a) This part does not preclude use of any other method of conveying real  
29 property that is permitted by law and that has the effect of postponing enjoyment  
30 of the property until the death of the owner.

31 (b) This part does not invalidate a deed of real property, otherwise effective to  
32 convey title to the property, that is not recorded until after the death of the owner.

33 **Comment.** Subdivision (a) of Section 5602 recognizes the possibility of other devices that may  
34 achieve an effect similar to the revocable TOD deed, such as a revocable deed under *Tennant v.*  
35 *John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914), or another instrument under  
36 Section 5000 (nonprobate transfer).

1 Although a revocable TOD deed is ineffective unless recorded before the owner’s death (see  
2 Section 5626), subdivision (b) makes clear that the pre-death recordation requirement does not  
3 apply to other types of deed.

## 4 Article 2. Definitions

### 5 § 5606. Application of definitions

6 5606. Unless the provision or context otherwise requires, the definitions in this  
7 article govern the construction of this part.

8 **Comment.** Although Section 5606 limits the application of these definitions, a defined term  
9 may also be used in another statute in its defined sense. See, e.g., Section 5000(a) (nonprobate  
10 transfer includes revocable TOD deed).

11 The definitions in this article are supplemented by those in Part 2 (commencing with Section  
12 20) of Division 1. See, e.g., Sections 24 (beneficiary), 28 (community property), 39 (fiduciary),  
13 45 (instrument), 48 (interested person), 56 (person), 58 (personal representative), 62 (property),  
14 68 (real property), 81 (transferor), 81.5 (transferee), 82 (trust), 84 (trustee), 88 (will).

### 15 § 5608. Beneficiary

16 5608. “Beneficiary” means a person named in a revocable transfer on death deed  
17 as transferee of the property.

18 **Comment.** Section 5608 is a specific application of Section 24 (“beneficiary” defined). The  
19 beneficiary must be identified by name. Section 5622 (beneficiary).

### 20 § 5610. Real property

21 5610. “Real property” means the fee or an interest in real property. The term  
22 includes but is not limited to any of the following interests in real property:

23 (a) A leasehold.

24 (b) An interest in a common interest development within the meaning of Section  
25 1351 of the Civil Code.

26 (c) An easement, license, permit, or other right in property to the extent the right  
27 is both (1) a recordable interest in property and (2) transferable on death of the  
28 owner of the right.

29 **Comment.** Section 5610 supplements the definition of real property found in Section 68 (“real  
30 property” includes leasehold). Any interest in real property may be the subject of a revocable  
31 TOD deed.

32 Under subdivision (b), an interest in a CID includes a community apartment project, a  
33 condominium project, a planned development, and a stock cooperative. The provision makes  
34 clear that these forms of tenure are real property for the purpose of a revocable TOD deed,  
35 regardless of whether elements of the interest are contractual in nature.

36 Subdivision (c) would apply to such an interest as a use or occupancy permit or an extraction  
37 or removal right (e.g., oil and gas, minerals, timber, or grazing). A property interest under  
38 subdivision (c) may relate to private land as well as to public land (whether state or federal). If  
39 the interest is both recordable and transferable at death, by will or otherwise, the interest may be  
40 the subject of a revocable TOD deed.

### 41 § 5612. Recorded

42 5612. “Recorded” has the meaning provided in Section 1170 of the Civil Code.





1 (c) The transferor may name more than one beneficiary or alternate beneficiary.  
2 Unless the instrument otherwise provides, beneficiaries take the property as  
3 tenants in common.


4 (d) The transferor may name as beneficiary the trustee of a trust even if the trust  
5 is revocable.

6 **Comment.** Subdivision (a) of Section 5622 makes explicit the requirement that a beneficiary  
7 be identified by name in the instrument. A class gift is not permissible.

8 Subdivision (b) makes explicit the right of a transferor to name an alternate beneficiary. The  
9 transferor may name more than one alternate beneficiary. Subdivision (c); see also Section 10  
10 (singular includes plural).

11 Subdivision (c) makes explicit the right of a transferor to name multiple beneficiaries. A  
12 beneficiary must survive the transferor in order to take an interest under this section. Section  
13 21109. For the consequence of a named beneficiary's failure to survive the decedent, see Section  
14 21110 (antilapse).

15 Subdivision (d) makes clear that the beneficiary under a revocable TOD deed may be a trustee  
16 and need not be the trust beneficiary. If a trust named as beneficiary is revoked before the  
17 transferor's death, general rules of construction applicable to such a gift would govern. See  
18 Section 21111 (failure of transfer).

19  **Note.** The Commission solicits comment on whether the transferor should be statutorily  
20 authorized to fractionate the beneficial interests that pass under a revocable TOD deed between a  
21 life estate and remainder interest.

## 22 § 5624. Execution

23 5624. (a) The transferor shall sign and date a revocable transfer on death deed  
24 and acknowledge the deed before a notary public.

