

## Memorandum 2021-51

### **Stock Cooperatives and Uniform TOD Security Registration Act: (Public Comment)**

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In this study, the Commission<sup>1</sup> is developing a proposed law to provide a relatively simple means of making a nonprobate transfer on death of a decedent's ownership interest in a stock cooperative. The proposed law would complement the existing law on Revocable Transfer on Death Deeds ("RTODD").

In April, the Commission approved a tentative recommendation on this topic, with a public comment deadline of July 1, 2021.

The Commission received only one comment letter, from DeAnne E. Parker and John M. Andersen of the Trusts and Estates Section Executive Committee of the California Lawyers Association (hereafter "TEXCOM"). That letter is attached as an Exhibit. The staff appreciates their continued and very valuable contributions to this study.

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

#### GENERAL OBSERVATIONS

##### **Insufficient Need**

TEXCOM's primary observation about the proposed law is that there is not a sufficient demonstrated need for the reform:

TEXCOM's primary observation regarding the April 21 Recommendation is that it appears to be somewhat of a solution — and a complicated one at that, adding over 50 new statutes to the Probate Code — in search of a problem. There are relatively few stock cooperatives in California; approximately 30,000 units according to the Commission's estimate. (CLRC Staff Memorandum

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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.

2020-5, p. 2.) Given that the participation of a stock cooperative in offering TOD registrations is completely optional under proposed Probate Code section 5802, the number of stock cooperative units potentially subject to the proposed legislation may well be substantially fewer than 30,000. In short, the April 21 Recommendation would devote a substantial statutory framework to potentially benefit a tiny percentage of Californians.<sup>2</sup>

The Commission should consider whether the benefits of providing a relatively simple and inexpensive means of transferring property on death outside of probate to 30,000 homeowners justifies the effort required to achieve that reform.

In considering that point, the staff believes that the following points should be kept in mind:

- The Legislature specifically directed the Commission to consider whether homes in stock cooperatives should have an RTODD-type option.
- While 30,000 homes is a small fraction of California's overall housing stock, it is still a lot of people (and likely hundreds of millions of dollars of property value). Those 30,000 homeowners were denied the benefits of the RTODD statute simply because of the unusual nature of their form of ownership. As a matter of policy, they should have the same rights as other homeowners, unless there is a strong reason to provide otherwise.
- Most of the necessary work has already been done. All that remains is to complete a recommendation and present it to the Legislature for their consideration. The introduction and consideration of a bill is not cost-free. But a bill in this study should be relatively simple for the Legislature to assess. As discussed further below, most of the heavy lifting — deciding whether the advantages of an RTODD-type instrument outweigh its disadvantages — has already been completed. The only new question the Legislature would need to consider is whether the adaptation of the RTODD concept to stock cooperatives is workable.
- The number of code sections in the draft legislation is not a good way to measure the complexity of the law. The Commission initially decided to draft a stand-alone statute in this study in order to more easily accommodate any necessary deviations from the RTODD statute. As it turned out, those points of difference were relatively few and modest in character. Consequently, most of the provisions of the proposed law are near-duplicates of provisions of the RTODD statute. If the proposed law had been drafted as an add-on to the existing RTODD statute, rather than a stand-alone statute, it would consist of only a handful of provisions. Viewed that way, as a tweak

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2. See Exhibit p. 2.

to the existing RTODD statute rather than a wholly new enactment, the complexity of the proposed law is relatively low. **The possibility of taking that alternative drafting approach is discussed at the end of this memorandum.**

TEXCOM also pointed out that the number of homes affected by the proposed law will probably be significantly fewer than 30,000, because the proposed law would make participation in the administration of TOD registrations optional for stock cooperatives (at the election of the stock cooperative itself, rather than individual owners).<sup>3</sup> **That issue will also be discussed further below, in connection with an alternative drafting approach.**

### **Disadvantages Outweigh Advantages**

TEXCOM's "other main concern with the April 21 recommendation will be familiar to the Commission because TEXCOM has repeatedly raised it in connection with RTODDs."<sup>4</sup> In other words, the concern is one that TEXCOM has about the RTODD concept as a whole, rather than the particulars of the proposed law in this study. They write:

[I]n the interest of providing a simple, inexpensive method of making a non-probate transfer of an interest in a stock cooperative, the proposed legislation incorporates numerous procedural requirements and safeguards that leave a large margin for error. TEXCOM is concerned that, in the aggregate, the cost savings enjoyed by stock cooperative owners who successfully navigate the procedural requirements of the proposed legislation may be largely offset by the legal expenses incurred by those who do not, or more precisely, their transferees, many of whom will likely have to resort to the courts to rectify mistakes made by the transferor.<sup>5</sup>

TEXCOM is not the only group that has had such concerns about the net benefit of allowing layperson-homeowners to execute a form instrument to transfer their real property on death, without the assistance of counsel or supervision in the courts.

