

Memorandum 2017-6

Revocable Transfer on Death Deed: Follow-Up Study

In 2006, the Commission¹ recommended that California authorize the use of a revocable transfer on death deed (“RTODD”) to transfer real property on death, outside of probate.²

In 2015, legislation was enacted to implement most of the Commission’s recommendation (with some significant changes as to the scope and effect of the proposed RTODD).³ Among other things, the Legislature added a “sunset” provision, which will cause the repeal of the RTODD statute on January 1, 2021 (unless the sunset is extended or repealed before it operates).⁴ In addition, the legislation requires the Commission to conduct a follow-up study of the efficacy of the RTODD statute, and make recommendations for the improvement of that law.⁵

The Commission decided to postpone most of the work on that study until 2018 or 2019, to provide time for the accumulation of practical experience under the new statute.⁶ However, as a first step, the staff sent inquiries to affected groups, asking them to collect information about their experiences under the new law.⁷

At its December meeting, the Commission decided to accelerate its consideration of one specific issue in this study, relating to the process of recordation of RTODDs.⁸

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

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

2. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103 (2006).

3. AB 139 (Gatto), 2015 Cal. Stat. ch. 293.

4. Prob. Code § 5600(c).

5. 2015 Cal. Stat. ch. 293, § 21.

6. Minutes (Dec. 2015), p. 5.

7. The staff also reviewed RTODD case law in other states, to look for evidence of fraud, abuse, and mistake. See Memorandum 2016-36.

8. Minutes (Dec. 2016), p. 3.

That decision was made in response to a letter that the Commission received from Trevor Joyner, of Bidwell Title in Chico.⁹ He noted that the RTODD is comprised of two parts: (1) a page that is used to provide required information and signatures,¹⁰ and (2) an informational “Common Questions” page (hereafter the “FAQ”).¹¹ He reports that many RTODD forms are being recorded without the FAQ.

In his view, which others in the title insurance industry reportedly share, recordation of an RTODD without the FAQ casts doubt on the validity of the deed.

BACKGROUND

In order to be legally effective, a revocable transfer on death deed must be recorded, within 60 days of the date that it was executed.¹²

The provision that requires recordation of the “deed” does not expressly indicate whether recordation of the FAQ is required. However, Probate Code Section 5642 requires that an RTODD be executed in a specified form. That form includes both the fillable page and the FAQ:

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

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

[fillable form]

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

[FAQ]

Taken together, the provisions discussed above can be read to mean that the FAQ is a mandatory component of an RTODD, which must be recorded as part of the deed.

DISCUSSION

In all likelihood, many people will execute RTODDs without the advice of counsel. It seems inevitable that some self-represented individuals, and perhaps

9. See Exhibit p. 1.

10. Prob. Code § 5642(a).

11. Prob. Code § 5642(b).

12. Prob. Code § 5626(a) (“A revocable transfer on death deed is not effective unless the deed is recorded on or before 60 days after the date it was executed.”).

also some persons represented by counsel, will record only the first page of the form (especially because the recording fee is based in part on page count).

Mr. Joyner's experience confirms this. He reports that he has seen many RTODDs in Butte County that were recorded without the FAQ.

If an RTODD recorded without the FAQ were considered invalid, transferor intentions would be frustrated. Property that was intended and expected to transfer on death outside of probate would instead require probate and could wind up being transferred to someone other than the intended beneficiary.

Even if recording an RTODD without the FAQ would not invalidate the RTODD, any *uncertainty* on that point would itself be problematic. If the validity of such an RTODD is uncertain, title insurers may be reluctant to insure title for the RTODD beneficiary. In that situation, the beneficiary probably would need to bring a quiet title action to confirm ownership of the property. That would defeat the transferor's intention to transfer property simply and nonjudicially, significantly increasing the cost and hassle of effecting the transfer.

Given those potential problems, the staff recommends that the law be revised to provide certainty as to whether the validity of an RTODD is contingent on recording the FAQ.

