Study L-3032.1 February 27, 2019

First Supplement to Memorandum 2019-16

Revocable Transfer on Death Deed: Follow-Up Study — Execution and Revocation

This supplement addresses issues raised by the Executive Committee of the Trusts and Estates Section of the California Lawyers Association ("TEXCOM") in a letter that is attached to Memorandum 2019-16.[1] The issues discussed here involve the statutory rules for execution or revocation of a revocable transfer on death deed ("RTODD").

The memorandum also discusses a related issue that was raised by the County Recorders' Association of California, in connection with last year's AB 1739 (Chau).

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

EXECUTION FORMALITIES

Existing Section 5624 provides:

> A revocable transfer on death deed is not effective unless the transferor signs and dates the deed and acknowledges the deed before a notary public.

TEXCOM has two concerns about that provision, which are discussed below.

Method of Dating

TEXCOM is concerned that Section 5624 could be read to require that the date of execution be hand-written by the transferor, rather than typed.[2] Presumably, the concern is that a strict reading of the provision might preclude the deed being dated by a person other than the transferor. If the date is typed, rather than

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. See Memorandum 2019-16, Exhibit p. 4.

hand-written, it would be harder to determine whether the transferor was the one who dated the deed.

The staff reviewed the Commission's materials and found nothing suggesting that the language of Section 5624 (which is not materially different from the language recommended by the Commission[3]) was intended to require a hand-written date.

As a matter of policy, the staff sees no need for such a requirement. It is a person's signature that serves to identify the person and to signal that person's intention to execute the deed. That would seem to be equally true if the date were typed (or pre-filled by another, regardless of whether typed or hand-written). In other words, requiring that the date be hand-written by the transferor would probably not meaningfully increase the certainty of the transferor's identity and intentions.

Moreover, if the law were to forbid typed dates, that rule would create another trap for those who execute an RTODD without assistance of counsel. No matter how clearly the form might instruct a transferor that the date must be hand-written by the transferor, it seems inevitable that some people will overlook or misunderstand the instructions and violate the rule. This technical error could make it difficult to effect the transfer outside of the courts. It could even invalidate the transfer altogether.

The staff recommends that the law be revised to eliminate any implication that there are any special formal requirements for dating an RTODD. That could be achieved with a revision along the following lines:

> 5624. A revocable transfer on death deed is not effective unless the deed is (a) signed by the transferor ~~signs and dates the deed and acknowledges the deed~~, (b) dated, and (c) acknowledged before a notary public.
>
> **Comment**. Section 5624 is amended to make clear that there are no formal requirements regarding the method by which a deed is dated. The date of execution may be typed or hand-written, by any person.

Should a revision along those lines be included in a tentative recommendation?

3. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 146 (2006).

Signed in Presence of Notary

TEXCOM is also concerned that Section 5624 could be read to require that an RTODD be *signed* in the presence of a notary (as opposed to signing the RTODD before presenting it to a notary for acknowledgment).[4]

TEXCOM correctly points out that the general law on acknowledgment does not require that an instrument be signed in the presence of a notary in order to be acknowledged.[5] The person who executed the instrument need only (1) show sufficient proof of identity and (2) acknowledge having executed the instrument.[6]

Presumably, TEXCOM's concern is grounded in a possible ambiguity about whether "before a notary public" applies to the entire section (including the signature requirement), or only the acknowledgment requirement. The staff does not see much scope for ambiguity on that point. However, there should be no harm in tweaking the language to provide greater clarity. In fact, the staff drafted the proposed revision set out on the preceding page with an eye toward also addressing the concern discussed here. To reiterate:

> 5624. A revocable transfer on death deed is not effective unless the deed is (a) signed by the transferor ~~signs and dates the deed and acknowledges the deed~~, (b) dated, and (c) acknowledged before a notary public.

The proposed separation and enumeration of the formal requirements should make clear that "before a notary public" only governs the acknowledgment requirement. The point could be emphasized further by revising the proposed Comment as follows:

> **Comment**. Section 5624 is amended to ~~make clear that there~~ make two points clearer:
>
> (1) There are no formal requirements regarding the manner in which a deed is dated. The date of execution may be typed or hand-written, by any person.
>
> (2) Only the acknowledgment must occur before a notary public. The deed may be signed and dated prior to presenting it to a notary public for acknowledgment.

