Study L-3032.1 August 6, 2018

Memorandum 2018-33

Revocable Transfer on Death Deed: Follow-Up Study Discussion of Issues

In 2006, the Commission[1] 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, Assembly Bill 139 (Gatto) 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added a "sunset" provision, which will repeal the RTODD statute on January 1, 2021 (unless the sunset is extended or repealed before it operates).[4] In addition, the law requires the Commission to conduct a follow-up study of the efficacy of the RTODD statute, and make recommendations for the improvement or repeal of that law.[5]

The Commission decided to postpone most of the work on that study until 2018 or early 2019, to provide time for the accumulation of practical experience under the new statute.[6] However, the Commission later learned of a problem with the statute that warranted a quicker response — questions about the validity of an RTODD if the "FAQ" instruction page was not recorded along with the deed form. Reportedly, those questions were an obstacle to obtaining title insurance, impairing the marketability of property that was transferred by operation of an RTODD.

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.

The Commission accelerated study of that issue, eventually recommending that the law be revised to make clear that FAQ recordation is not required for an RTODD to be legally effective.[7] A bill to implement that recommendation was enacted this year, as an urgency measure.[8]

This memorandum begins discussion of three other matters that could undermine the validity of an RTODD or impair the marketability of property conveyed by RTODD:

(1) The "residential property" limitation on the application of the RTODD.
(2) The natural person limitation on the application of the RTODD.
(3) The potential return of property to a probate estate for use in paying creditor claims.

Unless otherwise indicated, all statutory references in this memorandum are to the Probate Code.

RESIDENTIAL PROPERTY LIMITATION

In the Commission's RTODD recommendation, an RTODD could be used to transfer any type of interest in real property that is transferrable on death. This rule was established in a special definition of "real property," which governed the application of the statute:

> 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 definition of real property found in Section 68 ("real property" includes leasehold). Any interest in real property may be the subject of a revocable TOD deed.
> Under subdivision (b), an interest in a CID includes a community apartment project, a condominium project, a planned development, and a stock cooperative. The provision makes clear

7. *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm'n Reports ___ (2017).
8. AB 1739 (Chau); 2018 Cal. Stat. ch. 65.

> that these forms of tenure are real property for the purpose of a revocable TOD deed, regardless of whether elements of the interest are contractual in nature.
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> 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.[9]

AB 139 was amended, late in the legislative process, to significantly restrict the type of property that can be transferred by RTODD. The amendment narrowed the governing definition of "real property" to read as follows:

> 5610. "Real property" means any of the following:
>
> (a) Real property improved with not less than one nor more than four residential dwelling units.
>
> (b) A condominium unit, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.
>
> (c) A single tract of agricultural real estate consisting of 40 acres or less that is improved with a single-family residence.

The apparent purpose of that amendment was to limit the use of the RTODD to residential property. The staff sees some technical problems with the language used to achieve that goal. Moreover, it is not clear why, as a matter of policy, the RTODD should be limited to transferring residential property.

This memorandum will address the technical problems first, then turn to the policy question.

Imprecision of Terms

The meanings of some of the terms used in Section 5610 may not be sufficiently clear. This could cause problems for transferors, who might not know whether a particular piece of property can be transferred by RTODD. An error on that point could lead to litigation and the invalidation of an RTODD. That would add costs and could result in transfer of the affected property to someone other than the person intended by the transferor.

Specifically, the staff sees the following problems with the language used in Section 5610:

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9. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 218 (2006) (proposed Section 5610).

- In subdivisions (a) and (c) respectively, the terms "real property" and "real estate" are used. Do they have the same meaning? If not, what is the intended difference?
- In subdivisions (a) and (c) respectively, the terms "residential dwelling unit" and "residence" are used. Do they have the same meaning? If not, what is the intended difference?
- Subdivision (b) refers to a condominium unit and "the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit." That is not language that is used in common interest development law and its meaning is not clear. It must have been intended to refer to a condominium unit's associated "common area," *because a separate condominium unit cannot be conveyed without the associated interest in the common area* (which often comprises the physical walls, floors, and ceilings of the unit, as well as lobbies, elevators, parking, etc.). This issue is discussed further below, under "Condominiums."
- Subdivision (c) refers to "agricultural real estate." That seems to be the only use of that phrase in the codes. Does it refer to any property that is used for agriculture? Property that is limited to agricultural use by land use regulations? Something else?

There is another general issue involving the language used in Section 5610. Title insurers need to be able to assess the validity of an RTODD solely from the information that is in official public records. If necessary information is off-record, it will not be possible to determine whether the property that is the subject of an RTODD is "real property" that can be effectively transferred by an RTODD.

For that reason, the terms used in Section 5610 should be based on facts that can be determined from the record. For example, if "agricultural real estate" means any land that is used to grow food for commercial sale, the title records could not tell you whether a piece of property is agricultural real estate. The validity of an RTODD would depend on off-record information — whether crops are being grown on the land. By contrast, if the term means property that is restricted to agricultural use by zoning, that fact should be determinable from public records.

If the Commission decides to retain the limitations in existing Section 5610, the terminology should be standardized, with an eye toward relying on facts that can be found in official public records.

Condominiums

A common interest development ("CID") is a kind of real property development where an owner holds a "separate interest" granting exclusive possession of part of the development, along with an appurtenant interest in "common area."[10] A "condominium project" is one kind of CID.[11] The other types are planned developments, community apartment projects, and stock cooperatives.[12]

In the Commission's recommendation, proposed Section 5610 included express language stating that any type of CID is included in the "real property" that can be transferred by RTODD.[13]

As enacted, Section 5610(b) expressly includes condominiums in the definition of "real property," but does not include any of the other kinds of CIDS:

> A condominium unit, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

That language impliedly precludes the use of an RTODD to transfer other types of CID property. The statutory FAQ for RTODDs, which is part of the statutory firm, seems to affirm that limitation:

> CAN I USE THIS DEED TO TRANSFER BUSINESS PROPERTY? This deed can *only* be used to transfer (1) a parcel of property that contains one to four residential dwelling units, (2) a *condominium unit*, or (3) a parcel of agricultural land of 40 acres or less, which contains a single-family residence.[14]

In 2016, the Commission was specifically directed to consider the appropriateness of that limitation.[15]

As a matter of policy, the staff sees no good justification for the condominium limitation. There is nothing different about condominiums, as compared to other kinds of CID property, that would make them uniquely suitable for transfer by RTODD.