25 (b) A revocable transfer on death deed may be signed and dated in the  
26 transferor's name by a person other than the transferor at the transferor's direction  
27 and in the transferor's presence but shall be acknowledged by the transferor.

28 **Comment.** Section 5624 prescribes execution requirements. A revocable TOD deed is not  
29 invalid because it does not comply with the requirements for execution of a will. See Section  
30 5000(a) (provision for nonprobate transfer on death in written instrument).

31 A properly executed revocable TOD deed is ineffective unless recorded before the transferor's  
32 death. See Section 5626 (recordation, delivery, and acceptance).

## 33 § 5626. Recordation, delivery, and acceptance

34 5626. (a) A revocable transfer on death deed is not effective unless the deed is  
35 recorded before the transferor's death.

36 (b) The transferor need not deliver a revocable transfer on death deed to the  
37 beneficiary during the transferor's life.

38 (c) The beneficiary need not accept a revocable transfer on death deed from the  
39 transferor during the transferor's life.

40 **Comment.** Subdivision (a) of Section 5626 requires recordation of the revocable TOD deed  
41 before the transferor's death, but does not require recordation by the transferor — an agent or  
42 other person authorized by the transferor may record the instrument. The deed is considered  
43 recorded for purposes of this section when it is deposited for record with the county recorder. See  
44 Section 5612 ("recorded" defined).

1 Subdivision (b) makes clear that delivery of a revocable TOD deed is not necessary,  
2 notwithstanding a Law Revision Commission Comment to Section 5000 to the effect that Section  
3 5000 does not relieve against the delivery requirement of the law of deeds. The recordation  
4 requirement for a revocable TOD deed makes delivery unnecessary. Consideration is not required  
5 for a revocable TOD deed. See Civ. Code § 1040.

6 Subdivision (c) states the rule that, unlike an inter vivos deed, a revocable TOD deed does not  
7 require acceptance. Acceptance of a donative transfer is presumed. Disclaimer procedures are  
8 available to a beneficiary. See Sections 267, 279 (disclaimer).

9 A revocable TOD deed has no effect, and confers no rights on the beneficiary, until the  
10 transferor's death. See Section 5650 (effect during transferor's life).

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

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

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

21 • A prompt recording requirement could help ensure that the revocable TOD deed is in fact  
22 recorded before the transferor's death, helping to ameliorate the problem that could occur if the  
23 transferor holds off for privacy reasons until it is too late.

## 24 § 5628. Multiple deeds

25 5628. (a) If a revocable transfer on death deed is recorded for the same property  
26 for which another revocable transfer on death deed is recorded, the later executed  
27 deed is the operative instrument and its recordation revokes the earlier executed  
28 deed.

29 (b) Revocation of a revocable transfer on death deed does not revive an  
30 instrument earlier revoked by recordation of that deed.

31 **Comment.** Subdivision (a) of Section 5628 gives effect to the last executed of revocable TOD  
32 deeds recorded before the transferor's death. A revocable TOD deed is executed by signing,  
33 dating, and acknowledging before a notary public. See Section 5624 (execution). Execution is  
34 complete when the transferor acknowledges the deed before a notary public, not when the deed is  
35 signed and dated.

36 Under subdivision (b), recordation of a revocable TOD deed has the effect of revoking an  
37 earlier executed revocable TOD deed, regardless of the order of recordation of the deeds.  
38 Subsequent revocation of the later executed recorded deed does not revive an earlier executed  
39 deed. Instead, the property passes under failed transfer principles. See Section 21111 (failed  
40 transfer).

## 41 Article 2. Revocation

### 42 § 5630. Revocability

43 5630. (a) A transferor who has testamentary capacity may revoke a revocable  
44 transfer on death deed at any time.

45 (b) Revocation of a revocable transfer on death deed is effective notwithstanding  
46 a provision in the deed that purports to make the deed irrevocable.



1 pass your interest in the property to the beneficiary and not to the surviving joint  
2 tenant or spouse.

3 **Notice to Beneficiary.** This deed does not transfer ownership of the property to  
4 you until the owner dies, and you acquire no rights in the property until then. The  
5 owner may revoke this deed at any time. When the owner dies you should record  
6 evidence of death under Probate Code Section 210 and you must (1) file the  
7 change in ownership notice required by Revenue and Taxation Code Section 480  
8 and (2) notify the Department of Health Services if required by Probate Code  
9 Section 215. If you do not wish to receive the property, you may disclaim it under  
10 Probate Code Section 275.

11 **IDENTIFYING INFORMATION**

12 **Name of Owner:** \_\_\_\_\_

13 Names of Co-Owners Who Join in this Deed: \_\_\_\_\_

14 **Address or Other Description of Property:** \_\_\_\_\_

15 **Name of Beneficiary:** \_\_\_\_\_

16 Names of Additional Beneficiaries [optional]: \_\_\_\_\_

17 Name of Alternate Beneficiary [optional]: \_\_\_\_\_

18 Names of Additional Alternate Beneficiaries [optional]: \_\_\_\_\_

19 **TRANSFER ON DEATH**

20 I transfer all my interest in the described property to the beneficiary on my  
21 death, or if the beneficiary does not survive me, to the alternate beneficiary. This  
22 deed is revocable until that time. This revocable TOD deed revokes any previous  
23 revocable TOD deed I have made for the described property.