As has been recounted before, when the Commission first recommended the RTODD statute, that recommendation was met with significant skepticism in the Legislature. Repeated attempts to enact the statute failed. Even after the statute was eventually enacted, its effect was limited. The application of the law was restricted to residential property and the statute was given a five-year sunset date.

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3. See Exhibit p. 2.

4. *Id.*

5. *Id.*

The Commission was then directed to complete a follow-up study of whether the RTODD was causing problems in practice. Only after the Legislature had received the results of the Commission's follow-up study would it decide whether the law should continue in effect.<sup>6</sup>

The Commission completed its follow-up study in 2019, recommending that the RTODD law be continued in effect for another 10 years, with significant improvements. Near the end of that period, the Commission would conduct another follow-up study.<sup>7</sup>

Legislation to enact the Commission's recommended follow-up proposal was enacted this year.<sup>8</sup>

Thus, it is the current and recently affirmed policy of California that the RTODD statute should continue in effect for at least the next 10 years. This is true despite the legitimate concerns that TEXCOM and others have raised about the risks associated with the use of simple instruments to transfer real property on death.

Given that existing policy, the staff does not believe that the Commission needs to reconsider the general advantages and disadvantages of the RTODD as an alternative to probate. Instead, the focus in this study should be on whether there is some policy reason or technical obstacle that would justify treating stock cooperatives differently from all other types of residential real property.

The staff has never seen a good *policy* argument for denying homeowners in stock cooperative the benefits of the RTODD. The concerns about implementing such an option for stock cooperatives have always been operational. The focus of this study has been on identifying and solving those operational problems.

## **Conclusion**

The staff does not believe that the general concerns discussed above are sufficient to justify denying stock cooperative homeowners the equivalent of the RTODD.

TEXCOM's more technical concerns about the proposed law are discussed below.

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6. See Section 5600. The sunset date was extended by one year in 2020, to accommodate the disruption caused by the COVID-19 pandemic. 2020 Cal. Stat. ch. 238.

7. *Revocable Transfer on Death Deed: Follow-Up Study*, 46 Cal. L. Revision Comm'n Reports 135 (2019).

8. 2021 Cal. Stat. ch. 215 (SB 315 (Roth)).

## RECORDING A CONFLICTING INSTRUMENT

Because an RTODD would operate outside of the courts, the availability of title insurance is critical to ensure the marketability of property transferred by RTODD. In turn, the availability of title insurance depends on the law being structured so that the validity of an RTODD can be determined entirely from information within the public record. If an off-record fact could affect the validity of an RTODD, title insurers would not have the necessary confidence that the RTODD is valid.

That is why the RTODD statute requires recordation of the RTODD. It is also why the RTODD statute's treatment of a conflicting instrument (i.e., an instrument that purports to convey ownership of the same property that is governed by an RTODD) turns on whether the conflicting instrument is recorded. Specifically, existing Section 5660 provides as follows:

If a revocable transfer on death deed recorded on or before 60 days after the date it was executed and another instrument both purport to dispose of the same property:

(a) If the other instrument is not recorded before the transferor's death, the revocable transfer on death deed is the operative instrument.

(b) If the other instrument is recorded before the transferor's death and makes a revocable disposition of the property, the later executed of the revocable transfer on death deed or the other instrument is the operative instrument.

(c) If the other instrument is recorded before the transferor's death and makes an irrevocable disposition of the property, the other instrument and not the revocable transfer on death deed is the operative instrument.

The Commission's follow-up study recommended relaxation of the timing rule in Section 5660. Rather than requiring that a conflicting instrument be recorded before the transferor's death, the revised provision will only require that it be recorded within 120 days of the beneficiary giving notice of the RTODD to the transferor's heirs. This will give interested persons approximately four months to record a conflicting instrument, in order to preserve its effect. As noted above, the Commission's recommendation was enacted.<sup>9</sup>

### **TEXCOM's Concerns**

TEXCOM raises some technical questions about how the equivalent provision in the stock cooperative statute (proposed Section 5880) would operate.

