Study L-3032.1 February 28, 2019

Third Supplement to Memorandum 2019-16

Revocable Transfer on Death Deed: Follow-Up Study — Marketability

This supplement addresses an issue 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]

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

DISCUSSION

Under the existing revocable transfer on death deed ("RTODD") statute, a deceased transferor's personal representative or any interested person may file an action to contest the validity of an RTODD.[2] The person who files such an action may record a lis pendens in the county where the property is located.[3]

Section 5694 prescribes the relief that can be granted if the contest is successful:

> (1) If the action was commenced and a lis pendens recorded within 120 days after the transferor's death, the court shall void the deed and order the transfer of the property to the person who is entitled to it.
>
> (2) If the action was not commenced within 120 days, or a lis pendens was not recorded within 120 days, the court must fashion "appropriate relief" that does not "affect the rights in the property of a purchaser or encumbrancer for value and in good faith acquired before commencement of the proceeding and recordation of a lis pendens."

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. Section 5690(a).
3. Section 5690(c).

TEXCOM correctly points out that this results in a 120-day period after the transferor's death, in which the validity of an RTODD is unsettled and there is no protection of bona fide purchasers. This significantly impairs marketability during the 120-day period. TEXCOM suggests that this issue be considered further.[4]

The kind of limbo period created by Section 5694 is not uncommon. It represents a policy compromise, which balances two legitimate interests. On the one hand are the transferor and beneficiary of the RTODD, who have an interest in effecting the transfer expeditiously, without the cost and delay of court involvement. On the other hand, we have a person who contests the validity of the RTODD. Such a person should have some ability to preserve the status quo while the contest is being resolved. Otherwise, the beneficiary could sell or encumber the property before the contest action has been decided.

For example, the statutes that establish simplified procedures for transferring a decedent's property outside of probate impose a delay before the property can be taken. Under Section 13100, a decedent's successor can collect decedent's property outside of probate "if the gross value of the decedent's real and personal property in this state does not exceed one hundred fifty thousand dollars ($150,000) *and if 40 days have elapsed since the death of the decedent* …."[5] This provides a period during which other potential claimants to the decedent's property can learn of the decedent's death and take steps to assert their claims. Similarly, a decedent's successor can use an affidavit procedure to take title to decedent's real property valued at $50,000 or less, but only after *six months* have passed since the decedent's death.

Under the version of Section 5694 that was originally recommended by the Commission, the limbo period would only have been 90 days long. The Commission's proposed Comment to Section 5694 explained how it settled on that number:

> The 90 day period under Section 5694 represents a balance between the 40 day period applicable to disposition of an estate without administration under Sections 13100 (affidavit procedure for collection or transfer of personal property) and 13151 (court order determining succession to property), and the six month

4. See Memorandum 2019-16, Exhibit p. 9.
5. Emphasis added. See also Section 13151.

> period applicable to the affidavit procedure for real property of small value under Section 13200.[6]

When the first bill to implement the Commission's recommendation was introduced, Section 5694 used the proposed 90-day period. The Senate Committee on Judiciary expressed concern that the 90-day period was too short. As the Commission's staff explained in a memorandum discussing the bill:

> Concern was expressed that the 90-day period might be too short. The disruption and grief associated with the death of a loved one may make it difficult to learn of a revocable TOD deed, figure out whether there is grounds for a contest, and file a contest within such a short time after the transferor's death. The California Judges Association has previously recommended that the period be doubled, to 180 days.
>
> That would extend the period in which it would be difficult for a beneficiary to sell the property, but not by much. However, the extra 90 days could possibly be crucial to grieving heirs who need time to evaluate a transferor's estate plan and figure out whether a problem exists with the revocable TOD deed.
>
> On balance, the increased delay on the sale of the property that would result from an extension of the time period would be relatively modest, while the increased opportunity to stop a fraudulent transfer could be quite significant.[7]

Ultimately, the Legislature changed the period from 90 to 120 days.[8]

As is often the case when competing policy interests are in direct tension, there is no perfect answer on how to balance them. It is a zero sum situation. The Commission considered the matter carefully when it first studied the RTODD proposal. Its proposed solution was adjusted slightly by the Legislature. The limbo period was retained, but extended from 90 to 120 days. In other words, the Legislature placed greater weight on protecting against an invalid RTODD than it did on expediting marketability for the beneficiary.

The staff does not believe that there is a compelling enough case to change the number again and recommends against doing so.

Respectfully submitted,

Brian Hebert
Executive Director

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6. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 247 (2006).
7. Memorandum 2007-60, p. 4.
8. See AB 250 (DeVore) (2007) (as amended April 9, 2008).