

Memorandum 2020-61

**Stock Cooperatives and Uniform TOD Security Registration Act  
(Discussion of Issues)**

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In this study, the Commission<sup>1</sup> is developing a proposed law that could be used to make a nonprobate transfer on death of a decedent's ownership interest in a stock cooperative.

The ownership of an interest in a stock cooperative is based on the ownership of a share of stock. For that reason, the Commission has looked to the Uniform TOD Security Registration Act ("Uniform Securities Act")<sup>2</sup> as a possible model for the proposed law. That statute authorizes the registration of securities in transfer on death ("TOD") form. Securities registered in that form pass to a named beneficiary on the registering owner's death, without probate administration.

The Commission has also been using the revocable transfer on death ("RTODD") statute as a model. For many issues addressed by the RTODD statute, an interest in a stock cooperative is not materially different from any other interest in real property. On those issues, the Commission's and the Legislature's policy conclusions regarding the RTODD statute should be given weight in this study. This is especially true where the Legislature enacted a policy choice that is contrary to the Commission's recommendation. On those matters, the clear policy preference of the Legislature should be respected.

This study has been moving progressively through the issues that need to be addressed in developing the proposed law. The staff had hoped to discuss authentication issues in this memorandum. Unfortunately, we have not yet received sufficient information about the role of recordation and title insurance in transferring an interest in a stock cooperative. Efforts to obtain that information are ongoing.

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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](http://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. Prob. Code §§ 5500-5512.

Instead, this memorandum will present a handful of “nuts and bolts” provisions from the RTODD statute, which involve matters that should be addressed in the proposed law.

The issues presented for decision in this memorandum were selected to be fairly straightforward and uncontroversial. For that reason, **the staff is treating them as presumed consent items. Unless a Commissioner requests otherwise, the staff’s recommendations in this memorandum will be presumed to be unanimously approved without oral presentation.** At the November meeting, the staff will provide an opportunity for Commissioners to request discussion and a vote on any of those items.

For many items in this memorandum, the decision is framed in terms of whether or not to include in the proposed law a provision that is “similar” to a particular RTODD provision. That is because the language used in the proposed law cannot be identical to that in the RTODD statute, due to minor technical and terminological differences. Moreover, the final language for some provisions is contingent on decisions that have not yet been made (e.g., decisions about authentication processes).

Unless otherwise indicated, all of the statutory citations below are to the Probate Code.

#### PRELIMINARY PROVISIONS

The RTODD statute contains a handful of preliminary provisions, which address the application of the statute and its relation to other law. Those provisions are discussed below.

#### **Discussion and Recommendations**

##### *Prospective Application*

Section 5600(a) establishes the prospective application of the RTODD statute (as measured against the date of the transferor’s death):

5600. (a) This part applies to a revocable transfer on death deed made by a transferor who dies on or after January 1, 2016, whether the deed was executed or recorded before, on, or after January 1, 2016.

That language provides helpful certainty, avoiding the need for litigation on the issue of retroactivity. **The staff recommends that a similar provision (with adjusted dates) be included in the proposed law in this study.**

*No Preclusion of Other Transfer Mechanisms*

Section 5600(b) and Section 5602 make clear that the statute is not intended to preclude any other existing way to transfer property on death (e.g., a will or trust).

5600. ...

(b) Nothing in this part invalidates an otherwise valid transfer under Section 5602.

5602. This part does not preclude use of any other method of conveying real property that is permitted by law and that has the effect of postponing enjoyment of the property until the death of the owner.

Again, this provides helpful certainty. It makes clear that the law is intended to supplement, rather than supplant existing law. **The staff recommends that similar provisions be included in the proposed law in this study.**

*Relation to Other Nonprobate Transfer Laws*

With one exception, Section 5604(a) makes clear that the RTODD statute does not affect any other law that governs a nonprobate transfer of property on death. That provision reads as follows (with the addition of bracketed glosses added by the staff to summarize the nature of the provisions referenced in the nonexclusive exemplary list):

5604. (a) Except as provided in subdivision (b), nothing in this part affects the application to a revocable transfer on death deed of any other statute governing a nonprobate transfer on death, including, but not limited to, any of the following provisions that by its terms or intent would apply to a nonprobate transfer on death:

(1) Division 2 (commencing with Section 100) [general provisions for the Probate Code as a whole].

(2) Part 1 (commencing with Section 5000) of this division [general provisions for nonprobate transfers].

(3) Division 10 (commencing with Section 20100) [estate taxation].