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9. *Id.*

First, they ask whether it is sufficiently clear that a will or trust can be recorded. Specifically, they note that such documents are not typically notarized, which might be an obstacle to recordation. Also, they wonder if a will that has not yet been admitted to probate would be recordable.<sup>10</sup>

It should be possible to address those issues directly in the proposed law. Language could be added to provide, as a matter of law, that a trust or will can be recorded, with or without notarization, and without regard for whether a will has been admitted to probate. **That should be a sufficient solution to this specific problem.**

TEXCOM is also concerned that requiring public recordation of a trust would defeat a transferor's desire that the terms of a trust remain private.<sup>11</sup>

The staff also sees a way to draft around that problem. Rather than requiring that a conflicting instrument itself be recorded, proposed Section 5880 could allow for the recordation of a written notice that a conflicting instrument exists and purports to dispose of the same property as a TOD registration. **The law could provide that such notice, if recorded within 120 days, is also sufficient to preserve the effect of the conflicting instrument.**

Bear in mind that the purpose of requiring recordation of a conflicting instrument is merely to establish record notice of the competing claim. It is not necessary that the complete contents of the document be recorded in order to achieve that purpose.

If the Commission agrees that the points raised by TEXCOM should be addressed as proposed above, it should consider a related question: **Should the same changes be made to the RTODD statute?** If there are concerns about whether wills and trusts are recordable and whether recordation would inappropriately defeat a trustor's desire for privacy, those problems would seem to exist for RTODDs as well.

### **More Substantive Reform Possibility**

The process of thinking through TEXCOM's concerns and the possible statutory solutions to them led the staff to an interesting idea. It is explained below. The new idea is not specific to stock cooperatives. If it has merit, the Commission should consider applying it to the RTODD statute as well.

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10. See Exhibit p. 3.

11. *Id.*

*As a general matter, the law should effectuate a transferor's intentions.* When a transferor has executed two conflicting instruments, both of which purport to dispose of the same property, it may be difficult to determine with certainty exactly what the transferor actually intended. In that situation, it may be necessary to apply certain statutory presumptions, with the goal of implementing the transferor's most likely intention. Those kinds of presumptions are common in estate planning law.

The RTODD statute's rules on conflicting instruments establish such a presumption. All other things being equal, a later-executed instrument controls over an earlier-executed instrument. This rule is based on the likelihood that the last-executed document is probably the best expression of the transferor's intentions at the time of death.

The RTODD statute also provides that, all other things being equal, an irrevocable instrument controls over the RTODD. This rule is not so much a presumption about the transferor's intentions as a recognition that an irrevocable act cannot be undone. Once a transferor has irrevocably disposed of property, the transferor lacks the power to make a different disposition.

The RTODD statute subordinates both of those principles to operational concerns. Under Section 5660, an RTODD has priority over any unrecorded conflicting instrument, even if the conflicting instrument was irrevocable or was executed last. *This is not ideal; it is a policy compromise.* The goal of effectuating the transferor's intentions is subordinated to the need to have all relevant information in the title records.

The disadvantage of that compromise should be minimized by the enactment of the Commission's follow-up recommendation. Specifically, the Commission recommended that the law be amended to allow for the recording of a conflicting instrument within 120 days after the beneficiary of an RTODD gives notice to the transferor's heirs (rather than requiring recording before death, as under the existing provision). That will make it much more likely that a conflicting instrument will be recorded in time to be given effect. However, there will still be a possibility that a conflicting instrument could fail simply because it is not recorded within the 120-day period.

*The staff is now wondering whether the compromise described above is necessary at all.* Consider the following:

- As discussed above, it is possible to further amend the law to allow for recordation of a *notice* of a conflicting instrument within 120 days, rather than recordation of the conflicting instrument itself.
- Such a notice would be very similar to a lis pendens (notice of an action to contest the validity of the RTODD), in that it would establish record notice of a competing claim to the property at issue.
- Under the RTODD statute as amended, the time for recording a lis pendens would be the same as the time for recording a conflicting instrument: 120 days after the beneficiary of the RTODD gives notice to the transferor's heirs.
- If a lis pendens is recorded in that period, a successful contest will void the RTODD, without any protection of a bona fide purchaser. If the lis pendens is not recorded in time, the bona fide purchaser's title is protected. In the latter case, a successful contestant could still recover from the beneficiary who sold the property, but could not disturb the bona fide purchaser's title.
- This means that a title insurer would probably not guarantee valid title until the time for recording a lis pendens (or notice of a conflicting instrument) has run. A successful contest or the appearance of a conflicting instrument during that time could invalidate the RTODD. But once that time has passed without a lis pendens or conflicting instrument being recorded, the rights of a bona fide purchaser would be protected. This should allow for the issuance of title insurance.
- **Given all of that, would it work to delete the requirement that a conflicting instrument be recorded and simply subsume the issue within the rules that govern all contests?**