24 **SIGNATURE AND DATE**

25 **Signature of Owner:** \_\_\_\_\_

26 **Signatures of Co-Owners Who Join in this Deed:** \_\_\_\_\_

27 **Date:** \_\_\_\_\_

28 **ACKNOWLEDGMENT**

29 State of California )

30 County of \_\_\_\_\_ )

31 On \_\_\_\_\_ before me, (here insert name and title of the officer), personally  
32 appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of  
33 satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the  
34 within instrument and acknowledged to me that by his/her/their signature(s) on the  
35 instrument the person(s) executed the instrument.

36 WITNESS my hand and official seal.

37 Signature \_\_\_\_\_ (Seal)

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**Comment.** Section 5642 prescribes a form for creation of a revocable TOD deed. Use of the form is not mandatory. See Section 5640 (statutory forms permissive).

**§ 5644. Statutory form revocation of revocable TOD deed**

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

**Revocation of  
Revocable Transfer on Death (TOD) Deed  
[California Probate Code Section 5600]**

**Notice to Owner.** This revocation **MUST** be recorded before you die in order to be effective.

**IDENTIFYING INFORMATION**

**Name of Owner:** \_\_\_\_\_

Names of Co-Owners Who Join in this Revocation: \_\_\_\_\_

**Address or Other Description of Property:** \_\_\_\_\_

**Recording Information for Revocable TOD Deed:**

County: \_\_\_\_\_

Date of Recordation: \_\_\_\_\_

Book and Page or Series Number: \_\_\_\_\_

**REVOCATION**

I revoke the described revocable TOD deed.

**SIGNATURE AND DATE**

**Signature of Owner:** \_\_\_\_\_

**Signatures of Co-Owners Who Join in this Revocation:** \_\_\_\_\_

**Date:** \_\_\_\_\_

**ACKNOWLEDGMENT**

State of California )

County of \_\_\_\_\_ )

On \_\_\_\_\_ before me, (here insert name and title of the officer), personally appeared \_\_\_\_\_, personally known to me (or proved to me on the basis of satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that by his/her/their signature(s) on the instrument the person(s) executed the instrument.

WITNESS my hand and official seal.

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

1  
2 **Comment.** Section 5644 prescribes a form for revocation of a revocable TOD deed. Use of the  
3 form is not mandatory, since other recorded instruments may revoke a TOD deed. See Sections  
4 5640 (statutory forms permissive), 5660 (conflicting dispositive instruments).

5 CHAPTER 3. EFFECT

6 Article 1. General Provisions

7 **§ 5650. Effect during transferor's life**

8 5650. During the transferor's life, execution and recordation of a revocable  
9 transfer on death deed:

10 (a) Does not affect the ownership rights of the transferor, and the transferor or  
11 the transferor's agent or other fiduciary may convey, assign, contract, encumber,  
12 or otherwise deal with the property, and the property is subject to process of the  
13 transferor's creditors, as if no revocable transfer on death deed were executed or  
14 recorded.

15 (b) Does not create any legal or equitable right in the beneficiary, and the  
16 property is not subject to process of the beneficiary's creditors.

17 (c) Does not transfer or convey any right, title, or interest in the property.

18 **Comment.** Section 5650 makes clear that a revocable TOD deed is effective only on the  
19 transferor's death and not before. A revocable TOD deed remains revocable until that time. See  
20 Section 5630 (revocability).

21 The transferor's execution and recordation of a revocable TOD deed has no effect on the  
22 ability of the transferor's creditors to subject the property to an involuntary lien or execution of a  
23 judgment.

24 The reference to the transferor's agent or other fiduciary in subdivision (a) includes a  
25 conservator. The authority of the fiduciary is subject to the qualification that the specific  
26 transaction entered into on behalf of the transferor must be within the scope of the fiduciary's  
27 authority. See, e.g., Section 4264 (power of attorney).

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

32 The beneficiary's joinder, consent, or agreement to any transaction by the transferor is  
33 unnecessary and irrelevant. If an obligation of the beneficiary incurred before the transferor's  
34 death attaches to the property on the transferor's death as a result of the doctrine of after-acquired  
35 title, that obligation is subordinate to prior limitations on the transferor's interest in the property.  
36 See Sections 5652 (effect at death), 5670 (priority of secured creditor of transferor).

37 Subdivision (c) reinforces the concept that a revocable TOD deed does not effectuate a transfer  
38 before the transferor's death. Creation of a revocable TOD deed should not have the effect of a  
39 default on a loan secured by the property, since it is not a disposition of the property.

