Study L-3032.1 March 20, 2019

Memorandum 2019-18

Revocable Transfer on Death Deed — Follow-Up Study: Other States

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, legislation was enacted to implement most of the Commission's recommendation.[3]

The enacted statute contains a "sunset" provision that will repeal the statute by operation of law on January 1, 2021, unless the sunset date is extended or repealed.[4] The statute also requires the Commission to complete a follow-up study on or before January 1, 2020, relating to how well the RTODD is working.

In 2016 the staff prepared a summary of case law from other states that authorize use of an RTODD,[5] discussing the experience of those states with the deed.

The staff has extended that research to the present day, searching for cases decided after the 2016 memorandum was prepared. Noteworthy cases are attached and summarized below.

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

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. See 2015 Cal. Stat. ch. 293 (AB 139 (Gatto)).
4. Prob. Code § 5600(c).
5. See Memorandum 2016-36. For convenience, this memorandum uses the acronym "RTODD" to refer to transfer on death deeds authorized in any state, regardless of how the deed is denominated in that state.

SCOPE AND METHODOLOGY

As in 2016, the staff searched for cases discussing the use of an RTODD in the nine states that have authorized such use for the longest period of time. Those states are listed below (with the date of authorization noted in parentheses):

Missouri (1989)[6]
Kansas (1997)[7]
Ohio (2000)[8]
Arizona (2001)[9]
New Mexico (2001)[10]
Nevada (2003)[11]
Colorado (2004)[12]
Arkansas (2005)[13]
Wisconsin (2005)[14]

The staff also used the same methodology it had used previously, searching for cases within those jurisdictions that include the terms "transfer on death deed" or "beneficiary deed," or that include an express reference to the state statute authorizing use of an RTODD.

The staff reviewed a total of 39 state and federal opinions, published and unpublished. While unpublished opinions may have limited precedential value, they can still serve as a source of information about practical problems with the operation of the law.

Most of the cases found in this second round of research mention an RTODD as part of the factual background, but do not present an issue that is relevant to the operation or effect of the RTODD. Those opinions are not discussed further in this memorandum.

The staff found three cases that are relevant to this study. Those opinions and issues are discussed below.

6. Mo. Rev. Stat. § 461.025.
7. Kan. Stat. Ann. § 59-3501.
8. Ohio Rev. Code Ann. § 5302.22.
9. Ariz. Rev. Stat. § 33-405.
10. N.M. Stat. Ann. § 45-6-401.
11. Nev. Rev. Stat. § 111.109.
12. Colo. Rev. Stat. § 15-15-401.
13. Ark. Code Ann. § 18-12-608.
14. Wisc. Stat. § 705.15.

In *Brown v. Ralston*,[15] a transferor executed an RTODD, naming his granddaughter as beneficiary of the transferor's 70 acre farm.

A year later, the transferor executed a power of attorney naming his daughter as his attorney-in-fact. Three years later, the daughter opened the transferor's safety deposit box, and discovered the RTODD leaving the farm property to the transferor's granddaughter.

Acting pursuant to the power-of-attorney, the daughter revoked the transfer-on-death designation to the granddaughter, and named herself as the transfer-on-death beneficiary. Following the transferor's death, the granddaughter sued the daughter, alleging intentional interference with an expectancy of inheritance.

The daughter contended that the granddaughter could not have had any expectancy of inheritance, as then applicable Ohio law provided:

> The designation of a transfer on death beneficiary has no effect on the present ownership of real property, and a person designated as a transfer on death beneficiary has no interest in the real property until the death of the owner of the interest. [16]

The court disagreed:

> Clear from the name of the claim itself, is that the inheritance is not a present interest in the property but only an expectancy. And an inheritance means that the property passes after the owner's death. Thus, a claim for intentional interference with the expectancy of inheritance does not require a present interest in the property. That is not one of the elements set out by the Ohio Supreme Court that is needed to prove a claim for intentional interference with the expectancy of inheritance.[17]

This case seems relevant to one of the questions that the Commission decided to consider in this study — "[w]hether the beneficiary of an RTODD has standing to contest an instrument that would revoke or otherwise defeat the effect of the RTODD."[18] While *Brown v. Ralston* did not involve an action to contest the validity of the revocation, it does illustrate an alternative remedy that might be available if a beneficiary lacks standing to contest a revocation, the tort of

15. Brown v. Ralston, 2016-Ohio-4916, 67 N.E. 3d 15 (2016).
16. Ohio Rev. Code Ann. § 5302.23(B)(3) (in effect from August 29, 2000, until December 28, 2009).
17. Brown v. Ralston, 2016-Ohio-4916, 67 N.E. 3d 15, at 20 (2016). The staff found no other published appellate authority citing this opinion.
18. Minutes (July 2016), p. 5.

intentional interference with an expectancy. That issue will be discussed further in Memorandum 2019-17.

EXECUTION DEFECTS

In Memorandum 2016-36, the staff noted an Ohio trial court decision, *Fragola v. Graham*,[19] that considered the validity of an RTODD that had been defectively executed. In that case, a woman had executed an RTODD naming her son as beneficiary. Four years later, she executed a new RTODD that named her daughter as beneficiary. By operation of law, the second RTODD would revoke the first.