Consider an example of how this alternative approach would work:

Transferor executes an RTODD naming Cousin as beneficiary. Five years later, Transferor executes a will that leaves the same property to Sibling. Transferor dies. Cousin gives notice of the RTODD to the transferor's heirs, including Sibling. Sibling decides to contest the RTODD, arguing that it was superseded by the later-executed will.

If Sibling records a lis pendens within the 120-day period, there will be no protection of bona fide purchasers during the pendency of the contest and, if the contest is successful, the RTODD will be voided.

If Sibling does not record a lis pendens within the 120-day period, the bona fide purchaser will be protected and the RTODD cannot be voided. *However, if the contest is successful Sibling can still seek to recover from Cousin (rather than the BFP).*

Compare that to the outcome on similar facts under existing Section 5660. If the will is not recorded within the 120-day period, *it does not operate*. There is no



opportunity for Sibling to recover from Cousin. The transferor's intention to transfer the property to Sibling is wholly defeated.

The idea of treating the conflicting instrument as grounds for a contest, without requiring that it be recorded in order to have effect, seems like it might be worth pursuing. **The staff would like to hear public comment on this idea.** It would be a significant change from the existing law on this issue. If the alternative approach makes sense, it could be implemented in the RTODD statute as well.

#### RECORDING GENERALLY

As a general matter, TEXCOM questions whether the proposed law should require that a TOD registration be recorded.<sup>12</sup>

At the beginning of this study, the Commission had decided against requiring recordation of a TOD registration, for two main reasons:

- (1) The concept of recording an ownership instrument that is a share of stock rather than a deed seemed inapt.
- (2) The involvement of the stock cooperative as a third-party who could authenticate and administer the transfer of an interest on the transferor's death seemed to dispense with the need for title insurance.

The staff later learned, from realtors and title insurers whose practices include significant numbers of stock cooperatives, that title insurance is sometimes required when an interest in a stock cooperative changes hands. The need for title insurance typically depends on whether lender financing is required for a purchase. Financing is sometimes not required for an interest in a limited equity cooperative, but is typically required for a market rate cooperative.

Rather than try to draft statutory language to treat those cases differently, the Commission changed its position, deciding that recordation of a TOD registration should be required across the board.

The Commission's transition toward requiring recordation of a TOD registration in all cases has implications for another issue — the role of the stock cooperative in administering a transfer pursuant to a TOD registration. **This will be discussed further below, in connection with the proposed alternative drafting approach.**

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12. See Exhibit pp. 2-3.

## TOD REGISTRATIONS SHOULD BE EASIER TO REVOKE

TEXCOM believes that the proposed process for revocation of a TOD registration is unduly onerous. They believe that a transferor should be able to revoke a TOD registration unilaterally, without requiring the signature of an agent of the stock cooperative and notarization of the form. They also question whether the specified capacity standard for revocation – capacity to contract – is too high. They wonder whether it should be lowered to testamentary capacity.<sup>13</sup>

The requirement that a revocation form be notarized and that the transferor have the capacity to contract in order to revoke a TOD registration parallels the equivalent rules in the RTODD statute.<sup>14</sup> **The staff sees no good policy reason for the law on these points to be different for stock cooperatives.**

The question of whether a revocation should require the signature of an agent of the stock cooperative is unique to this proposed law; there is no equivalent rule in the RTODD statute. In general, if the law requires the involvement of an agent of the stock cooperative to authenticate and administer the creation of a TOD registration, there is an argument that a revocation should have the same safeguards. That way, the stock cooperative will have immediate access to all information that governs a TOD registration.