40 **§ 5652. Effect at death**

41 5652. (a) A revocable transfer on death deed transfers all of the transferor's  
42 interest in the property to the beneficiary on the transferor's death. A revocable  
43 transfer on death deed that purports to transfer less than all of the transferor's

1 interest in the property is void, and the instrument does not transfer the property  
2 on the transferor's death.

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

10 (c) Notwithstanding a contrary provision in the deed, a revocable transfer on  
11 death deed transfers the property without covenant or warranty of title.

12 **Comment.** Under subdivision (a) of Section 5652, whatever interest the transferor owned at  
13 death in the property passes to the beneficiary. It should be noted, however, that this provision is  
14 not limited to the fee interest. If the transferor's ownership interest is a less than fee interest, the  
15 transferor's entire less than fee ownership interest passes to the beneficiary on the transferor's  
16 death.

17 Under subdivision (b), a beneficiary takes only what the transferor has at death. This is a  
18 specific application of the general rule that recordation of a revocable TOD deed does not affect  
19 the transferor's ownership rights or ability to deal with the property until death. See Section 5650  
20 (effect during transferor's life). Likewise, if an obligation of the beneficiary attaches to the  
21 property as a result of the doctrine of after-acquired title, that obligation is subordinate to any  
22 prior limitations on the transferor's interest in the property, and a transfer by the beneficiary  
23 financed by a purchase money mortgage is subject to the priority of a recorded encumbrance on  
24 the transferor's interest notwithstanding Civil Code Section 2898 (priority of purchase money  
25 encumbrance).

26 Subdivision (c) emphasizes the point that a revocable TOD deed is basically a quitclaim,  
27 passing whatever interest the transferor had at death to the beneficiary. A covenant or warranty of  
28 title included by the transferor in the deed has no effect.

29 **§ 5654. Medi-Cal eligibility and reimbursement**

30 5654. (a) For the purpose of determination of eligibility for health care under  
31 Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with  
32 Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code,  
33 execution and recordation of a revocable transfer on death deed is not a lifetime  
34 transfer of the property.

35 (b) For the purpose of a claim of the Department of Health Services under  
36 Section 14009.5 of the Welfare and Institutions Code, property transferred by a  
37 revocable transfer on death deed is a part of the estate of the decedent, and the  
38 beneficiary is a recipient of the property by distribution or survival.

39 **Comment.** Subdivision (a) of Section 5654 is a specific application of the general rule that  
40 execution and recordation of a revocable TOD deed divests the transferor of no interest in the  
41 property, and invests the beneficiary with no rights in the property, during the transferor's life.  
42 Section 5650 (effect during transferor's life).

43 Subdivision (b) is consistent with case law interpretation of the meaning and purpose of  
44 Welfare and Institutions Code Section 14009.5, providing for reimbursement to the state for  
45 Medi-Cal payments made during the decedent's life. See *Bonta v. Burke*, 98 Cal. App. 4th 788,  
46 120 Cal. Rptr. 2d 72 (2002).



1    **§ 5656. Property taxation**

2    5656. For the purpose of application of the property taxation provisions of the  
3 Revenue and Taxation Code:

4    (a) Execution and recordation of a revocable transfer on death deed of real  
5 property is not a change in ownership of the property.

6    (b) Transfer of real property on the death of the transferor by a revocable  
7 transfer on death deed is a change in ownership of the property.

8    **Comment.** Section 5656 prescribes the effect of a revocable TOD deed for purposes of  
9 property tax reassessment. Although a transfer of property by a revocable TOD deed is a change  
10 in ownership for reassessment purposes, the transfer may qualify for exclusion under the Revenue  
11 and Taxation Code, depending on the nature of the parties to the transfer. See, e.g., Rev. & Tax.  
12 Code §§ 62-63.1.

13                                   Article 2. Other Instruments and Forms of Tenure

14    **§ 5660. Conflicting dispositive instruments**

15    5660. If a revocable transfer on death deed and another instrument, each of  
16 which purports to dispose of the same property, are both recorded before the  
17 transferor's death:

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

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

24    **Comment.** Section 5660 establishes the general rules governing a conflicting disposition of  
25 property that is subject to a recorded revocable TOD deed. A revocable TOD deed has no effect  
26 unless recorded. Section 5626 (recordation, delivery, and acceptance). A conflicting instrument  
27 may not affect a revocable TOD deed under this section unless recorded before the transferor's  
28 death.

29    Under this section the transferor's will does not override a revocable TOD deed,  
30 notwithstanding a devise of the property in the will and regardless of the date of execution of the  
31 will. This section does not apply if the transferor revokes a recorded revocable TOD deed before  
32 death. See Section 5630 (revocability).

33    Absent a total disposition of the property before death, the revocable TOD deed passes  
34 property subject to conflicting interests of record. See Section 5652 (effect at death).

35    **§ 5662. Co-owned property**

36    5662. (a) If co-owners of real property jointly make a revocable transfer on  
37 death deed of the property, the property passes [in a manner to be determined].

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

41    **Comment.** For the rules governing disposition of an individual interest in joint tenancy  
42 property or community property, see Sections 5664 (joint tenancy property) and 5666  
43 (community property).