Is that an acceptable way to address the point raised by TEXCOM?

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4. See Memorandum 2019-16, Exhibit p. 4.
5. *Id.*
6. Civ. Code § 1189. See also 12 B. Witkin, Summary of Cal. Law Real Prop. § 295, at 349-50 (11th ed. 2018) ("An acknowledgment is the act of a person who has executed an instrument declaring before a competent officer or court that it is the person's act or deed.").

EXECUTION BY ATTORNEY-IN-FACT

TEXCOM suggests that existing law should be revised to allow an attorney-in-fact to make or revoke an RTODD, provided that the power to do so was expressly granted in the power of attorney instrument ("POA"):

> Attorneys-in-fact. The RTODD law is silent regarding whether an attorney-in-fact may execute or revoke a TOD deed. This should be clarified. The Commission's 2006 Recommendation observed that California law (section 4264) allows an attorney-in-fact named in a power of attorney to create, modify, or revoke the principal's trust, make or revoke a gift of the principal's property, create or change survivorship interests in the principal's property, and designate or change a beneficiary to receive property on the principal's death, provided that the principal expressly authorizes the act in the power of attorney. The Commission further observed that this rule would appear to cover revocation of a revocable TOD deed as well, but recommended that the power of attorney law should be revised to make the coverage explicit. TEXCOM agrees that the power of attorney law should be revised to allow for attorneys-in-fact to make or revoke RTODDs, provided that the principal expressly authorizes the act in the power of attorney.[7]

Existing law in this area is not entirely clear or consistent. It is discussed below.

Express Authority Required to Make or Revoke Gift

Section 4264(c) provides that an attorney-in-fact may "[m]ake or revoke a gift of the principal's property in trust or otherwise," *but only if such action was expressly authorized in the POA.* That broad "or otherwise" catch-all could perhaps encompass a gift made by RTODD.

Express Authority Required to Change Beneficiaries

Section 4264(f) also requires express authorization in the POA in order for an attorney-in-fact to "[d]esignate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death." On its face, that language seems to be referring to a beneficiary designation in a pay-on-death instrument, like life insurance or a pay-on-death bank account. This subdivision could also be construed to permit an attorney-in-fact to create an RTODD on behalf of the principal (because the RTODD would designate a

7. See Memorandum 2019-16, Exhibit p. 5.

beneficiary to receive property on the principal's death). Express authorization of such a power would need to be included in the POA.

However, subdivision (f) has been construed by an appellate court to have a different, and somewhat surprising, application.

In *Schubert v. Reynolds*,[8] a man near death executed a POA naming one of his four children as attorney-in-fact. Acting under that authority, the child executed a living trust granting a life estate in the principal's home to herself, with the remaining property to be divided between the principal's grandchildren. The principal's other three children received nothing. The principal died days after the trust was executed.

The disinherited siblings contested the trust on the grounds that the POA had not authorized a *change in the beneficiaries* of the principal's property on his death; therefore, the trust was ultra vires and invalid under Section 4264(f). The court agreed.

There was some uncertainty in the trial court records about whether the principal had a will. To address that uncertainty, the court offered two alternative reasons for its holding, one applicable if a will existed, the other applicable if there was no will.

If a will had existed and divided the decedent's property equally between his children, then the attorney-in-fact needed an express grant of authority to "change beneficiaries" in order to create a trust with a different disposition of the decedent's property than the disposition under the will. The POA did not contain such authority, so the trust was unauthorized and invalid.

Alternatively, if the will had not existed, the attorney-in-fact would still have needed an express grant of authority to "change beneficiaries." Why? Because absent a will, the disposition of the decedent's property on death would have been governed by the rules of intestate succession. Under those rules, the property would have been divided equally among the decedent's four children. Because the trust would have distributed the decedent's property differently, it "changed the beneficiaries" under intestate succession.

In other words, even if a POA expressly authorizes an attorney-in-fact to create a trust or other nonprobate transfer instrument, that authority may not be sufficient. If the instrument would change the existing distribution of the

8. 95 Cal. App. 4th 100 (2002).

property (even under the laws of intestacy) a separate grant of authority to change beneficiaries is also required.