**The staff would like to postpone decision on this issue, because the general issue of the involvement of the stock cooperative in the TOD registration process is discussed further below.**

## PROBATE CODE SECTION 21134

TEXCOM asks whether Section 21134 should apply to property governed by a TOD registration:

Property that is the subject of a TOD registration is in many ways analogous to property that is the subject of a “specific gift” under a will or revocable trust. If property that is the subject of a specific gift is sold during the testator's lifetime, the gift is said to “adeem by extinction” (be revoked). Probate Code section 21134 provides certain protections to the prospective recipient of a specific gift when the subject property is sold or encumbered by an agent or conservator acting on behalf of an incapacitated testator. Namely, unless the instrument of gift expresses a contrary intent, if the subject property is sold, the recipient is entitled to a pecuniary gift equal to

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13. See Exhibit p. 4.

14. See Sections 5630, 5632, 5644.

the sale price (unreduced by the encumbrance, if any), and if the property is encumbered, the recipient is entitled to a pecuniary gift equal to the amount of the encumbrance, in addition to the subject property itself.

In TEXCOM's reading of the April 21 Recommendation, the protections of Probate Code section 21134 would not apply to the sale or encumbrance of a stock cooperative unit that is the subject of a TOD registration. Assuming this understanding is correct, the Commission may wish to consider whether the protections in Probate Code section 21134 should be extended to TOD registrations.<sup>15</sup>

The same question can also be asked about the RTODD. Both the RTODD statute and the proposed law in this study are silent regarding the application of Section 21134. However, the application of Section 21134 is addressed elsewhere in the Probate Code.

Section 21134 is located within Part 1 (commencing with Section 21101) of Division 11 of the Probate Code. Part 1 is entitled "Rules for Interpretation of Instruments." The application of Part 1 (and therefore Section 21134) is governed by Section 21101, which provides: "Unless the provision or context otherwise requires, this part applies to a will, trust, deed, and any other instrument." The reference to "deed" in that provision suggests that Section 21134 applies to an RTODD. The section also applies to "any other instrument." The Probate Code defines "instrument" as follows:

45. "Instrument" means a will, a document establishing or modifying a trust, a deed, or any other writing that designates a beneficiary or makes a donative transfer of property.

Both an RTODD and a TOD registration would be writings that designate a beneficiary and make a donative transfer of property.

By its own terms, Section 21134 applies to an "instrument of gift." The staff could not find a definition of that term. Reading it as plain language, it would seem to have the same meaning as "instrument," i.e., a writing that makes a donative transfer of property.

Thus, Section 21134 seems to already apply to an RTODD and would also apply to a TOD registration if the proposed law were enacted.

**Unless TEXCOM provides contrary information on this point, the staff does not see a need to act on it.**

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15. See Exhibit p. 4.

## TECHNICAL COMMENTS

TEXCOM points out a few technical drafting problems in the proposed law.<sup>16</sup> **The staff appreciates their help with this and will address those problems when preparing the next iteration of the proposed law.**

### POSSIBLE ALTERNATIVE DRAFTING APPROACH

#### **Background**

When this study was first initiated, the Commission intended to explore whether a nonprobate transfer of an interest in a stock cooperative could be achieved under the existing Uniform TOD Security Registration Act<sup>17</sup> (because ownership of an interest in a stock cooperative is typically grounded in ownership of a share of stock in the cooperative).

The Commission quickly recognized that reliance on that Act would probably be more trouble than it was worth. Instead, the Commission decided to develop a separate statute that would borrow concepts and language from both the Uniform TOD Security Registration Act and the RTODD statute, with any necessary modifications. That approach was grounded in an assumption that the differences between the proposed law in this study and the RTODD statute would outweigh the similarities.

One of the more important differences established early on was the decision to move toward a procedure centered on the stock cooperative as a neutral who would authenticate and administer the operation of a revocable TOD registration. This model is the one used in the Uniform TOD Security Registration Act. That move away from reliance on title insurance to validate the transfer suggested that the statute need not require recordation of a TOD registration.

Reliance on the stock cooperative to administer the TOD registration system would impose a burden and potential liability that some cooperatives would not want. For that reason, the Commission decided to make the application of the proposed law to a particular stock cooperative optional, at the election of the stock cooperative. Again, that would be consistent with the Uniform TOD Security Registration Act.

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16. See Exhibit p. 5.

17. Sections 5500-5512.

All of the assumptions discussed above started to unravel when the Commission learned that recordation is sometimes required when an interest in a stock cooperative is transferred or encumbered. That recordation establishes the record information necessary for the issuance of title insurance, in cases where it is required. In addition, when the Commission reached the point in this study where it was considering the effect of conflicting instruments on a TOD registration, it recalled that the approach to that issue taken in the RTODD statute relies heavily on recordation.