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10. See Civ. Code §§ 4095 ("common area"), 4100 ("common interest development"), 4165 ("separate interest").
11. See Civ. Code §§ 4100, 4125.
12. See Civ. Code §§ 4100, 4105, 4175, 4190.
13. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 218 (2006) (proposed Section 5610(b)).
14. Section 5642(b) (emphasis added).
15. 2016 Cal. Stat. ch. 179 (Commission study of RTODDs to consider "Whether it is feasible and appropriate to expand the revocable transfer on death deed to include [the] transfer of stock cooperatives or other common interest developments.").

Moreover, a rule precluding use of an RTODD to transfer interests in other kinds of CIDs would seem to create a trap for those who own such property. Because the special treatment of condominiums makes no obvious sense, it may not occur to such owners that they cannot use an RTODD to transfer their property. This could lead to widespread error and invalidity of RTODDs. **The staff recommends that the Commission's original recommendation on this point be restored, by revising Section 5610 to include all kinds of CIDs.**

On a related technical point, if the goal of the narrowed definition of "real property" was to limit it to residential properties, the condominium provision is inapt. The condominium form of ownership is not limited to residential use. It can be used for commercial and industrial property. **If the Commission decides to retain the residential use limitation, any language referring to CIDs will need to be revised to exclude commercial and industrial uses.**

Agricultural Property

The apparent purpose of subdivision (c) is to limit the use of an RTODD to transfer "agricultural real estate."

Under that provision, an RTODD can only be used to transfer agricultural real estate if it is a single tract of 40 acres or less in size, improved with a single-family residence. This conjures images of a small family farm.

However, that limitation would seem to be swallowed by subdivision (a), which defines "real property" as any real property, regardless of its use and size, so long as it has between one and four residential dwelling units. Under that definition, agricultural land of any size would be "real property" so long as it has between one and four residential dwelling units. Notwithstanding subdivision (c), such land could be transferred by RTODD.

The Executive Committee of the Trusts and Estates Section of the California Lawyers Association ("TEXCOM") noted this problem in a June 1, 2017, letter to the Commission:

> [It] appears from section 5610, subdivision [(c)], that agricultural property of more than 40 acres was intended to be excluded from the definition of "real property." However, as long as agricultural real property (of potentially unlimited size) is improved with not less than one nor more than four residential dwelling units, such real property would come within the definition of "real property" under subdivision (a).[16]

16. Memorandum 2017-35, Exhibit p. 3.

If the Commission decides that the agricultural limitation in subdivision (c) should be retained, the law should be revised to address the problem noted above. One way to do so would be to add limiting language to subdivision (a), along these lines:

> Real property, other than agricultural real estate, that is improved with not less than one nor more than four residential dwelling units.

The staff is also concerned that the term "agricultural real estate" may not be sufficiently precise or apt. **If the Commission decides to retain the agricultural limitation, the staff will take a closer look at land use law, to see if there is a standard way to refer to agricultural land.**

Timing

In its letter, TEXCOM also raised a technical issue about timing:

> As discussed above, section 5610 limits the type of real property that may be the subject of a RTODD to the types of real property described in that section. However, the statutes are ambiguous regarding when the real property must come within the statutory definition of "real property." In other words, must the real property be "real property," as defined, at the time that the RTODD is executed? Or, at the time that the RTODD operates because of the transferor's death? Suppose that a parcel of real property was improved with a residence at the time a transferor signs a RTODD with respect to the property; however, before the transferor dies, the residence is demolished such that the property is unimproved at the time of the transferor's death. Such property would have come within the definition of "real property" at the time that the RTODD was executed, but would not come within the definition of "real property" at the time that the RTODD operates because of the transferor's death. The intention in this regard should be clarified.[17]

The problem described by TEXCOM would probably be rare, but it could happen (and it could arise in different fact situations from the one described). **If the Commission decides to retain the existing limitations on the kinds of "real property" that can be transferred by RTODD, the staff recommends that it revise the law to address the timing issue.**

In doing so, the Commission would need to decide: should the relevant point in time be the date of execution or the date of operation? It is difficult to know

17. Memorandum 2017-35, Exhibit p. 3.

how to answer that question, because the staff does not understand the policy purpose of the limitations on use of the RTODD.

Two possible policy purposes, and the timing rule that would seem to best serve them, are noted below:

- *Reduce risk of mistake and fraud.* It is possible that the Legislature saw greater scope for transferor error and fraud if the RTODD were permitted to transfer nonresidential property, perhaps because the ownership of business property can involve more complicated legal issues than the ownership of residential property. **If so, the validity of an RTODD with regard to the limited definition of "real property" should be evaluated at the time that the RTODD is executed.** That is the point in time when any error or fraud would occur. A later change in the character of the property would not affect whether the transferor had made a mistake when executing the RTODD or been tricked into doing so.
- *Prevent certain types of property being transferred by RTODD.* If the policy goal is to ensure that certain kinds of property will never by transferred by RTODD, t**he best approach would be to determine the validity of an RTODD when it operates.** The character of the property at that time — when the transfer occurs — would seem to be most relevant to banning the transfer of certain kinds of property by RTODD. Before that time, the character of the property is changeable. At the moment of the transferor's death, the character of the property is fixed (at least for the purposes of the transfer).

The staff believes that the first of those two policy purposes is more likely to have been the Legislature's reason for limiting the kinds of property that can be transferred by RTODD. When the various bills to implement the Commission's recommendation on RTODDs were pending in the Legislature, the Senate Committee on Judiciary repeatedly expressed concerns about mistake and fraud. When the committee finally approved AB 139, it did so after making amendments that converted the bill into a sort of pilot project. It was given a sunset date and the Commission was charged with conducting a follow-up study. The amendment that limited the kinds of property that could be transferred might have part of the pilot project concept. Rather than allowing unfettered use of an RTODD, the Legislature decided to narrow its operation during the pilot period. This could have been intended to correspondingly narrow the scope for any problems that might surface. The limitations may not have seemed onerous, because most of those wishing to use a self-help method to convey property on death would probably be legally unsophisticated

individuals, who would most likely be transferring their homes, rather than commercial property.

As to the second possibility, that the Legislature intended to proscribe the transfer of certain types of property because those kinds of property should not be transferred by RTODD, the staff sees no policy justification for such a position.

If the staff's conjecture is correct, then it would probably be best to adopt the first approach — evaluate the validity of an RTODD at the time that it is executed. That would limit the scope of use of the RTODD during the pilot period, without creating a trap for those transferors who have the misfortune of having changed circumstances take their property out of the definition of "real property."

Eliminate Limitations

Having considered the various technical issues that should be addressed if the Commission decides to retain the existing limitations on the kinds of property that can be transferred by RTODD, the Commission now needs to decide whether, as a matter of policy, those limitations should continue to exist.