The upshot is that any grant of authority to create an RTODD might need to be paired with a grant of authority to "change beneficiaries."

Prohibition on Wills

Section 4265 expressly prohibits an attorney-in-fact making, amending, or revoking a *will* on behalf of the principal. The staff does not know why the law permits an attorney-in-fact to create a trust (if granted the necessary authority in the POA) but does not allow the creation of a will (even if purportedly authorized in the POA).

The only clear implication is that existing state policy is somewhat grudging about allowing an attorney-in-fact to create an estate plan for a principal. Wills are not allowed at all; any other type of at-death transfer must be expressly authorized and any change of beneficiaries must be separately authorized.

Commission Recommendation

The Commission's original RTODD recommendation proposed that the law be revised to provide that an attorney-in-fact may execute an RTODD on behalf of the principal, if that authority is expressly granted in the POA. The Commission explained:

> The law allows an agent to create, modify, or revoke the principal's trust, make or revoke a gift of the principal's property, create or change survivorship interests in the principal's property, and designate or change a beneficiary to receive property on the principal's death, provided that the principal expressly authorizes the act in the power of attorney. That would appear to cover revocation of a revocable TOD deed as well, but the power of attorney law should be revised to make the coverage explicit.[9]

Legislative History

As introduced, the original bill to effectuate the Commission's recommendation[10] included the following amendment to Section 4264:

> 4264. A power of attorney may not be construed to grant authority to an attorney in fact to perform any of the following acts unless expressly authorized in the power of attorney:
> (a) Create, modify, or revoke a trust.

9. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 167 (2006).
10. AB 250 (DeVore) (2007).

> (b) Fund with the principal's property a trust not created by the principal or a person authorized to create a trust on behalf of the principal.
>
> (c) Make or revoke a gift of the principal's property in trust, by revocable transfer on death deed, or otherwise.
>
> (d) Exercise the right to make a disclaimer on behalf of the principal. This subdivision does not limit the attorney in fact's authority to disclaim a detrimental transfer to the principal with the approval of the court.
>
> (e) Create or change survivorship interests in the principal's property or in property in which the principal may have an interest.
>
> (f) Designate or change the designation of beneficiaries to receive any property, benefit, or contract right on the principal's death.
>
> (g) Make a loan to the attorney in fact.

The bill was amended, before its first policy hearing, to remove that provision. At least at that time, the Legislature seems to have been unwilling to authorize an attorney-in-fact to make an RTODD on behalf of a principal. Because the issue was resolved before the bill was heard in committee, there is no committee analysis discussing the issue. It is not clear why the Legislature took the position that it did; the Commission's memoranda from that time do not discuss the amendment.

Conservatorship

The issue discussed above becomes more complicated when one considers the authority of conservators to make or revoke estate planning instruments on behalf of a conservatee.

In general, a conservator can create a trust or will to make an at-death gift of the conservatee's property under the procedures and standards for "substituted judgment," *which require court review and authorization of the proposed action.*[11]

That policy make sense. It recognizes that a conservator may need to do some estate planning on behalf of a conservatee, in order to protect the conservatee's interests and effectuate the conservatee's donative intentions. But it also requires court review and approval, in order to prevent misuse of the power.

Although the Commission made no recommendation on the point, the 2015 legislation that enacted the RTODD statute[12] included a provision to allow a

11. Sections 2580-2586.
12. AB 139 (Gatto) (2015).

conservator to create or revoke an RTODD under the substituted judgment process. Thus:

> 2580. (a) The conservator or other interested person may file a petition under this article for an order of the court authorizing or requiring the conservator to take a proposed action for any one or more of the following purposes:
>
> (1) Benefiting the conservatee or the estate.
>
> (2) Minimizing current or prospective taxes or expenses of administration of the conservatorship estate or of the estate upon the death of the conservatee.
>
> (3) Providing gifts for any purposes, and to any charities, relatives (including the other spouse or domestic partner), friends, or other objects of bounty, as would be likely beneficiaries of gifts from the conservatee.
>
> (b) The action proposed in the petition may include, but is not limited to, the following:
>
> (1) Making gifts of principal or income, or both, of the estate, outright or in trust.
>
> (2) Conveying or releasing the conservatee's contingent and expectant interests in property, including marital property rights and any right of survivorship incident to joint tenancy or tenancy by the entirety.
>
> (3) Exercising or releasing the conservatee's powers as donee of a power of appointment.
>
> (4) Entering into contracts.
>
> (5) Creating for the benefit of the conservatee or others, revocable or irrevocable trusts of the property of the estate, which trusts may extend beyond the conservatee's disability or life. A special needs trust for money paid pursuant to a compromise or judgment for a conservatee may be established only under Chapter 4 (commencing with Section 3600) of Part 8, and not under this article.
>
> (6) Transferring to a trust created by the conservator or conservatee any property unintentionally omitted from the trust.
>
> (7) Exercising options of the conservatee to purchase or exchange securities or other property.
>
> (8) Exercising the rights of the conservatee to elect benefit or payment options, to terminate, to change beneficiaries or ownership, to assign rights, to borrow, or to receive cash value in return for a surrender of rights under any of the following:
>
> (A) Life insurance policies, plans, or benefits.
>
> (B) Annuity policies, plans, or benefits.
>
> (C) Mutual fund and other dividend investment plans.
>
> (D) Retirement, profit sharing, and employee welfare plans and benefits.
>
> (9) Exercising the right of the conservatee to elect to take under or against a will.

> (10) Exercising the right of the conservatee to disclaim any interest that may be disclaimed under Part 8 (commencing with Section 260) of Division 2.
>
> (11) Exercising the right of the conservatee (A) to revoke or modify a revocable trust or (B) to surrender the right to revoke or modify a revocable trust, but the court shall not authorize or require the conservator to exercise the right to revoke or modify a revocable trust if the instrument governing the trust (A) evidences an intent to reserve the right of revocation or modification exclusively to the conservatee, (B) provides expressly that a conservator may not revoke or modify the trust, or (C) otherwise evidences an intent that would be inconsistent with authorizing or requiring the conservator to exercise the right to revoke or modify the trust.
>
> (12) Making an election referred to in Section 13502 or an election and agreement referred to in Section 13503.
>
> (13) Making a will.
>
> (14) Making or revoking a revocable transfer on death deed.

In other words, a conservator may, with express court approval, create or revoke an RTODD to dispose of conservatee property on the conservatee's death.

Discussion

To recap all of the points above:

- An attorney-in-fact may execute a trust or other gift of the principal's property if the power to do so is expressly granted by the POA.
- Such a gift may not "change the beneficiaries" of property to be transferred on the principal's death, unless the POA expressly authorizes such a change.
- An attorney-in-fact may not execute a will on behalf of a principal.
- In 2007, a Commission-recommended reform to permit an attorney-in-fact to make or revoke an RTODD on behalf of the principal was removed from the implementing bill.
- A conservator may make a gift of the conservatee's property, including a gift by trust or will, with the authorization of the court.
- In 2015, a provision was included in the bill that authorized the RTODD, to allow a conservator to make or revoke an RTODD, with the express authorization of the court. That is existing law.

What should we make of all this?

The law governing an attorney-in-fact's authority to create estate planning documents on behalf of a principal is strict. The power must be expressly granted in the POA itself. Moreover, the attorney-in-fact requires a separate grant of

authority in order to create an instrument that "changes the beneficiaries" of an existing instrument or, if there is no instrument under the rules of intestate succession. Finally, the attorney-in-fact may not create a will.

Taken together, those rules are very protective of the principal. They require that the POA include express grants of authority before an attorney-in-fact can make any changes to the distribution of the principal's property on death. In other words, it must be very clear that the principal contemplated and intended that the attorney-in-fact would be able to take such actions.

Given the strictness of those protections, why not allow an attorney-in-fact to create an RTODD, subject to the same authorization requirements? The staff sees three possible reasons:

(1) *Risk of Abuse.* At a recent meeting, an attorney who specializes in elder financial abuse informed the Commission that, in her experience, the POA is the most common vehicle for such abuse. That makes sense. The execution and operation of a POA is generally not subject to judicial oversight. Simple POA forms are available online. This makes it relatively easy to obtain and misuse a POA, without setting off alarm bells. Any increase in the scope of authority that can be established in a POA runs the risk of a commensurate increase in the scope for fraud. This may have been the Legislature's reason for deleting the POA provision from the original RTODD bill.