In order to address those issues, the Commission decided that the proposed law should require recordation of a TOD registration.

### **Fresh Look**

TEXCOM's letter has prompted the staff to take a fresh look at the proposed law and consider whether some significant restructuring might be warranted. In particular, the staff considered the following points:

- **Given that the statute has moved back toward a reliance on recording and title insurance, does it still make sense to involve the stock cooperative as a participant in the TOD process?** The staff sees three advantages to removing the stock cooperative as an actor in the process:
  - (1) There would be no need to make the proposed law optional, at the election of the stock cooperative. The beneficial effect of the proposed law would be greater if it were to apply universally to all stock cooperatives. This would also help to mitigate TEXCOM's concern that the effect of the law would be too modest to justify its complexity.
  - (2) There would be no need to require the signature of an agent of the stock cooperative on the original TOD instrument or on a revocation form. This would simplify the process for transferors. It would also directly address one of the concerns raised by TEXCOM (i.e., that requiring the signature of a stock cooperative agent on a revocation form is too burdensome).
  - (3) If the TOD process does not center on the stock cooperative, it would be much closer to the approach taken in the RTODD statute. Minimizing the differences between two such similar laws would likely reduce the risk of error (e.g., reading from the wrong FAQ or using the wrong form).
- **Although the staff does not agree that the complexity of the proposed law can be judged by the number of sections it contains, it seems likely that many people will have that as their first impression.** This could create problems in the legislative process,

where first impressions are often difficult to shake. Also, the more provisions in the proposed law, the more material there will be to cause snags. In general, a leaner bill is probably easier to enact.

- **One of the reforms that was just amended into the RTODD statute on the Commission's recommendation was the requirement that a beneficiary of an RTODD give notice to the transferor's heirs before the RTODD can operate.** The date of that notice serves as the trigger for the 120-day period for recordation of a lis pendens or conflicting instrument. The staff sees that as a significant improvement, because it alerts interested persons that an RTODD exists and is about to operate. Those persons can then take steps to intervene if they see a problem.

The proposed law does not include such a requirement, in large part because the involvement of the stock cooperative's agent was seen as enough of a protection against fraud. If the stock cooperative's agent were to be removed from the TOD process, that reason for omitting notice to heirs would disappear. Presumably, the proposed law should then require such notice. Especially in light of the discussion of conflicting instruments earlier in the memorandum, the staff believes that such notice is important. If the transferor's heirs are not given notice, they may not learn of a TOD registration until it is too late to object.

- **If the Commission decides to apply the notice requirement to stock cooperatives, the staff believes that the notice should also be given to the stock cooperative itself.** In addition to the 120-day periods for recording a lis pendens or a conflicting instrument, the RTODD statute also imposes a 120-day period for recording instruments that burden the title of the property to be transferred. Under Section 5652(b), an RTODD transfers property subject to limitations that are *recorded within the 120-day period*. If a stock cooperative has an option to repurchase interests on the death of the owner, or imposes limitations on the occupancy of units within the stock cooperative, those limitations would need to be recorded within the statutory period in order to avoid being extinguished by operation of the RTODD.

**The Commission should consider the points discussed above and decide whether it wants to make any changes to the proposed law to address them.**

To help the Commission in its consideration of the points made in this memorandum, the staff has prepared a draft of a proposed law that would implement all of the suggestions made above.

The draft language would also remove the requirement that a conflicting instrument be recorded in order to be viable (as discussed above).

The draft is attached to this memorandum, after the Exhibit.

Respectfully submitted,

Brian Hebert  
Executive Director





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June 23, 2021

VIA E-MAIL AND U.S. MAIL

California Law Revision Commission  
Attn: Mr. Brian Hebert  
c/o UC Davis School of Law  
400 Mrak Hall Drive  
Davis, California 95616  
E-mail: [bhebert@clrc.ca.gov](mailto:bhebert@clrc.ca.gov)

Re: Tentative Recommendation – Transfer on Death Registration of Interest in Stock Cooperative (#L-3032.5)

Dear Commissioners:

This letter addresses the April 2021 Staff Draft Recommendation (the “April 2021 Recommendation”) regarding Transfer on Death Registration of Interest in Stock Cooperative (“TOD Registration”) on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”).

Preliminary, TEXCOM commends the Commission and Staff for their careful consideration and methodical approach in addressing the issues involved in the non-probate transfer of an interest in a stock cooperative, as evidenced by the numerous memoranda produced during the course of this study.