1 **Note.** The Commission particularly requests public comment on alternative approaches to  
2 treatment of a revocable TOD deed made by co-owners of property:

- 3 • The interest of each co-owner passes to the named beneficiary on the death of that co-  
4 owner, with the deed of the surviving co-owner being revocable.
- 5 • The interest of each co-owner passes to the surviving co-owner and then to the named  
6 beneficiary on the death of the surviving co-owner, with the deed of the surviving co-  
7 owner being either revocable or irrevocable.
- 8 • There could be different rules depending on whether the property is held as joint tenancy,  
9 as community property, as community property with right of survivorship, or as tenancy  
10 in common.
- 11 • Regardless of the answers to these questions, should an individual co-owner acting alone  
12 have a revocation right before the death of any co-owner? If so, should there be a  
13 notification requirement?

14 **§ 5664. Joint tenancy property**

15 5664. If a revocable transfer on death deed is made by an owner of property held  
16 in joint tenancy:

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

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

21 **Comment.** Section 5664 addresses the conflict between a revocable TOD deed and an earlier  
22 joint tenancy in the property, where fewer than all joint tenants join in the revocable TOD deed.  
23 In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660  
24 (conflicting dispositive instruments). If all joint tenants join in the revocable TOD deed, the  
25 disposition of the property is governed by Section 5662 (co-owned property).

26 Because a revocable TOD deed is revocable until the transferor's death, execution and  
27 recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when  
28 the transferor dies with the revocable TOD deed still in effect. If another joint tenant predeceases  
29 the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the  
30 combined interest passes pursuant to the revocable TOD deed. See Section 5652(a) (transferor's  
31 entire interest in property passes at death).

32 **§ 5666. Community property**

33 5666. (a) A revocable transfer on death deed of community property made  
34 without the joinder of the transferor's spouse is effective only as to the transferor's  
35 one-half interest in the property.

36 (b) A revocable transfer on death deed of community property with right of  
37 survivorship made without the joinder of the transferor's spouse is governed by  
38 the rules applicable to property held in joint tenancy under Section 5664.

39 **Comment.** Subdivision (a) of Section 5666 is a specific application of the rule that a person  
40 has the power of disposition at death of that person's interest in community property without the  
41 joinder of the person's spouse. Cf. Section 100 (one-half of community property belongs to  
42 decedent). A revocable TOD deed of community property made with the joinder of the  
43 transferor's spouse is subject to Chapter 2 (commencing with Section 5010) of Part 1, relating to  
44 nonprobate transfers of community property. Comparable principles apply to the property of  
45 registered domestic partners pursuant to Family Code Section 297.5.

46 Under subdivision (b), death of the transferor terminates the survivorship right in community  
47 property with right of survivorship. See Section 5664 (joint tenancy property); cf. Civ. Code §

1 682.1(a) (“Prior to the death of either spouse, the right of survivorship may be terminated  
2 pursuant to the same procedures by which a joint tenancy may be severed.”)

3 Article 3. Creditors

4 **§ 5670. Priority of secured creditor of transferor**

5 5670. Notwithstanding any other statute governing priorities among creditors, a  
6 creditor of the transferor whose right is evidenced at the time of the transferor’s  
7 death by an encumbrance or lien of record on property transferred by a revocable  
8 transfer on death deed has priority over a creditor of the beneficiary, regardless of  
9 whether the beneficiary’s obligation was created before or after the transferor’s  
10 death and regardless of whether the obligation is secured or unsecured, voluntary  
11 or involuntary, recorded or unrecorded.

12 **Comment.** Section 5670 makes clear that a creditor of the transferor has priority over a  
13 creditor of the beneficiary, at least to the extent the transferor’s creditor has a lien or  
14 encumbrance of record at the time of the transferor’s death. Thus the doctrine of after-acquired  
15 title (Civ. Code §§ 1106, 2930) does not create a priority in the beneficiary’s creditors, even if the  
16 right of the transferor’s creditor was created after the interest of the beneficiary’s creditor.  
17 Likewise, the priority given by statute to a purchase money encumbrance by the beneficiary’s  
18 transferee does not override the general priority of an encumbrance of record by a creditor of the  
19 transferor. See Civ. Code § 2898 (priority of purchase money encumbrance).

20 **§ 5672. Liability for unsecured debts**

21 5672. Each beneficiary is personally liable to the extent provided in Section  
22 5674 for the unsecured debts of the transferor. Any such debt may be enforced  
23 against the beneficiary in the same manner as it could have been enforced against  
24 the transferor if the transferor had not died. In any action based on the debt, the  
25 beneficiary may assert any defense, cross-complaint, or setoff that would have  
26 been available to the transferor if the transferor had not died. Nothing in this  
27 section permits enforcement of a claim that is barred under Part 4 (commencing  
28 with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure  
29 applies in an action under this section.