As discussed above, the restrictions might have made sense as a way to narrow the scope of a pilot project, with only the most straightforward kinds of transfers being permitted. More complicated transactions involving commercial, industrial, or agricultural property would be held off until the basic concept of the RTODD had been tested and any bugs ironed out.

If that was the reason for the restrictions, the staff provisionally recommends that they be eliminated. If the Commission eventually recommends the repeal of the sunset provision, then the RTODD statute would no longer be operating as a pilot program. The idea of testing it on a limited basis during a pilot period would no longer apply. Any continuing limitation on the kinds of property that could be transferred by RTODD would need to be justified on other grounds, which are not readily apparent. Moreover, if the Commission instead recommends that the RTODD statute be allowed to sunset, then the scope issue would be moot.

The staff invites public comment on whether there are separate policy grounds for limiting the use of an RTODD to the transfer of residential property. As noted above, it is possible that the ownership of nonresidential property involves complications that are so likely to produce mistakes that it

would be better to foreclose the possibility by precluding use of the RTODD to transfer such property. But the staff has had a hard time finding support for that argument.

The core legal effect of an RTODD is quite straightforward. It transfers the owner's interest in identified real property to the named beneficiaries on the owner's death. It is not necessary to identify the nature of the owner's interest in the property. The RTODD transfers all of the owner's interest in the property, whatever it may be.[18] All that the owner needs to do is properly identify the beneficiaries and the property to be transferred. Unless for some reason nonresidential property is difficult to identify on a deed, there does not seem to be significant scope for error in using an RTODD to transfer such property.

Practical input on these issues would be helpful. If the Commission decides to recommend deletion of the existing limitations on the types of property transferable by an RTODD, all of the technical problems discussed above would be eliminated. **How would the Commission like to proceed on this point?**

NATURAL PERSON LIMITATION

Background

The Commission's recommendation did not include any express limitation on who could be named as the beneficiary of an RTODD.[19]

The recommended definition of "beneficiary" was "a person named in a revocable transfer on death deed as transferee of the property."[20] The Probate Code defines "person" as "an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity."[21] Thus, the Commission's recommendation would have permitted the RTODD to name a legal entity as beneficiary, and not just a natural person. That point was underscored by an express provision stating that the beneficiary could be "the trustee of a trust even if the trust is revocable."[22]

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18. Section 5652.
19. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 220 (2006) (proposed Section 5622).
20. *Id.* at 217 (proposed Section 5606).
21. Section 56.
22. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 220 (2006) (proposed Section 5622).

In the statute that was eventually enacted, the term "beneficiary" is still defined as "a person named in a revocable transfer on death deed as transferee of the property."[23] The Probate Code's definition of "person" remains the same. Read together, those provisions could be understood as permitting a legal entity to be named as a beneficiary of an RTODD.

However, the language expressly stating that a trustee of a trust can be named as beneficiary was removed in the legislative process. Furthermore, language was added to the mandatory statutory form and FAQ that can be read to imply that the beneficiary must be a natural person.[24] That was the staff's understanding of the Legislature's intention at the time.

In 2016, Assembly Member Gatto introduced Assembly Bill 1779. As introduced, the bill would have revised the definition of "beneficiary" as follows and made conforming changes to the statutory form and FAQ:

> 5608. "Beneficiary" means a person named in a revocable transfer on death deed as transferee of the property. A "beneficiary" may include a legal entity, such as a trust.

The bill was later amended (before its first hearing) to remove the proposed revision and instead require the Commission to specifically study:

> Whether it is feasible and appropriate to expand the revocable transfer on death deed to include [t]ransfers to a trust or other legal entity.[25]

In short, there seems to be uncertainty about whether the RTODD statute permits a legal entity to be named as beneficiary. Any uncertainty on that point could cause serious problems. In addition, regardless of the meaning of existing law, the Legislature has directed the Commission to consider whether the law *should* contain such a rule. Those issues are discussed in more depth below.

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23. Section 5608.

24. See AB 139 (Gatto), as amended June 29, 2015. See also Section 5642(a) ("Print the FULL NAME(S) of the person(s) who will receive the property on your death (DO NOT use general terms like "my children") and state the RELATIONSHIP that each named person has to you (spouse, son, daughter, friend, etc.)", (b) ("HOW DO I NAME BENEFICIARIES? You MUST name your beneficiaries individually, using each beneficiary's FULL name. You MAY NOT use general terms to describe beneficiaries, such as "my children." For each beneficiary that you name, you should briefly state that person's relationship to you (for example, my spouse, my son, my daughter, my friend, etc.).").

25. 2016 Cal. Stat. ch. 179.

Public Comment

TEXCOM

In its June 1, 2017, letter to the Commission, TEXCOM discusses this issue. TEXCOM begins by arguing that existing law already allows a trust or other legal entity to be named as a beneficiary of an RTODD:

> [T]rusts and legal entities are already authorized to be named as beneficiaries of RTODDs, without any expansion of the enacted statutes required. Pursuant to section 5608, the beneficiary of a RTODD may be any "person." And, in turn, section 56 defines "person" to include, "an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity." Thus, regardless of whether such was intended by the Legislature, trusts and legal entities are already eligible to be named as beneficiaries in RTODDs.[26]

However, TEXCOM goes on to suggest that the law should be revised to only permit natural persons to be named as beneficiaries:

> In TEXCOM's view, allowing for transferors to name trusts and legal entities as beneficiaries of RTODDs invites confusion and errors by unknowing transferors; thus, the better rule would be to provide that only individuals may be named as beneficiaries in RTODDs.[27]

TEXCOM does not elaborate on how naming a legal entity as beneficiary would cause confusion or error.

It may be that the naming conventions for trusts are too loose and colloquial to provide the degree of precision required for such an important document (e.g., "The Jones Family Trust" could refer to thousands of different trusts). A similar problem might arise when charitable nonprofits are named as beneficiaries (e.g., "SPCA" might refer to a number of entities with those initials, or there might be confusion over whether the intended recipient is a local chapter, state-level chapter, or national organization). There might be ways to require greater precision in naming legal entities (e.g., requiring the entity's federal taxpayer identification number), but any such requirements might set traps of their own. If the Commission decides that the law should permit naming a legal entity as beneficiary, it should consider ways in which to reduce the risk of error.

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26. Memorandum 2017-35, Exhibit pp. 3-4.
27. *Id.* at 4.

The staff requests comment, from TEXCOM and other interested persons and groups, on how allowing legal entities to be beneficiaries would increase the risk of error and how any such risks might be mitigated.