(4) Division 11 (commencing with Section 21101) [rules of construction].

Subdivision (b) states an exception, under which the RTODD statute prevails over any other statute applicable to nonprobate transfers, to the extent that the RTODD statute is contrary to that other law:

5604. ...

(b) Notwithstanding subdivision (a), a provision of another statute governing a nonprobate transfer on death does not apply to a revocable transfer on death deed to the extent this part provides a contrary rule.

The staff believes that Section 5604 provides helpful guidance. **A similar provision should be included in the proposed law in this study.**

*Sunset Date*

As amended this year, Section 5600(c) provides the sunset date on the RTODD statute:

5600. ...

(c) This part shall remain in effect only until January 1, 2022, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, 2022, deletes or extends that date. The repeal of this part pursuant to this subdivision shall not affect the validity or effect of a revocable transfer on death deed that is executed before January 1, 2022, and shall not affect the authority of the transferor to revoke a transfer on death deed by recording a signed and notarized instrument that is substantially in the form specified in Section 5644.<sup>3</sup>

**The staff recommends against including such a provision in the proposed law.**

The proposed law will not be completed in time for the introduction of implementing legislation in 2021. The soonest it could be introduced would be 2022. By then, the Legislature should have decided whether to extend the sunset date of the RTODD statute.

If the date is extended, then it might make sense to add a parallel provision in the proposed law. If the date is not extended, then the RTODD statute will be repealed. **In that event, work on this proposal should probably be tabled.** There is no reason to believe that the proposed law would be viable if the Legislature decides that the RTODD statute should be repealed. **In either case, a final decision on the sunset issue should wait until next year, when we should know the fate of the RTODD statute.**

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3. 2020 Cal. Stat. ch. 238 (SB 1305 (Roth)).

## DEFINITIONS

The RTODD statute contains a handful of definition provisions. They govern the statute as a whole, “[u]nless the provision or context otherwise requires....”<sup>4</sup>

The definitions are as follows:

5608. “Beneficiary” means a person named in a revocable transfer on death deed as transferee of the property.

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.

5612. “Recorded” has the meaning provided in Section 1170 of the Civil Code.

5614. (a) “Revocable transfer on death deed” means an instrument created pursuant to this part that does all of the following:

(1) Makes a donative transfer of real property to a named beneficiary.

(2) Operates on the transferor’s death.

(3) Remains revocable until the transferor’s death.

(b) A revocable transfer on death deed may also be known as a “revocable TOD deed.”

5616. “Transferor” means an owner of real property who makes a revocable transfer on death deed of the property.

## Discussion and Recommendations

**In general, definitions similar to the ones shown above should be included in the proposed law in this study.** That would provide useful certainty and simplify drafting. However, there are two exceptions.

First, it may not be necessary to include a definition of “real property” in the proposed law. The proposed law would only apply to one specific type of property, a stock cooperative. The meaning of “stock cooperative” is defined in Civil Code Section 4190. Use of that term and incorporation of its definition should be sufficient.

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4. Section 5606.

Recall that the Legislature also used the definition of “real property” to establish a substantive rule, limiting the application of the RTODD statute to residential property. **Such a limitation is probably not necessary in the proposed law in this study.** To the staff’s knowledge, stock cooperatives are exclusively residential. **We invite expert input on that point.**

The second exception is that it may not be necessary to include a definition of “recorded” in the proposed law. Until we have a better understanding of the role of recording in the process of transferring an interest in a stock cooperative, the staff does not know whether that term will be used in the proposed law. **That will be decided later in the study.**

#### EFFECT OF RTODD

The RTODD statute includes general rules on the effect of an RTODD. They are discussed below.

#### **Discussion and Recommendations**

##### *Expectancy Interest*

Because an RTODD remains revocable during the life of the transferor, it only creates an expectancy. The beneficiary has no rights under an RTODD until the time of the transferor’s death. Section 5650 codifies that principle:

5650. During the transferor’s life, execution and recordation of a revocable transfer on death deed:

(a) Does not affect the ownership rights of the transferor, and the transferor or the transferor’s agent or other fiduciary may convey, assign, contract, encumber, or otherwise deal with the property, and the property is subject to process of the transferor’s creditors, as if no revocable transfer on death deed were executed or recorded.

(b) Does not create any legal or equitable right in the beneficiary, and the property is not subject to process of the beneficiary’s creditors.

(c) Does not transfer or convey any right, title, or interest in the property.