30 **Comment.** Section 5672 is drawn from Section 13204, relating to the liability of a decedent’s  
31 successor who takes real property of small value under the affidavit procedure. A beneficiary who  
32 wishes to avoid the liability imposed by this section may commence a probate proceeding and the  
33 return the property to the estate under Section 5676. See Section 5674 (limitation on liability).  
34 See also Section 275 (disclaimer).

35 **§ 5674. Limitation on liability**

36 5674. (a) A beneficiary is not liable under Section 5672 if proceedings for the  
37 administration of the transferor’s estate are commenced and the beneficiary  
38 satisfies the requirements of Section 5676.

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

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

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

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

9 **Comment.** Section 5674 is drawn from Section 13207, relating to limitation of liability of a  
10 decedent's successor who takes real property of small value under the affidavit procedure.

11 **§ 5676. Return of property to estate for benefit of creditors**

12 5676. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the  
13 administration of the transferor's estate are commenced each beneficiary is liable  
14 for:

15 (1) The restitution to the transferor's estate of the property the beneficiary  
16 received pursuant to the revocable transfer on death deed if the beneficiary still  
17 has the property, together with (A) the net income the beneficiary received from  
18 the property and (B) if the beneficiary encumbered the property after the  
19 transferor's death, the amount necessary to satisfy the balance of the encumbrance  
20 as of the date the property is restored to the estate.

21 (2) The restitution to the transferor's estate of the fair market value of the  
22 property if the beneficiary no longer has the property, together with (A) the net  
23 income the beneficiary received from the property prior to disposing of it and (B)  
24 interest from the date of disposition at the rate payable on a money judgment on  
25 the fair market value of the property. For the purposes of this paragraph, the "fair  
26 market value of the property" is the fair market value, determined as of the time of  
27 the disposition of the property, of the property the beneficiary received pursuant to  
28 the revocable transfer on death deed, less the amount of any liens and  
29 encumbrances on the property at the time of the transferor's death.

30 (b) Subject to subdivision (c), if proceedings for the administration of the  
31 transferor's estate are commenced and a beneficiary made a significant  
32 improvement to the property received by the beneficiary pursuant to the revocable  
33 transfer on death deed, the beneficiary is liable for whichever of the following the  
34 transferor's estate elects:

35 (1) The restitution of the property, as improved, to the estate of the transferor  
36 upon the condition that the estate reimburse the beneficiary for (A) the amount by  
37 which the improvement increases the fair market value of the property restored,  
38 determined as of the time of restitution, and (B) the amount paid by the  
39 beneficiary for principal and interest on any liens or encumbrances that were on  
40 the property at the time of the transferor's death.

41 (2) The restoration to the transferor's estate of the fair market value of the  
42 property, determined as of the time of the transferor's death, less the amount of

1 any liens and encumbrances on the property at that time, together with interest on  
2 the net amount at the rate payable on a money judgment running from the time of  
3 the transferor's death.

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

7 (d) An action to enforce the liability under this section may be brought only by  
8 the personal representative of the estate of the transferor. In an action to enforce  
9 the liability under this section, the court's judgment may enforce the liability only  
10 to the extent necessary to protect the interests of creditors of the transferor.

11 (e) An action to enforce the liability under this section is forever barred three  
12 years after the transferor's death. The three-year period specified in this  
13 subdivision is not tolled for any reason.

14 **Comment.** Section 5676 is drawn from Section 13206, relating to restoration of property to the  
15 estate by a decedent's successor who takes real property of small value under the affidavit  
16 procedure.

#### 17 CHAPTER 4. EFFECTUATION OF TRANSFER

##### 18 § 5680. Beneficiary rights and duties

19 5680. (a) The beneficiary may establish the fact of the transferor's death under  
20 the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of  
21 Division 2.

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

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

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

30 **Comment.** Section 5680 establishes that a beneficiary may record an affidavit of death of the  
31 transferor to effectuate the transfer. See Section 212 (recording is prima facie evidence of death  
32 to the extent it identifies real property located in the county, title to which is affected by the  
33 death).

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

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

40 Subdivision (d) is a specific application of Division 10 (commencing with Section 20100),  
41 relating to proration of taxes. The beneficiary of a nonprobate transfer, such as a revocable TOD  
42 deed, is liable for a pro rata share of estate and generation skipping transfer taxes paid by the

1 transferor's estate. See Sections 20100 et seq. (proration of estate tax), 20200 et seq. (proration of  
2 tax on generation-skipping transfer).

3 A beneficiary may disclaim the property under Section 275 (disclaimer).

4 **§ 5682. BFP protection**

5 5682. A person acting in good faith and for a valuable consideration with the  
6 beneficiary of a revocable transfer on death deed of real property for which an  
7 affidavit of death is recorded under the procedure provided in Chapter 2  
8 (commencing with Section 210) of Part 4 of Division 2 has the same rights and  
9 protections as the person would have if the beneficiary had been named as a  
10 distributee of the property in an order for distribution of the transferor's estate that  
11 had become final.