Roberta Roberts

The staff also received informal communications from Ms. Roberta Roberts of Oceanside. As we understand the situation, she intended to use an RTODD to make a charitable gift of her home on her death, only to run into roadblocks. The county assessor informed her that such a use of the RTODD would be invalid. This position was based on analysis that the county assessor had received from the State Board of Equalization ("SBOE").

Ms. Roberts contacted Assembly Member Chau (in an email that was copied to the staff) to ask that AB 1739 be amended to expressly permit the use of an RTODD to make a gift to a legal entity.[28] She attached a copy of a letter that she had sent to SBOE, arguing against their interpretation of existing law on that point.[29] Mr. Chau did not make the requested amendment to AB 1739.

Angela Petrusha

Angela Petrusha, a Eureka estate planning attorney, ran into similar unexpected obstacles when she prepared and recorded RTODDs that named a legal entity as beneficiary. She was informed by her county assessor that the RTODDs could not be used in that way and were invalid. Again, that position was based on guidance from SBOE.[30]

This was unexpected, because Ms. Petrusha had examined the statutory law, committee analysis, and a CEB estate planning practice manual.[31] She had also consulted with a local title insurer. All led her to believe that a legal entity could be named as beneficiary of an RTODD. She also points out that TEXCOM, in its letter to the Commission, reaches the same conclusion.

Ms. Petrusha urges the Commission to revise the law to make clear that a trust can be named as beneficiary. She explains:

> Considering the fact that both CEB and TEXCOM have interpreted the current law to allow this practice, I am certain other California attorneys have recorded RTODDs naming trusts,

28. See Exhibit p. 1. The staff understands that former Assembly Member Gatto made a similar request.
29. *Id.* at 2.
30. *Id.* at 7.
31. *Id.* at 9.

charitable organizations, or other legal entities as beneficiaries. Surely many laypersons using the statutory forms continue to do so as well. Some transferors may have already died or become incompetent to sign additional legal documents. Narrowing the scope of this law now, more than 2 1/2 years after its effective date, should be done with the following in mind:

There is great concern that if these already-recorded RTODDs are later declared invalid, there will be unintended results upon the death of the transferor, when it will be too late to take any alternative action. These results will likely lead to costly litigation for estates which have little resources (other than the subject property) and cannot afford the legal costs. Therefore the testamentary intent of the transferors will be undermined, and this law will have failed them.

Some have questioned the necessity of naming a trust as beneficiary of an RTODD rather than transferring the subject property to a revocable living trust, which would also avoid probate. While this may be the solution in most cases, sometimes this is not a viable option. For example, consider the homeowner who does not wish to incur the expense of creating a trust for herself, but wishes to name a supplemental needs trust (or "Special Needs Trust") as beneficiary of her home. A Special Needs Trust is typically created for the benefit of a person with a disability who would encounter negative consequences if he or she received property or money outright. The homeowner has a modest estate that would not otherwise require a formal probate. In keeping with the intent of AB 139, shouldn't this homeowner be allowed a straightforward, inexpensive, non-probate option for transferring this asset upon death?[32]

Analysis

Why would the Legislature have decided to limit beneficiaries to natural persons? The best explanation is probably the one discussed above, in connection with the residential property limitation — the statute was intended to operate as a pilot project initially. Limiting beneficiaries to natural persons would limit the scope for error during the pilot period (by limiting the number of permutations in play).

On the substantive merits, the only reason that the staff can see for such a limitation going forward is the one advanced by TEXCOM in its letter. If allowing legal entities to be named as beneficiaries increases the risk of error by a sufficient degree, then it might be best to forbid that practice. Bear in mind that this would come at the cost of denying the benefit of the law to those who wish

32. *Id.* at 8 (emphasis in original).

to make gifts to legal entities (e.g., charitable gifts to nonprofits and gifts to support a disabled relative or friend who is the beneficiary of a Special Needs Trust).

Any increased risk of error that would result from allowing gifts to legal entities, and the efficacy of any changes in the law that might mitigate such risks, would seem to be grounded in practical considerations. How would legal entities be identified? How could ambiguity be minimized?

It would be valuable to get input from practitioners, judges, title insurers, and other interested persons about these practical matters before making a decision on whether the law should permit a legal entity to be named as a beneficiary of an RTODD. The staff also invites comment on whether there are any other kinds of problems that would result from allowing that practice.

Regardless of the rule the Commission decides to recommend, **the law should be revised to eliminate any ambiguity on the point.** There should be no uncertainty on an issue that will determine the validity or invalidity of an RTODD.

RETURN OF PROPERTY FOR PAYMENT OF DECEDENT'S DEBTS

Background

Under existing Section 5672, a beneficiary who receives title to real property by operation of an RTODD is personally liable, up to the value of the property received, for the unsecured debts of the deceased transferor.

In addition, if the transferor's estate is being administered and there are creditor claims, Section 5676 provides that the beneficiary can be liable for "restitution of the property" to the transferor's estate, for use in paying the transferor's debts.[33]

Section 5676, the provision requiring return of the property, is subject to a three-year enforcement period: "An action to enforce the liability under this section is forever barred three years after the transferor's death. The three-year period specified in this subdivision is not tolled for any reason. …"[34]

Former Assembly Member Gatto reached out to the staff to report that some title insurers have declined to insure property transferred by RTODD during that three-year period. This results in a significant impairment of marketability,

33. Section 5676.
34. Section 5676(f).

which could cause serious problems for beneficiaries. Many beneficiaries will not be in a situation where it would make economic sense to retain ownership of the property for three years. Prompt sale may be the only way to realize the full benefit of the gift. If the property cannot be sold, the beneficiary may even need to disclaim the gift, in order to avoid a net burden.

Earlier this year, Assembly Member Kiley introduced a bill (AB 3004) to address that issue and some other points. Ordinarily, the staff would not comment on an issue addressed by a pending bill. However, AB 3004 was withdrawn from consideration by the author and has missed the deadline for approval by the Assembly.

AB 3004 would have amended the provision establishing a three-year time period for return of property to a probate estate as follows:[35]

> (e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent's property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason. This subdivision shall not be construed to operate as a three-year waiting period for the transfer of property pursuant to a properly executed revocable transfer on death deed.

While the actual effect of that language is not entirely clear, it seems to have been *intended* to prohibit title insurers from relying on Section 5676 as grounds for declining to insure title to property received by RTODD.

Aside from the technical problem of determining exactly what the proposed language would do (or how it might be better expressed to achieve its purpose), there could be understandable resistance to a reform that would require private insurers to issue policies under circumstances that they believe would expose them to liability. Inclusion of such an approach in AB 3004 may be part of the reason that the bill was never set for a hearing.