After his mother's death, the son contested the validity of the second RTODD on the ground that it had not been dated or properly acknowledged before a notary, as Ohio law requires (the notary had failed to write the transferor's name on the notarization form, or date it). Citing state law that allows a court to overlook technical execution errors where the transferor's intention is clear, the trial court upheld the validity of the second RTODD.

That decision was appealed in 2016.[20] In that case, the court held that the execution and acknowledgement errors had invalidated the second RTODD. However, relying on Ohio precedent,[21] the court noted that in the absence of fraud, a defectively executed conveyance of an interest in land is valid as between the parties to the conveyance. Therefore, absent proof of any fraud, the second RTODD, though legally invalid, still conveyed to the daughter an *equitable* interest in the conveyed property.

That decision did not fully resolve the dispute. The matter was remanded to the trial court to consider "the effect that [the daughter's] equitable interest had, if any, on the [first executed RTODD] and [the son's] interest."[22]

The staff found no other published appellate authority citing this opinion.

The extent to which defects in an RTODD defeat the operation and effect of the RTODD will be considered in Memorandum 2019-17.

---

19. 2015 Ohio Misc. LEXIS 22054.
20. Fragola v. Graham, 2016-Ohio-8281, 78 N.E. 3d 277 (2016).
21. Citizens Nat'l Bank v. Denison, 165 Ohio St. 89, 133 N.E.2d 329 (1956).
22. Fragola v. Graham, 2016-Ohio-8281, 78 N.E. 3d 277, at 283 (2016). After remand, the matter settled two days before trial. Fragola v. Graham, 2017 Ohio Misc. LEXIS 13378.

SIGNATURE BY AMANUENSIS

The Kansas RTODD statute — like the California statute — requires an RTODD to be signed by the transferor.[23] In *Moore v. Miles*[24] a Kansas court of appeal considered the validity of an RTODD that had been signed by an "amanuensis" [uh-man-yoo-en-sis] on the transferor's behalf.[25]

As the Kansas court opinion was largely based on the holding of a related California Supreme Court opinion, the staff will first discuss the California opinion.

California Amanuensis Rules

In *Estate of Stephens*,[26] the California Supreme Court considered the validity of a grant deed that had been signed by an amanuensis, which purported to retitle property as a joint tenancy held by the property owner and the amanuensis.

First, the court held that signature by a properly authorized amanuensis is an exception to the general statute of frauds requirement that a deed be signed by the property owner. This is true even if the amanuensis signs a document out of the presence of the property owner.

Next, the court considered the validity of a document signed by an "interested amanuensis" (i.e. an amanuensis who benefits from the instrument that was signed by the amanuensis).

The court acknowledged that an unscrupulous person could use the amanuensis rule to perpetrate fraud. To protect against such misconduct, the court held that an instrument signed by an interested amanuensis is presumed to be invalid. That presumption can be overcome this presumption by showing that the signing of the transferor's name by the amanuensis was a mere "mechanical act;" the grantor intended to sign the document using the amanuensis as an instrumentality.[27] The court held that the deed at issue met that test and was valid.

---

23. See Kan. Stat. Ann. § 59-3501; Calif. Prob. Code § 5624.
24. Moore v. Miles (In re Estate of Moore), 53 Kan. App. 2d 667 (2017), *hrg. granted* Moore v. Miles (In re Estate of Moore), 2017 Kan. LEXIS 1011 (12/22/2017).
25. An amanuensis is generally defined as a person employed to write from dictation, or copy manuscripts. See <https://en.oxforddictionaries.comdefinition/amanuensis>; <www.merriam-webster.com/dictionary/amanuensis>.
26. Estate of Stephens, 28 Cal. 4th 665, 674, 49 P.3d 1093, 122 Cal. Rptr. 2d 358 (2002).
27. *Id.* at 678.

Justice Kennard dissented from the majority opinion.[28] She urged, citing a number of secondary sources and appellate opinions from other jurisdictions, that the court's holding had crafted an exception to the statute of frauds so broad as to defeat its purpose. She pointed out that although the evidence of the transferor's intent in the case before the court was overwhelming, the court's rule would permit *any* interested amanuensis to validate such a transfer by establishing proof of the transferor's intent by only a preponderance of the evidence.[29] Justice Kennard suggested that this standard could often be easily met by *any* person signing an aging and infirm relative's name to a deed without permission, and later falsely testifying that the relative had asked the person to sign as an amanuensis.

It does not appear that the "interested amanuensis rule" has been relied on in any other published California opinion.

Moore v. Miles

In 2017, however, a Kansas appellate court relied on *Estate of Stephens* to validate an RTODD signed by an interested amanuensis.[30] In the Kansas case, an elderly transferor who was in a lot of pain asked her former daughter-in-law to have an RTODD prepared that would name the former daughter-in-law as the beneficiary. She then asked the former daughter-in-law to sign the RTODD for her. The former daughter-in-law did so, and a notary at the scene notarized the document.