12 **Comment.** Section 5682 is drawn from Section 13203(a) (affidavit procedure for real property  
13 of small value).

14 **CHAPTER 5. CONTEST**

15 **§ 5690. Contest of transfer**

16 5690. (a) The transferor's personal representative or an interested person may  
17 contest the validity of a transfer of property by a revocable transfer on death deed  
18 under Part 19 (commencing with Section 850) of Division 2.

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

21 **Comment.** Section 5690 incorporates the procedure of Sections 850-859, relating to a  
22 conveyance or transfer of property claimed to belong to a decedent or other person. A person  
23 adversely affected by a revocable TOD deed has standing to contest the transfer. Cf. Section 48  
24 ("interested person" defined).

25 Grounds for contest may include but are not limited to lack of capacity of the transferor  
26 (Section 5620), improper execution or recordation (Sections 5622-5624), invalidating cause for  
27 consent to a transfer of community property (Section 5015), and transfer to a disqualified person  
28 (Section 21350). See also Section 5696 (fraud, undue influence, duress, mistake, or other  
29 invalidating cause).

30 Recordation of a lis pendens within 40 days after the transferor's death preserves remedies for  
31 the contestant. See Section 5694 (remedies).

32 **§ 5692. Time for contest**

33 5692. (a) A contest proceeding may not be commenced before the transferor's  
34 death.

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

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

38 (2) One year after the beneficiary establishes the fact of the transferor's death  
39 under the procedure provided in Chapter 2 (commencing with Section 210) of Part  
40 4 of Division 2.



1 those expenditures and to account to the court for all extraordinary expenditures  
2 made after service of the summons on that party.

3 Notwithstanding the foregoing, nothing in the restraining order shall preclude a  
4 party from using community property, quasi-community property, or the party's  
5 own separate property to pay reasonable attorney's fees and costs in order to retain  
6 legal counsel in the proceeding. A party who uses community property or quasi-  
7 community property to pay his or her attorney's retainer for fees and costs under  
8 this provision shall account to the community for the use of the property. A party  
9 who uses other property that is subsequently determined to be the separate  
10 property of the other party to pay his or her attorney's retainer for fees and costs  
11 under this provision shall account to the other party for the use of the property.

12 (3) Restraining both parties from cashing, borrowing against, canceling,  
13 transferring, disposing of, or changing the beneficiaries of any insurance or other  
14 coverage, including life, health, automobile, and disability, held for the benefit of  
15 the parties and their child or children for whom support may be ordered.

16 (4) Restraining both parties from creating a nonprobate transfer or modifying a  
17 nonprobate transfer in a manner that affects the disposition of property subject to  
18 the transfer, without the written consent of the other party or an order of the court.

19 (b) Nothing in this section restrains any of the following:

20 (1) Creation, modification, or revocation of a will.

21 (2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to  
22 the instrument, provided that notice of the change is filed and served on the other  
23 party before the change takes effect.

24 (3) Elimination of a right of survivorship to property, provided that notice of the  
25 change is filed and served on the other party before the change takes effect.

26 (4) Creation of an unfunded revocable or irrevocable trust.

27 (5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with  
28 Section 260) of Division 2 of the Probate Code.

29 (c) In all actions filed on and after January 1, 1995, the summons shall contain  
30 the following notice:

31 "WARNING: California law provides that, for purposes of division of property  
32 upon dissolution of marriage or legal separation, property acquired by the parties  
33 during marriage in joint form is presumed to be community property. If either  
34 party to this action should die before the jointly held community property is  
35 divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in  
36 common, or community property) will be controlling and not the community  
37 property presumption. You should consult your attorney if you want the  
38 community property presumption to be written into the recorded title to the  
39 property."

40 (d) For the purposes of this section:

41 (1) "Nonprobate transfer" means an instrument, other than a will, that makes a  
42 transfer of property on death, including a revocable trust, pay on death account in  
43 a financial institution, Totten trust, transfer on death registration of personal



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

3 (2) “Nonprobate transfer” does not include a provision for the transfer of  
4 property on death in an insurance policy or other coverage held for the benefit of  
5 the parties and their child or children for whom support may be ordered, to the  
6 extent that the provision is subject to paragraph (3) of subdivision (a).

7 (e) The restraining order included in the summons shall include descriptions of  
8 the notices required by paragraphs (2) and (3) of subdivision (b).

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

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

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

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

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

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

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

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

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

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

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

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

38 **Comment.** Section 250 is amended to expand its express application to all forms of nonprobate  
39 transfer under Division 5, including a provision for transfer on death in a written instrument  
40 (Section 5000), a multiple party account (Section 5100), a TOD security registration (Section  
41 5500), and a revocable TOD deed (Section 5600). This is consistent with Section 253 (no  
42 acquisition of property by killer).

1 **Prob. Code § 267 (amended). Disclaimable interest**

2 267. (a) “Interest” includes the whole of any property, real or personal, legal or  
3 equitable, or any fractional part, share, or particular portion or specific assets  
4 thereof, or any estate in any such property, or any power to appoint, consume,  
5 apply, or expend property, or any other right, power, privilege, or immunity  
6 relating to property.