A more even-handed and less controversial approach may be to identify the risk that title insurers might face under Section 5676 and try to find a way to mitigate it.

35. AB 3004 would have amended Section 13111, which does not govern RTODDs. That appears to have been a mistake. The analogous section in the RTODD statute is Section 5676. The remainder of this discussion treats the amendment as if it were made to Section 5676.

Risk Posed by Section 5676

As noted above, Section 5676 authorizes a personal representative to require that property transferred by RTODD be returned to the probate estate for use in paying a decedent's unsecured debts. The Commission modeled that provision on nearly identical provisions that are part of the procedures for the distribution of a small estate without probate administration.[36] Those model provisions were also based on a Commission recommendation.[37]

The liability established in Section 5676 can be enforced by a personal representative for any time up to three years after the death of the transferor.[38]

The staff sees two ways in which the period of liability provided in Section 5676 might be of concern to title insurers.

Subsequent Transfer

Suppose that a beneficiary receives property by RTODD and records proof of the transferor's death.[39] The beneficiary decides to sell the property and finds a buyer. Title insurance is required as a condition of the sale. The title insurer checks the record, finds no evidence of any problem, and issues a policy.

Later, a probate is opened to pay debts and the personal representative enforces the liability under Section 5676.

This scenario should not create any liability for title insurers. Section 5676 has a special rule that applies if a beneficiary "no longer has the property" (as would be the case if the property had been sold). Instead of returning the property, the beneficiary is liable for its value.[40] The liability is personal and should not affect the property.

Moreover, the RTODD statute includes a provision that expressly protects a good faith purchaser of property transferred by an RTODD:

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

36. See Sections 13111 (personal property of small value), 13206 (real property of small value), 13562 (property received by surviving spouse).
37. *Disposition of Estate Without Administration*, 18 Cal. L. Revision Comm'n Reports 1005 (1986).
38. Section 5676(e).
39. Section 5680.
40. Section 5676(a)(2).

> (a) The person acted in good faith and for a valuable consideration.
>
> (b) An affidavit of death was recorded for the property under Chapter 2 (commencing with Section 210) of Part 4 of Division 2.[41]

In short, Section 5676 does not require the return of property that has already been sold. In that situation, the liability under Section 5676 is personal and should not affect the title of any subsequent purchaser.

Despite that conclusion, some title insurers may still be reluctant to insure title in that circumstance. Even if the result seems fairly clear, it might not be clear enough to avoid all risk of litigation on the point, with costs borne by the title insurer.

Subsequent Encumbrance

Now suppose that instead of selling property received by RTODD, the beneficiary decides to keep it and use it as security for a loan. The lender requires title insurance to protect its secured interest in the property. The title insurer checks the record, finds no evidence of any problem, and issues a policy. Later, a probate is opened and the personal representative enforces the liability under Section 5676. Because the beneficiary *still has the property*, it must be returned to the probate estate.[42] Presumably, the personal representative could then sell the property and use the proceeds to pay the decedent's debts.

In that scenario, the beneficiary who took out a loan loses ownership of the asset that was used as collateral for the loan. What result?

Section 5676(a)(1) provides, in relevant part and with added emphasis:

> (a) [If] proceedings for the administration of the transferor's estate are commenced, each beneficiary is liable for:
>
> (1) The restitution to the transferor's estate of the property the beneficiary received pursuant to the revocable transfer on death deed if the beneficiary still has the property, together with (A) the net income the beneficiary received from the property *and (B) if the beneficiary encumbered the property after the transferor's death, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.*

The italicized language clearly anticipates that return of the property to the estate will not extinguish any encumbrances that attached to the property after its transfer to the beneficiary. The law expressly requires the beneficiary to pay

41. See also Civ. Code § 1214.
42. Section 5676(a)(1).

the estate the amount required to satisfy those obligations. This strongly suggests that the personal representative will be required to pay off any secured obligations that attached to the property after the beneficiary received it.

It is easy to imagine a situation in which the beneficiary does not have sufficient funds available to pay the estate the amount required to satisfy the encumbrance. What result then?

Presumably, the personal representative would sell the property, pay off the debts secured against the property, and if sufficient funds remain, pay off the decedent's unsecured debts. If there is a shortfall, the estate would likely have a cause of action against the beneficiary for the amount owed under Section 5676(a)(1).

The analysis above rests on two important assumptions:

(1) Encumbrances created after the transfer of property by an RTODD would survive the return of the property to the probate estate under Section 5676.
(2) Those secured obligations would be senior in priority to the decedent's unsecured debts.

Neither of those points is directly addressed in the RTODD statute.

Under existing law, it would not be surprising if a title insurer were reluctant to insure title for a lender who is considering lending funds to a beneficiary with RTODD property as security. At a minimum, the title insurer may be required to defend the continuing validity of the security interest in litigation. At worst, a court might find that the security interest does not survive return of the property under Section 5676, or that payment of the decedent's unsecured debts has priority over any secured interest established by the RTODD beneficiary after the decedent's death.

Conclusion

There do seem to be situations in which a title insurer might face some risk under Section 5676. It would be a serious problem if that perceived risk were to impede the beneficiary's ability to obtain title insurance for three years after a transfer takes effect. Because the RTODD transfers property by operation of law, without the involvement of the courts or any supervising fiduciary, it is essential that the validity of a beneficiary's title can be established entirely from title records. Title insurers play a critical role in that validation process. Any

significant obstacle to obtaining title insurance would undermine the value of the RTODD as an estate planning device.

Outreach to California Land Title Association

The staff reached out to the California Land Title Association ("CLTA") to discuss whether title insurers are in fact reluctant to insure title to RTODD property during the three-year period for enforcement of Section 5676. The staff discussed the issue informally with Craig Page, Executive Vice President and Counsel for CLTA.

Mr. Page agreed that the sorts of risk described above might lead some insurers to decline to cover property transferred by RTODD. He did not have any concrete sense of how common that practice might be.

The staff requested that CLTA consider the matters discussed in this memorandum and provide the Commission with input. **In particular, the staff would welcome feedback on the merits of the possible reforms discussed below.**

Ideally, the Commission should try to develop a reform that addresses the obstacle to obtaining title insurance without significantly prejudicing any other interest. CLTA should be able to assist the Commission in striking that balance.

Possible Reforms

The staff sees two general ways in which the law might be reformed to address the problems discussed above:

(1) Revise the law to strengthen the protection of subsequent purchasers and encumbrancers when property is returned to a probate estate under Section 5676.
(2) Revise Section 5676 so that it only imposes personal liability on a beneficiary. In other words, revise it to eliminate the power to require a return of real property to the decedent's estate.

