Study L-3032.1 December 5, 2018

First Supplement to Memorandum 2018-59

Revocable Transfer on Death Deed: Follow-Up Study (Public Comment)

The Commission[1] has received an email from estate planning attorney Nina Whitehurst, commenting on whether the law should permit an RTODD to be used to transfer real property to a trust. Her email is attached as an Exhibit. The staff greatly appreciates her input.

The staff would also like to correct an error in the Exhibit to Memorandum 2018-59. The date shown for the email from Kelly Richardson is incorrect. It was received on November 26, 2018.

Respectfully submitted,

Brian Hebert
Executive Director

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.

EMAIL FROM NINA WHITEHURST
(DECEMBER 4, 2018)

Re Memorandum 2018-59
Revocable Transfer on Death Deed: Follow-Up Study

Dear Commissioners:

You have requested comments on whether the law governing Revocable Transfer on Death Deeds (RTODD) should allow the designation of a trust as the death beneficiary, and you also questioned whether there would be any purpose in allowing designation of revocable living trusts. My answers are yes and yes, respectively.

The classic goals of a revocable living trust include, among others, (1) provide for distribution of assets upon death, (2) avoid probate, and (3) provide for administration of assets during lifetime while the grantor is incapacitated. The use of a RTODD that names a revocable living trust as the death beneficiary would accomplish goals (1) and (2) but not goal (3), so why would I advocate that it be allowed even though it is less than ideal?

Too many times I have seen individuals place their home into their revocable living trust only to be forced by a refinance lender to deed it back out again. (Many lenders think they cannot lend to a "trust". They are mistaken in that regard, but that is not the issue before us. The fact is it happens, a lot.) Then the borrower forgets to deed the property back into his or her or their trust after the refinance transaction is concluded. The results are time-consuming and expensive probate, frustration of the intended plan of distribution, and money wasted on estate planning that was not put to use because the main asset wasn't in the trust at death.

Although keeping the home in the trust at all times is the ideal, and second best is remembering to deed it back after every refinance, I would like to be able to recommend to clients that if they think there are one or more home loan refinancings in their future, they might want to just name their revocable living trust as the death beneficiary pursuant to a RTODD. For disability planning they could use a durable power of attorney (DPOA). Just for your information, the DPOA method is less than ideal because third parties (incorrectly) tend to only honor them only for a year or so after execution and then start to consider them stale, and they are not well suited to planning for succession of the agent/attorney-in-fact.

Regarding the question about whether a distinction should be made among types of trusts as death beneficiaries, I can think of no reason whatsoever to distinguish among them. All trusts should be eligible – grantor, non-grantor, revocable, irrevocable, special needs, charitable, you name it. If the trust could be an eligible beneficiary of a will, the trust should be an eligible beneficiary of a RTODD, the purpose of which is to avoid having to use a will as the transfer device because, as we all know, "Where there's a will, there's probate."

Yes, there are some types of trusts that would be poor choices for a death beneficiary of a home. It would be highly unusual to transfer a home at death to a standalone retirement trust or an irrevocable life insurance trust, as a couple of examples, because such special purpose trusts are not designed to hold real estate, but if that were to happen, it would "work", just in a less than ideal way. Besides, it is a very unusual individual that would pay an attorney to prepare such a specialized trust and then run off on his or her own and designate the trust as a death beneficiary in a RTODD without the advice of the estate planning attorney that created the trust.

It would be very difficult, in any event, to line out via legislation which trusts would be poor choices and which trusts would be good choices. If you did decide to go down that road, will you do the same for wills, making some trusts ineligible will beneficiaries as to homes? At some point, there has to be a limit to how far the state should go in protecting people from their poor choices. Don't be so protective of the least common denominator that you eliminate huge benefits for the vast majority of candidates for this type of planning.

As an aside, I have heard (though not personally experienced) that some (again, poorly informed) lenders are considering RTODDs to be clouds on the title and are demanding that they be revoked before the lender will lend against the security of the home. This is nonsense, of course, for reasons that I need not explain to this audience, but if there is anything you can do in the legislation to alleviate this problem, that would be greatly appreciated. The existence of a RTODD should not be any more of a cloud on title than a will would be, the only difference being that the former is on the record and the latter is not.

Thank you for your time and consideration.

Nina

Nina Whitehurst, Esq.
Owner/Attorney
Shasta Legacy Law Center
Business, Real Property and Estate Planning
"Planning for Peace of Mind and Wealth Preservation"
P.O. Box 100
Montague, CA 96064
707-670-1000
nina@shastalegacylaw.com
Licensed in AK, AZ, CA, CO and OR