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

9 (1) By intestate succession.

10 (2) Under a will.

11 (3) Under a trust.

12 (4) By succession to a disclaimed interest.

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

14 (6) By creation of a power of appointment.

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

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

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

19 (10) Under an insurance or annuity contract.

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

21 (12) Under an employee benefit plan.

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

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

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

27 **Comment.** New paragraph (14) of Section 267(b) is an explicit application of the general rule  
28 of paragraph (15). See Section 5614 (revocable transfer on death deed).

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

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

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

36 (1) An interest created under a will.

37 (2) An interest created by intestate succession.

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

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

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

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

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

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

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

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

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

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

17 (3) The time the interest becomes indefeasibly vested.

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

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

23 (2) The time the interest becomes indefeasibly vested.

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

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

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

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

33 **Comment.** Paragraph (9) is added to Section 279(b) in recognition of the establishment of the  
34 revocable TOD deed and other nonprobate transfer instruments. See Sections 5000 (nonprobate  
35 transfer), 5614 (revocable transfer on death deed).

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

37 4264. A power of attorney may not be construed to grant authority to an  
38 attorney-in-fact to perform any of the following acts unless expressly authorized in  
39 the power of attorney:

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

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

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

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

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

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

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

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

15 **Prob. Code § 5000 (amended). Nonprobate transfer**

16 5000. (a) A provision for a nonprobate transfer on death in an insurance policy,  
17 contract of employment, bond, mortgage, promissory note, certificated or  
18 uncertificated security, account agreement, custodial agreement, deposit  
19 agreement, compensation plan, pension plan, individual retirement plan, employee  
20 benefit plan, trust, conveyance, deed of gift, revocable transfer on death deed,  
21 marital property agreement, or other written instrument of a similar nature is not  
22 invalid because the instrument does not comply with the requirements for  
23 execution of a will, and this code does not invalidate the instrument.

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

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

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

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

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

39 **Comment.** Section 5000 is revised to make explicit its application to a revocable TOD deed.  
40 See Section 5614 (revocable transfer on death deed). This is a specific instance of the general  
41 principle stated in the section.

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

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

4 CHAPTER 3. NONPROBATE TRANSFER TO FORMER SPOUSE

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

8  
9 5040. (a) Except as provided in subdivision (b), a nonprobate transfer to the  
10 transferor's former spouse, in an instrument executed by the transferor before or  
11 during the marriage, fails if, at the time of the transferor's death, the former spouse  
12 is not the transferor's surviving spouse as defined in Section 78, as a result of the  
13 dissolution or annulment of the marriage. A judgment of legal separation that does  
14 not terminate the status of husband and wife is not a dissolution for purposes of  
15 this section.

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

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

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

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

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

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

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

33 (1) A provision of a type described in Section 5000.

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

36  
37 5042. (a) Except as provided in subdivision (b), a joint tenancy between the  
38 decedent and the decedent's former spouse, created before or during the marriage,  
39 is severed as to the decedent's interest if, at the time of the decedent's death, the  
40 former spouse is not the decedent's surviving spouse as defined in Section 78, as a  
41 result of the dissolution or annulment of the marriage. A judgment of legal

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

3 (b) Subdivision (a) does not sever a joint tenancy in either of the following  
4 cases:

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

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

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

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

15  
16 5044. (a) Nothing in this part affects the rights of a purchaser or encumbrancer  
17 of real property for value who in good faith relies on an affidavit or a declaration  
18 under penalty of perjury under the laws of this state that states all of the following:

19 (1) The name of the decedent.

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

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

24 (4) Either of the following, as appropriate:

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

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

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

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

34  
35 5046. Nothing in this part is intended to limit the court's authority to order a  
36 party to a dissolution or annulment of marriage to maintain the former spouse as a  
37 beneficiary on any nonprobate transfer described in this part, or to preserve a joint  
38 tenancy in favor of the former spouse.

39  
40 5048. (a) The operative date of this chapter (formerly Part 4, commencing with  
41 Section 5600) is January 1, 2002.

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

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

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

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

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

13 5302. Subject to Section ~~5600~~ 5040:

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

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

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

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

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

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

37 (2) On death of the sole trustee or the survivor of two or more trustees, (A) any  
38 sums remaining on deposit belong to the person or persons named as beneficiaries,  
39 if surviving, or to the survivor of them if one or more die before the trustee, unless  
40 there is clear and convincing evidence of a different intent, (B) if two or more  
41 beneficiaries survive, any sums remaining on deposit belong to them in equal and  
42 undivided shares unless the terms of the account or deposit agreement expressly

1 provide for different shares, and (C) if two or more beneficiaries survive, there is  
2 no right of survivorship in event of death of any beneficiary thereafter unless the  
3 terms of the account or deposit agreement expressly provide for survivorship  
4 between them.

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

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

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