Those possibilities are discussed below.

Express Protection of Purchasers and Encumbrancers

As discussed above, the RTODD statute already provides some express protection of persons who deal with a beneficiary of an RTODD in good faith and for valuable consideration. They "have the same rights and protections" as if

they were a person who was "named as a distributee of the property in an order for distribution of the transferor's estate that had become final."[43]

That may not be sufficient to address the concerns discussed above. Those concerns involve an issue that a final distributee in probate should not encounter — a three-year period of liability for restitution of the property to the estate for the payment of creditor claims.

It might therefore be helpful to add language making clear how the enforcement of Section 5676 affects the interests of a purchaser or encumbrancer of property that was transferred by RTODD. Specifically, such language could provide that enforcement of Section 5676:

(1) Has no effect on title to property that the beneficiary no longer has at the time that Section 5676 is enforced.
(2) Has no effect on encumbrances on the property at the time of its return.
(3) Has no effect on the priority of such encumbrances over the decedent's unsecured debts.

As discussed above, there is reason to believe that such statements would provide clarification of existing law, rather than making substantive changes.

While clarification on those points would probably be helpful, it might not be sufficient. So long as Section 5676 can operate to terminate a beneficiary's ownership of property transferred by an RTODD, title insurers may feel uneasy about any transaction that involves the property. If *all* of the potential risks can be identified, such concern could perhaps be addressed through clarifying language. But that may not be possible. It would be difficult to rule out the possibility that there are risks that have not been foreseen.

The staff invites comment on whether language along the lines discussed above would be helpful and sufficient.

Eliminate Property Return Remedy

Another possibility would be to revise Section 5676 to eliminate the liability for restitution of property to the probate estate. Instead, the liability under that section would be personal.

That would be similar to the approach that the staff originally proposed, when the Commission was first studying the merits of California authorizing use of an RTODD:

43. Section 5682.

> The staff thinks we should avoid making the property subject to creditor claims. Our whole effort here has been to protect the security of the transaction and facilitate title insurance. Instead, we would make the beneficiary liable for the transferor's unsatisfied debts, not exceeding the value of the property received.[44]

In a later memorandum, the staff discussed some complexities involved in calculating the value of the property received. The memorandum also pointed out that the existing Probate Code provisions on the disposition of a small estate without administration include detailed rules for such valuation. The staff raised the possibility of simply incorporating the small estate provisions into the RTODD statute.[45]

At that time, TEXCOM endorsed the latter approach:

> TOD deeds should be subject to creditor claims under the alternate approach recommended by the CLRC Staff, that is, to incorporate existing California liability concepts for a successor that takes a decedent's property without probate under small estate or spousal affidavit procedures. The beneficiary may return the property to the estate to be free of personal liability. A TOD deed is subject to abatement in the same class as a specific gift.[46]

The Commission decided to follow that course in preparing a tentative recommendation[47] and, eventually, the final recommendation.

TEXCOM now has doubts about whether application of the small estate creditor claims procedure is appropriate when dealing with real property of unlimited value:

> Misapplication of provisions from Sections 13200-13210 (Affidavit Procedure for Real Property of Small Value). With respect to the rights of creditors in RTODD property following the death of the transferor, the law follows the existing California model applicable to a successor who takes property of a decedent without probate under the affidavit procedure for real property of small value contained in sections 13200-13210. That model has some major deficiencies when applied to RTODD property.[48]

TEXCOM goes on to list a number of technical concerns that it has about how those provisions would apply to RTODD property.

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44. Memorandum 2006-16, p. 60.
45. First Supplement to Memorandum 2006-16, pp. 15-16.
46. First Supplement to Memorandum 2006-19, Exhibit p. 2.
47. Minutes (June 2006), p. 45.
48. Memorandum 2017-35, Exhibit p. 5.

The staff believes that the originally proposed approach might have been the better choice, for the reasons articulated by staff at that time. Any remedy that makes the *property* liable, rather than the *beneficiary*, could cast a cloud on beneficiary title that would make it harder to obtain title insurance, thereby undermining the efficacy of the RTODD.

For that reason, the Commission should consider the possibility of eliminating the property restitution remedy and making the beneficiary's liability for decedent debts personal only. If the Commission decides to pursue that approach, the staff will examine how the reform might be implemented. There may be complications or further opportunities for improvement that would need to be analyzed and presented for the Commission's consideration.

CONCLUSION

Once the Commission has made decisions on the points discussed in this memorandum, the staff will provide any further analysis that is required, along with implementing language as appropriate, in a future memorandum.

Respectfully submitted,

Brian Hebert
Executive Director

EMAIL FROM ROBERTA ROBERTS
(JUNE 6, 2018)

ATTN: Assemblyman Chau
RE: AB1739

Since you are proposing a revision to AB139 in the form of AB1739, I am writing to inform you of a roadblock that has been invented by Board of Equalization (BOE) staff. The roadblock, its consequences and my objections are described in my letter — attached as PDF.

In short, this year BOE staff told county assessors that Probate Code 5608 & AB139 prevent naming legal entities as beneficiaries in Transfer on Death Deeds (TODDs). This is a false claim. AB139 defines Beneficiary as PERSON and does NOT define PERSON. Under CA statutes, a PERSON may be either a human being or legal entity. BOE's "bible" — the Revenue and Taxation Code — recognizes both human beings and legal entities as legitimate property owners. Both are subject to taxation. TODDs which identify a legal entity as beneficiary will generate more tax dollars for counties expressly because there is no exclusion from reassessment as there may be for other similar transfers upon death—namely Joint Tenant With Right of Survivorship (JTWROS), Tenants in Common or Community Property.

I have fixed the problem for myself. My County Assessor's office notified me they will accept and act upon my TODD as recorded. However, the roadblock must be removed state-wide for all prospective benefactors. The stance taken by the women ("Glenna" & Pamela Lumsden) at BOE could and should be corrected administratively by intervention of a higher echelon official. Until that happens, you may wish to address the issue in your legislation. Since death can occur at any moment, time is of the essence!