(2) *Risk of Error.* As explained above, the rules for delegating estate planning authority to an attorney-in-fact are tricky. Not only must the POA expressly grant authority to create an estate planning instrument, it must also grant authority to "change beneficiaries." The latter requirement is not obvious from the language of the statute and could easily be overlooked. That could lead to invalidating mistakes, even when the principal intended to allow the attorney-in-fact to create an RTODD and expressly authorized that action in the POA.

(3) *Ambiguity in the record.* As noted many times before, effective operation of the RTODD statute depends on the completeness and clarity of the title records. If an attorney-in-fact were to execute an RTODD on a principal's behalf, the authorizing POA would need to be recorded (because it would contain information required to establish the validity of the RTODD). That would create a new point of potential error, with some laypeople misunderstanding or overlooking the recordation requirement. In addition, the authority language in the POA would need to be properly framed and unambiguous. If the sufficiency of the language is in doubt, litigation might be required to effect the transfer of title.

While the law does permit a *conservator* to execute an RTODD, that case can be distinguished from the situation of an attorney-in-fact. A court must expressly approve the execution of an RTODD by a conservator. That should fully address the first two points above (risk of abuse and error). The third point would be addressed if the authorizing court order is recorded along with the RTODD (more on this below).

With all of that in mind, the Commission needs to decide whether the law should permit an attorney-in-fact to execute an RTODD on behalf of a principal, if expressly authorized to do so in the POA. If so, the Commission should consider whether to require recordation of a copy of the POA, along with the RTODD.

In addition, it might make sense to expressly require recordation of a court order that authorizes the execution of an RTODD on behalf of a conservatee. The court order contains information that is required to evaluate the validity of an RTODD created by a conservator. That information should probably be in the title records. **Should such a requirement be included in a tentative recommendation?**

ACKNOWLEDGMENT FORM

When Assembly Member Chau introduced legislation to effectuate the Commission's recommendation on recording the RTODD FAQ,[13] he was contacted by the County Recorders' Association of California ("CRAC") about a related issue.

CRAC pointed out that the "Acknowledgment by Notary" part of the statutory RTODD form is not fully consistent with the general law governing acknowledgment. In 2014, Civil Code Section 1189 was amended to require that an acknowledgment form include certain language, which must be boxed.[14] The existing statutory forms to create or revoke an RTODD both include substantively equivalent language, *but it is not boxed*.[15]

CRAC was concerned that some RTODDs might be rejected by County Recorders because of that inconsistency. They suggested that the acknowledgment part of the form be deleted. When an RTODD is

13. Preprint Recommendation on *Revocable Transfer on Death Deed: Recordation* (June 20, 2018).
14. 2014 Cal. Stat. ch. 197.
15. Sections 5642(a), 5644.

acknowledged, the notary would provide a separate acknowledgment form (which would presumably be current with the latest formal requirements).

The staff sees three possible ways to address this issue:

(1) *Do nothing.* Although Civil Code Section 1189 does not contain any "substantial compliance" flexibility, it seems likely that use of a form specified in one code section would not be invalidated for inconsistency with a more general code section. Both are legal requirements and a specific requirement generally controls over a more general requirement. However, that legal reasoning would not prevent County Recorders rejecting RTODDs on the basis of their concerns.

(2) *Revise the forms to fully comply with Civil Code Section 1189.* This would avoid any legal and practical problems that exist today. But it would not prevent similar problems arising in the future, if the requirements of Section 1189 are changed again.

(3) *Implement CRAC's suggestion.* The acknowledgment portion of the statutory RTODD forms could be deleted and replaced with language advising that the form must be acknowledged and the acknowledgment form must be recorded along with the RTODD. This would be a permanent solution to the issue raised by CRAC. But it would come at a cost. The new recording requirement would create another potential error point, which could derail an RTODD. That risk could probably be substantially minimized by drafting sufficiently clear warning language.

How would the Commission like to proceed on this point?

Respectfully submitted,

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