TEXCOM understands, and has previously expressed its agreement with, the Commission’s conclusion that a Revocable Transfer on Death Deed (“RTODD”) is not an appropriate mechanism to accomplish a non-probate transfer of an interest in a stock cooperative. As a result of that conclusion, the Commission undertook Study L-3032.5 to consider whether the Uniform TOD Security Registration Act, Probate Code sections 5500-5012 (“TOD Registration Act”), could be adapted to apply to the testamentary transfer of an interest in a stock cooperative. Ultimately, rather than making modifications to the TOD Registration Act, the April 2021 Recommendation opts to add a whole new Part 5 to Division 5 of the Probate Code creating a statutory framework analogous to RTODDs, as modified by the

Commission's recommended changes currently pending before the Legislature under SB 315.<sup>1</sup> This decision was presumably driven, in part, by Commission Staff's finding that none of the 47 other states that have adopted the TOD Registration Act have modified it to apply to stock cooperatives, either by statute or court decision.<sup>2</sup> (CLRC Staff Memorandum 2020-16, p. 3.)

TEXCOM's primary observation regarding the April 21 Recommendation is that it appears to be somewhat of a solution – and a complicated one at that, adding over 50 new statutes to the Probate Code – in search of a problem. There are relatively few stock cooperatives in California; approximately 30,000 units according to the Commission's estimate. (CLRC Staff Memorandum 2020-5, p. 2.) Given that the participation of a stock cooperative in offering TOD registrations is completely optional under proposed Probate Code section 5802, the number of stock cooperative units potentially subject to the proposed legislation may well be substantially fewer than 30,000. In short, the April 21 Recommendation would devote a substantial statutory framework to potentially benefit a tiny percentage of Californians.<sup>3</sup>

TEXCOM's other main concern with the April 21 Recommendation will be familiar to the Commission because TEXCOM has repeatedly raised it in connection with RTODDs; namely, in the interest of providing a simple, inexpensive method of making a non-probate transfer of an interest in a stock cooperative, the proposed legislation incorporates numerous procedural requirements and safeguards that leave a large margin for error. TEXCOM is concerned that, in the aggregate, the cost savings enjoyed by stock cooperative owners who successfully navigate the procedural requirements of the proposed legislation may be largely offset by the legal expenses incurred by those who do not, or more precisely, their transferees, many of whom will likely have to resort to the courts to rectify mistakes made by the transferor.

With those general comments in mind, following are TEXCOM's observations on specific aspects of the April 21 Recommendation that, in TEXCOM's view, should be reconsidered, together with certain technical comments on the proposed legislation.

1. Recording Requirements Should be Removed. The recording requirements under the proposed legislation (i.e., §§5836, 5842, 5860, 5880, 5884, etc.) are inconsistent with how interests in stock cooperatives are held and transferred in the form of unrecorded stock certificates. The reason the Commission recommended that RTODDs not apply to stock cooperatives is that ownership of an interest in a stock cooperative is evidenced through an unrecorded share of stock, rather than a recorded deed. The April 21 Recommendation,

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<sup>1</sup> Unless otherwise noted, all references to the RTODD statutes include the proposed amendments under SB 315.

<sup>2</sup> TEXCOM would be curious to know whether stock cooperatives in California or other jurisdictions have allowed for TOD registrations under the existing TOD Registration Act, notwithstanding the lack of any such statutory modifications.

<sup>3</sup> According to a press release issued by the California Department of Finance in May 2021, California's population as of the beginning of this year was 39,466,855 people. Even if all 30,000 existing stock cooperative units adopted TOD registrations, that would represent approximately 0.076% of the state's population.



however, applies the RTODD recordation provisions to the TOD registration of an interest in a stock cooperative.

The Commission had initially tentatively decided against requiring recordation of a TOD registration. (CLRC Staff Memorandum 2021-5, p. 7.) The Commission, however, reversed course when considering the possibility of another instrument that conflicts with a TOD registration. To address this situation, the April 21 Recommendation includes proposed Probate Code section 5880 (borrowed from the RTODD statutes) which relies on recordation in determining the controlling instrument that will be given effect in disposing of an interest in the same stock cooperative unit. That section provides that if a TOD registration and another revocable instrument both purport to dispose of the same property, the later executed document will control, provided it is recorded within 120 days after the transferor's death. TEXCOM has several concerns with this section.