May 4, 2014 **Sent 5/7/2018 by email: Receipt acknowledged by phone call from Jeff Olson, Chief, Assessment Services Division @ 3pm. today, 5/7/18. He said another letter also received. Will discuss matter & advise.**

Ernest J. Dronenburg, Jr.
Assessor/Recorder/County Clerk
County of San Diego
1600 Pacific Coast Highway
San Diego, CA 92101-2480

Attn: Robert Gomez, Assessment Services Division

RE: Your correspondence dated April 23, 2018: REF: 158-160-00

This week I decided to inquire why I should be concerned about your office's 'inability to update (its) records.' Robert Gomez told me the 4/23/18 letter meant your staff would NOT transfer ownership of my single-family residence as I direct in the TOD Deed I recorded more than two years ago. Mr. Gomez said Glenna Schultz, a State Board of Equalization employee announced in a January 2018 'webinar' for California County Assessors that only a human being could be a "beneficiary." The BOE/Glenna declaration thwarts the intent of AB 139. It sets up an inequity among eventual benefactors. I recommend you reject Glenna's declaration, and ask you honor and abide by my TOD Deed's direction. Here's why:

It is a misrepresentation of Probate Code 5608 to state, "Beneficiaries cannot be a Trust or any other Legal Entity". AB139 & Probate Code 5608 state, ""Beneficiary" means a person named in a revocable transfer on death deed as transferee of the property." California's Constitution does not define PERSON. **(http://www.lao.ca.gov/BallotAnalysis/Initiative/2015-072).** AB139's author (an attorney) chose not to define PERSON. AB 139 includes definitions of other words—but not PERSON. AB139 was approved by the majority of members of California's legislature (many of whom possess JD's) and by the former CA Attorney General and current Governor, Jerry Brown. None considered it necessary to define PERSON. A principle in law is — If it's not prohibited, it's permitted.

No clause in California's probate code limits beneficiaries to human beings nor does any code or clause prohibit corporations or non-profit organizations from being named beneficiaries. Students, teachers and practitioners of law recognize two types of persons—**(https://legal-dictionary.thefreedictionary.com/person or check Black's Law Dictionary.):**

"person: n. 1) a human being. 2) a corporation treated as having the rights and obligations of a person. Counties and cities can be treated as a person in the same manner as a corporation. However, corporations, counties and cities cannot have the emotions of humans such as malice, and therefore are not liable for punitive damage."

AB 139 states: "(1) Existing law provides that a person may pass real property to a beneficiary at death by various methods including by will, intestate succession, trust, and titling the property in joint tenancy, among others." No county assessor or BOE employee has restricted asset transfers to only human beings by any method identified in (1) above. Glenna's restrictions are therefore inequitable. They discriminate against real property owners who want to leave property to a charity and want to avoid the expense, time, thoroughness & burden of paying legal professionals to create voluminous pages of circumlocutory legal gibberish. AB139 offers a one-page (or 2, counting the questionnaire) simple cheap clear DIY method to direct the post-mortem transfer of certain real estate.

Real property is just an asset. So is cash in a bank account. "Charitable groups and nonprofit organizations can serve as bank account beneficiaries." **(https://findlaw.com/probate/bank-account-beneficiary-rules.html).** The intent of AB 139 was to make designating the post-mortem recipient of certain real estate as cheap and uncomplicated a method as naming a beneficiary on a bank account.

Mr. Gomez indicated he had not read AB139. He said Glenna's instructions were only "advisory." I called the BOE phone number listed for Glenna Schultz. A woman answered the phone saying, "This is Glenna." I asked if her last name was Schultz. She repeated — 3 times — "This is Glenna." Therefore, I can only affirm I spoke to someone who said, "This is Glenna."

I asked “Glenna” to tell me about the decision to prohibit a legal entity from inheriting real property via a TOD Deed. She told me an “informal staff committee” within BOE—which included her—had reached that decision, and confirmed she recommended that position to California County Assessors’ staff via a “webinar”.

I asked Glenna if she had a JD: She said, “No.”… if other members of the “informal staff committee” had JD’s? “NO”…if a BOE attorney reviewed the decision? “NO.” Glenna’s resistance to sharing information made it painful to gain any headway in learning about the number of committee members, their points of discussion or reasoning.

In one of its analyses, the (California) Legislative Analyst’s Office, wrote the “California Constitution does not define who is considered to be a person”. **http://www.lao.ca.gov/Ballot(Analysis/Initiative/2015-072.)** Please note the subordinate clause in the second sentence of the paragraph entitled **Proposal.** It states “the term ‘PERSON,’ as it is applied to all living human beings …” This clause implies PERSON can be something other than “all living human beings”—as indeed it must be since California’s “Constitution does not define who is considered to be a person.” Some sections of California’s codes define person, while others do not: AB139 does not.

Let’s consider Glenna’s position by applying common sense. BOE was established to effect equality in California tax matters. It seems an over-reach for an “informal staff committee” to dictate a unique interpretation of the word PERSON. The word PERSON does not impact taxes. Changes in ownership may or may not trigger transfer taxes and reassessments. More revenue may be generated if counties acknowledge the right of an owner to use a TOD to bequeath qualified property to a “legal entity” rather than, for example, to a spouse or child. Because I have no spouse, child, or other known living relative, why should I be forced to either 1) convert my mortgage-free residence to a cash bank account with a beneficiary that can be either a human being or a legal entity; or 2) pay $2,000 + to an attorney to prepare cumbersome Trust documents & new papers to record? Why should a wife or mother be able to use a 1-page form to leave property to a chosen heir and not I ? Counties may generate more tax revenue by acknowledging legal entities as beneficiaries on TOD Deeds.

San Diego has been the beneficiary of great largess from several super-rich local women (and men). Generosity is not determined by the size of the treasure chest one leaves behind. Even those of us whose major asset is just a home may have a generous heart. I can afford to be generous when I'm dead, but less so while I am still alive. Instead of cow-towing to Glenna's edict, San Diego County, with its heritage of benefactors, should champion the right of property owners to use TOD's to leave their real property to either a human being or a legal entity as they wish.

Were I to create a Trust, I could name the same beneficiary as I have named in my TOD Deed … but doing so would cost me +/- $2,000. The cost to record my TOD Deed was under $20. Honoring my TOD directions will protect a major asset until I make other arrangements.

I have yet to talk with another human being (including attorneys) who has read AB139. In 2015/2016 a CA attorneys' trade magazine trashed AB139 claiming, in true henny-penney fashion, senior citizens would fall prey to fraudsters, etc. Who thinks only senior citizens own property, can die in a flash or be duped? The article argued plans for post-mortem ownership transfers should be handled by lawyers. Attorneys have a vested interest in warning against TOD's. Check this Wikipedia entry: **Shyster** /ˈʃaɪstər/ is a slang word for someone who acts in a disreputable, unethical, or unscrupulous way, especially in the practice of law, sometimes also politics or business. It is attorney websites that warn against using TOD's. No such warnings are made against other methods (e.g., JTWROS or community property entitlements) although spouses & blood relatives can be shysters too.