After the transferor's death, the transferor's son contested the validity of the RTODD. The court upheld the RTODD by applying the "interested amanuensis" rule set forth in *Estate of Stephens*.[31]

One of the judges on the three judge panel offered a lengthy concurrence.[32] The judge urged that when a document transfers property to an amanuensis and the transferor is no longer available to confirm the transfer was intended, the situation is "dripping with fraudulent possibilities." The judge indicated he would not go as far as Justice Kennard and find such a deed void in all

28. *Id*.
29. See Evid. Code § 115.
30. Moore v. Miles (In re Estate of Moore), 53 Kan. App. 2d 667 (2017), *hrg. granted* Moore v. Miles (In re Estate of Moore), 2017 Kan. LEXIS 1011 (12/22/2017). Based on the grant of review by the Kansas Supreme Court, this decision has no force and effect, but is apparently still citable authority. See Kansas Supreme Court Rule 8.03(k)(1) and (2).
31. The appellate court indicated that no Kansas decision had previously addressed the issue presented.
32. *Moore v. Miles*, 53 Kan. App. 2d at 691.

circumstances, but suggested that an interested amanuensis should be required to rebut the presumption of invalidity by clear and convincing evidence, rather than a mere preponderance:

> [T]he California Supreme Court and the majority here fail to look beyond the immediate cases to consider fully the outcomes the rule they fashion would foster in tougher cases where little evidence tends to corroborate the interested amanuensis. A putative amanuensis ought to have to do more than sneak past evidentiary equipoise to dispel the fraudulent appearance of a transfer-on-death deed in which he or she is the recipient of the real property.[33]

The Kansas opinion does not yet appear to have been cited in any other published appellate opinion applying the "interested amanuensis" rule to an RTODD. However, both the Kansas opinion and *Estate of Stephens* were cited in a recent South Dakota Supreme Court opinion, approving an amanuensis signature of an instrument that added an amanuensis as a joint owner of the transferor's bank account.[34]

Relevant History

The Commission's RTODD recommendation included language that would have expressly permitted signature of an RTODD by an amanuensis:

> 5624. (a) The transferor shall sign and date a revocable transfer on death deed and acknowledge the deed before a notary public.
>
> (b) A revocable transfer on death deed may be signed and dated in the transferor's name by a person other than the transferor at the transferor's direction and in the transferor's presence but shall be acknowledged by the transferor.[35]

In a memorandum discussing that language, the staff explained:

> In the draft below, the staff has added a provision authorizing execution by another person at the transferor's direction, in contemplation of possible physical disability of the transferor. The deed would still need to be acknowledged by the transferor.[36]

The bill that eventually enacted the RTODD statute was amended in the Senate to, among other things, remove Section 5624(b). The staff has not found any legislative history explaining that change. It is not clear whether the

33. *Id.* at 692-93.
34. In re Estate of Bronson, 2017 SD 9, 892 N.W.2d 604 (2017).
35. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 221 (2006).
36. See Memorandum 2006-16, p. 7.

amendment was intended to prevent signature of an RTODD by amanuensis or simply leave the matter to case law.

Analysis

Notwithstanding the removal of the amanuensis language from the RTODD statute, it seems likely that the common law amanuensis rules would apply to an RTODD. If so, then an RTODD could be signed by an amanuensis acting on behalf of a transferor. If the amanuensis is also a beneficiary, the RTODD would be presumed invalid. That presumption could be overcome by proving that the amanuensis signed as a purely "mechanical act."

Considering that the common law is generally in accord with the Commission's original recommendation, it might make sense to simply preserve existing law on the point, without recommending any change to the RTODD statute. However, if the Commission shares Justice Kennard's concern about the potential for fraud that exists under the existing amanuensis rules, it might wish to prohibit or somehow restrict the use of an amanuensis in the RTODD context.

For three reasons, the staff recommends against recommending any substantive change of the amanuensis rules in this study. First, there is no evidence suggesting that abuse of the amanuensis rules is a significant problem in practice. Second, the amanuensis rules provide an important accommodation for persons with disabilities. Without that option, some people with disabilities may not be able to execute RTODDs (or sign other important documents). Finally, if there are concerns about the use of an amanuensis when executing an RTODD, the same concerns probably exist with respect to other kinds of documents (e.g., a contract, power of attorney, or trust). If the Commission has serious enough concerns about the amanuensis rules, it should study that topic generally, rather than doing so in the narrow context of RTODDs.

However, it might be helpful to add language discussing the amanuensis issue to the statutory RTODD "Common Questions" form. For example:

> IF I AM UNABLE TO SIGN THE TOD DEED, MAY I ASK SOMEONE ELSE TO SIGN MY NAME FOR ME? Yes. However, if the person who signs for you would benefit from the transfer of your property, there is a chance that the TOD deed will fail. You should consult an attorney before taking that step.

The advantage of adding such language is that it would educate transferors about the option of using an amanuensis, while warning about the risk of using

an interested amanuensis. One possible disadvantage is that it might give ideas to potential abusers.

How does the Commission wish to proceed on this issue?

Respectfully submitted,

Steve Cohen
Staff Counsel