There are two general ways that the law could be clarified:

- (1) The law could be revised to make clear that recordation *is* required, or
- (2) The law could be revised to make clear that recordation *is not* required.

The advantage of requiring recordation is that it would increase the likelihood that a transferor had seen the FAQ. This would increase the likelihood that the transferor understands the effect of the RTODD and knows how to successfully execute it. **If the Commission chooses this approach, the instruction language on the form should be revised to prominently warn transferors that the FAQ *must* be recorded or the deed will not be valid.**

The staff sees two serious disadvantages to requiring recordation of the FAQ. First, there probably are many RTODD deeds that have already been recorded without the FAQ. If the law were revised to require recordation of the FAQ, those already-recorded RTODDs would be invalid. In that circumstance, it seems unlikely that the transferor (particularly if self-represented) would learn of the change in the law and correct the recordation error before the transferor's death.

Second, the stricter the recordation requirement, the greater the likelihood of invalidating errors. One possible way to limit such errors would be to require the transferor to initial or sign the FAQ, next to an admonition that the FAQ must be recorded. But even with such robust guidance, some level of error seems inevitable.

The other alternative would be to clarify that recording or failing to record the FAQ has no effect on the validity of an RTODD. This would eliminate a potential trap, increasing the likelihood that transferor intentions will be effectuated. It would also provide guidance for title insurers.

The staff favors the latter approach. While there is a good policy reason to encourage users to read the FAQ, any additional educational benefit that would result from requiring recordation of the FAQ would seem to be outweighed by the likelihood that such a rule would accidentally invalidate some otherwise legitimate RTODDs. If the Commission agrees, the staff also recommends that the clarification be made retroactive in its effect.

NEXT STEP

The Commission needs to decide whether to recommend a reform to address the problem described above.

If the Commission decides to do so, it then needs to decide which way to clarify the law: (1) expressly require FAQ recordation or (2) expressly provide that FAQ recordation is not required. Based on that decision, the staff would then prepare a draft tentative recommendation for consideration at the April meeting.

How would the Commission like to proceed?

Respectfully submitted,

Brian Hebert
Executive Director

EMAIL FROM TREVOR JOYNER
(NOV. 2, 2016)

Dear Mr. Hebert,

As a local title company owner in Chico, Butte County, California I take great pride and responsibility to help protect and serve the people in my communities in regards to title and real estate items.

There are some serious problems with the TODD that I would like you to know about for your study.

The last time I ran a report, a vast majority of the TODD's recorded in Butte County have been recorded incorrectly and are uninsurable for title insurance purposes!

I have already had the challenges of dealing with clients who were under the assumption their TODD deeds were recorded correctly and now that the grantor has deceased the deeds were not recorded properly and they are having to go through other legal channels to try to clear title.

The law states both pages need to be recorded in substantially the same format. The Common Questions second page normally being the issue. I have had several people including people from the legal fields told by our Butte County Recorder that the second page did not need to be recorded. According to the title insurance companies I am underwritten by, if this second page is not recorded, the documents legality is questionable and is potentially uninsurable.

I have been in contact with our county recorder on several occasions and after their discussions with other county recorders throughout the state, were not going to require or change their position on allowing these documents to record incorrectly and have apparently continued to sway the public to record the documents without the second page, "In order to save on recording fees" according to one paralegal I spoke with.

I have been able to convince some of the local attorneys who were incorrectly recording the deeds to change their policies. Even the Sacramento County Public Law Library has misleading info on the proper preparation of the deeds.

My suggested solution is to eliminate the requirement for the second page, include notice of the requirement on this second page or to clarify in the law the need for the awkward second page.

The second issue we are concerned with is the elder abuse situation. It has become obvious the potential for caregivers to take advantage of their relationship with the grantors. This is going to be a big challenge as the transfers start occurring.

Thank you for hearing my suggestions. I am available to discuss any questions you may have.

Sincerely,
Trevor Joyner