AB139 provides that a commission shall study the effects of TODs. Preventing use of TOD's by owners who want a non-profit or other legal entity to inherit their property will skew the results of the "study." Better data could be collected if BOE & County Assessors acknowledged, put the word out, even sanctified "legal entities" as bona fide TOD beneficiaries. The new law should run as written without additional restrictions imposed by narrow-minded bureaucrats with little or no legal education or experience. Let's see if anyone can prove the new law is dangerous.

I respectfully ask you acknowledge and honor my TOD Deed direction. Please advise me of your decision.

Sincerely,

Roberta Roberts

P.O. Box 4697
Oceanside, CA. 92052-4697

Telephone: (760) 681-9455
email: bobbi5151@gmail.com

PETRUSHA LAW
Estate Planning & Administration

July 20, 2018

Via email to:bhebert@clrc.ca.gov
and U.S. Mail

Mr. Brian Hebert, Executive Director
California Law Review Commission
c/o UC Davis School of Law
400 Mark Hall Drive
Davis, CA 95616

Re: Study L-2032 (Revocable Transfer on Death Deed: Follow-Up Study)
Trusts as beneficiaries

Dear Mr. Hebert:

Thank you for the opportunity to address the California Law Review Commission regarding California's revocable transfer on death deed ("RTODD") law enacted in Assembly Bill 139 of 2015 (Stats. 2015, Ch. 293). I am a California-licensed attorney practicing exclusively in the area of trusts and estate law, including planning and administration regarding non-probate transfers such as those made by RTODDs. My specific concern deals with whether trusts or other legal entities may be named as a beneficiary of an RTODD under the current law.

Last year, prior to preparing an RTODD for my client who wished to name a trust as beneficiary, I reviewed California Probate Code 5600-5696, including Section 5608 which defines beneficiary as a "person" named as the transferee in an RTODD. I also reviewed the attached educational material published by the Continuing Education of the Bar (CEB) in California Probate Workflow Manual Revised (rev ed Cal CEB) Section 4.12C. Therein, CEB states that the beneficiary of an RTODD may be any "person" as defined in Probate Code Section 56, which includes "an individual, corporation, government or governmental subdivision or agency, business trust, estate, trust, partnership, limited liability company, association, or other entity." In an effort to avoid any potential future title issues, I also contacted my local title insurance company to discuss the naming of the trust on the RTODD. Its senior title officer acknowledged that from the title company's perspective, trusts and other legal entities are eligible beneficiaries of an RTODD because they qualify under the definition of "person."

Thereafter, my client's RTODD was properly executed and recorded. Several weeks later the county assessor's office contacted me to advise that the RTODD is invalid because a trust cannot be named as beneficiary, per the State Board of Equalization's interpretation of the current law. The assessor notified my client that although the document was recorded, it will have no effect upon her death because it is invalid. Thereafter I did some additional research, including a review of comments by the Senate Judiciary Committee asking for further study of this issue, and a letter from the Executive Committee of the Trusts and Estates Section of the State Bar of California ("TEXCOM") to the Commission dated June 1, 2017, addressing several RTODD issues including this one.

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TEXCOM's letter points out that under the current law, trusts "... are already authorized to be named as beneficiaries of RTODDs." Although its recommendation is to *change* the law to provide that only individuals may be named beneficiaries, the fact remains that the law already allows any "person" under Probate Code Sec. 56 to be named on an RTODD.

Considering the fact that both CEB and TEXCOM have interpreted the current law to allow this practice, I am certain other California attorneys have recorded RTODDs naming trusts, charitable organizations, or other legal entities as beneficiaries. Surely many laypersons using the statutory forms continue to do so as well. Some transferors may have already died or become incompetent to sign additional legal documents. Narrowing the scope of this law now, more than 2 ½ years after its effective date, should be done with the following in mind:

There is great concern that if these already-recorded RTODDs are later declared invalid, there will be unintended results upon the death of the transferor, when it will be too late to take any alternative action. These results will likely lead to costly litigation for estates which have little resources (other than the subject property) and cannot afford the legal costs. Therefore the testamentary intent of the transferors will be undermined, and this law will have failed them.

Some have questioned the necessity of naming a trust as beneficiary of an RTODD rather than transferring the subject property to a revocable living trust, which would also avoid probate. While this may be the solution in most cases, sometimes this is not a viable option. For example, consider the homeowner who does not wish to incur the expense of creating a trust for herself, but wishes to name a supplemental needs trust (or "Special Needs Trust") as beneficiary of her home. A Special Needs Trust is typically created for the benefit of a person with a disability who would encounter negative consequences if he or she received property or money outright. The homeowner has a modest estate that would not otherwise require a formal probate. In keeping with the intent of AB 139, shouldn't this homeowner be allowed a straightforward, inexpensive, non-probate option for transferring this asset upon death?

Thank you for your consideration of my comments. If you have any questions, or if I may provide further information, please do not hesitate to contact me by telephone at (707) 798-6030 or by email to angela@petrushalaw.com.

Respectfully submitted,

Angela Petrusha
Attorney at Law
State Bar of CA License No. 297287

AMP:ah
Enclosure

§4.12C 1. Execution of a Transfer on Death Deed

An effective revocable TOD deed must meet the following requirements:

- The transferor must have capacity to contract (Prob C §5620);
- The beneficiary must be identified by name in the revocable TOD deed (Prob C §5622);
- The revocable TOD deed must be signed and dated and acknowledged by the transferor before a notary public (Prob C §5624); and
- The revocable TOD deed must be recorded on or before 60 days after the date it was executed (Prob C §5626(a)).

A revocable TOD deed need not be delivered to, or accepted by, the beneficiary during the transferor's lifetime to be effective. Prob C §5626(b), (c). A TOD deed beneficiary may be any "person" as defined in Prob C §56, which includes individuals, governmental entities, trusts, estates, corporations, partnerships, limited liability corporations, and other entities. Beneficiaries must be named individually and the transferor should include the beneficiary's relationship to him or her (*i.e.,* my wife, my son, my friend). General terms to describe beneficiaries, such as "my children" or other class of persons, are not permitted. Prob C §5642(b).

NOTE► Because contingent beneficiaries may not be named on a revocable TOD deed, it has the disadvantage that a named beneficiary may die at a time when the transferor no longer has contractual capacity to name a new beneficiary. See Prob C §1872(a). All beneficiaries of a revocable TOD deed take the property in equal shares on the death of the transferor. Prob C §565(a)(3). Therefore, a revocable TOD deed should not be used if a transferor wants to transfer real property disproportionately to the beneficiaries.