**The staff recommends that a similar provision be included in the proposed law in this study.** The registration of an interest in a stock cooperative in TOD form should be freely revocable during the owner’s life. No vested rights or obligations should be created, during the transferor’s life, merely as a result of such registration.

### *Conditions of Transfer*

Section 5652 specifies the effect of an RTODD when it operates, including important limitations on the effect of an RTODD:

5652. (a) A revocable transfer on death deed transfers all of the transferor's interest in the property on the transferor's death according to the following rules:

(1) Subject to the beneficiary's right to disclaim the transfer, the interest in the property is transferred to the beneficiary in accordance with the deed.

(2) The interest of a beneficiary is contingent on the beneficiary surviving the transferor. Notwithstanding Section 21110, the interest of a beneficiary that fails to survive the transferor lapses.

(3) Except as provided in paragraph (4), if there is more than one beneficiary, they take the property as tenants in common, in equal shares.

(4) If there is more than one beneficiary, the share of a beneficiary that lapses or fails for any reason is transferred to the others in equal shares.

(b) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor's interest that is of record at the transferor's death, including, but not limited to, a lien, encumbrance, easement, lease, or other instrument affecting the transferor's interest, whether recorded before or after recordation of the revocable transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed.

(c) A revocable transfer on death deed transfers the property without covenant or warranty of title.

The principles established in subdivision (a) are consistent with the Legislature's decision that an RTODD should only be used to effect a single straightforward kind of conveyance — the transfer of the decedent's entire interest, to named beneficiaries in equal shares, with no "per stirpes" distribution if a beneficiary predeceases the transferor (i.e., that beneficiary's share will be divided between the other named beneficiaries, rather than passing to the deceased beneficiary's children). **The Commission has already decided that a similar limitation should govern the proposed law in this study.**<sup>5</sup>

The rule in subdivision (b) is also consistent with a decision that the Commission has already made — i.e., property transferred under the proposed law should continue to be subject to any limitations on the transferor's title that existed at the time of the transferor's death (including, importantly, any reserved

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5. Minutes (Oct. 2020), p. 5.

rights of the cooperative to repurchase shares on the death of an owner or approve any proposed occupant).<sup>6</sup> **For that reason, the proposed law in this study should include a provision similar to subdivision (b).**

**The staff is not sure whether a provision along the lines of subdivision (c) should be included in the proposed law in this study.** With regard to the RTODD statute, the Commission explained the purpose of the provision:

Although a revocable TOD deed is a real property deed, it is not generally thought to carry with it the implied covenants and warranties of a grant deed. [n.5. Typical implied covenants and warranties include title and freedom from encumbrance.] The revocable TOD deed is more akin to a quitclaim in that whatever interest the transferor has in the property is transferred to the beneficiary subject to all encumbrances.<sup>7</sup>

The staff sees no problem applying that same principle to the proposed law, but is unsure whether it is necessary. While there may be implied warranties that govern deeds (unless expressly disclaimed), the staff is not sure whether the same is true for a share of stock. Nor is it clear that the specialized language used in subdivision (c) is apt outside the context in which it arose, i.e., the interpretation of deeds. **The staff invites expert input on this issue.**

#### *MediCal Eligibility and Reimbursement*

Section 5654 of the RTODD statute affirms existing law on the effect of a revocable nonprobate transfer on MediCal eligibility and liability:

5654. (a) For the purpose of determination of eligibility for health care under Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code, execution and recordation of a revocable transfer on death deed is not a lifetime transfer of the property.

(b) Property transferred by a revocable transfer on death deed is subject to claims of the State Department of Health Care Services to the extent authorized by law.

That section provides useful clarity on a question that might otherwise prompt litigation. **The staff recommends that the proposed law in this study include a similar provision.**

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6. Minutes (July 2020), pp. 4-6.

7. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 181 (2006).

*Taxes*

Section 5656 is another provision that simply affirms basic principles about how other law applies to property transferred by RTODD. In this case, the provision addresses the law on real property transfer taxes:

5656. For the purpose of application of the property taxation and documentary transfer tax provisions of the Revenue and Taxation Code:

(a) Execution and recordation of, or revocation of, a revocable transfer on death deed of real property is not a change in ownership of the property and does not require declaration or payment of a documentary transfer tax or filing of a preliminary change of ownership report.

(b) Transfer of real property on the death of the transferor by a revocable transfer on death deed is a change in ownership of the property.

**The staff recommends that the proposed law in this study include such a provision.**

Respectfully submitted,

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