Section 5880 requires that the conflicting instrument itself be recorded. If the conflicting instrument is a revocable trust, this would require that the trust be notarized, which is not legally required and, therefore, not always done. More importantly, it would be antithetical to one of the primary reasons people choose to dispose of their assets through a revocable trust rather than a will – privacy (i.e., a trust does not become a public record). Conversely, if the conflicting document is a will, it is uncertain whether it could even be recorded in the first place, as wills are not notarized. It may be possible to have a will recorded after the testator's death, but presumably the will would first need to be admitted to probate. If there is a will contest or other complication in having the will admitted to probate (e.g., difficulty in finding a subscribing witness to a will that is not "self-proving"), it may be impossible to have the will recorded within 120 days after the testator's death (assuming it is recordable at all). In sum, in determining which of two or more conflicting instruments prevails, section 5880 essentially relies on a "race to record" standard, rather than ascertaining the transferor's intent.

As further support for recommending that TOD registrations be recorded, Staff Memorandum 2021-5 maintains the existence of a TOD registration must be indicated in the title records for purposes of obtaining title insurance for a future transfer or encumbrance requiring it. (CLRC Staff Memorandum 2021-5, p. 7.) If prior transfers of interests in the same stock cooperative unit were effectuated without recordation, however, TEXCOM does not understand the necessity of recording TOD registrations.

For the reasons set forth above, TEXCOM suggests that the April 21 Recommendation be modified to eliminate the recordation requirement. Unlike a deed, a TOD registration would be held by an agent of the stock cooperative, who maintains the records to chain of title in the stock cooperative and can authenticate any transfers. Recordation is, therefore, unnecessary.

2. TOD Registrations Should be Easier to Revoke. Article 2 of the proposed legislation provides that a TOD registration may be revoked by a transferor “having the capacity to contract” by executing and recording a revocation in the same manner as the TOD registration was established; that is, the revocation must be signed by both the transferor and an officer of the stock cooperative and both signatures must be acknowledged by a notary public. The proposed legislation provides a statutory form for this purpose.

TEXCOM believes the foregoing requirements for revoking a TOD registration are unduly burdensome. People often make estate planning decisions on the eve of major or potentially life-threatening events; e.g., embarking on an extended vacation or undergoing major surgery. The proposed legislation would require a transferor seeking to revoke a TOD registration to not only locate a notary to acknowledge the transferor’s signature on the revocation, but to locate an officer of the stock cooperative to countersign the revocation, and perhaps another notary to acknowledge the officer’s signature. The revocation must then be recorded. A transferor wishing to revoke a TOD registration on short notice may not be able to accomplish all of these tasks in time, and therefore would be stuck with a TOD registration contrary to the transferor’s intentions. In TEXCOM’s view, a transferor should be capable of revoking a TOD registration unilaterally, without the need of a notary public or agent of the stock cooperative.<sup>4</sup>

TEXCOM also questions whether revocation of a TOD registration should require contractual capacity, or whether mere testamentary capacity should suffice.

3. Ademption. Property that is the subject of a TOD registration is in many ways analogous to property that is the subject of a “specific gift” under a will or revocable trust. If property that is the subject of a specific gift is sold during the testator’s lifetime, the gift is said to “adeem by extinction” (be revoked). Probate Code section 21134 provides certain protections to the prospective recipient of a specific gift when the subject property is sold or encumbered by an agent or conservator acting on behalf of an incapacitated testator. Namely, unless the instrument of gift expresses a contrary intent, if the subject property is sold, the recipient is entitled to a pecuniary gift equal to the sale price (unreduced by the encumbrance, if any), and if the property is encumbered, the recipient is entitled to a pecuniary gift equal to the amount of the encumbrance, in addition to the subject property itself.

In TEXCOM’s reading of the April 21 Recommendation, the protections of Probate Code section 21134 would not apply to the sale or encumbrance of a stock cooperative unit that is the subject of a TOD registration. Assuming this understanding is correct, the Commission may wish to consider whether the protections in Probate Code section 21134 should be extended to TOD registrations.

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<sup>4</sup> Having a simplified revocation procedure for TOD registrations would be consistent with wills, which require certain formalities to create, but which may be revoked simply by destroying the document.



4. Technical Comments.

a. The statutory TOD registration form under proposed Probate Code section provides that, when naming a trust as the TOD beneficiary, the TOD registration must state, inter alia, "the date shown on the signature page of the trust." The date of a trust is not always written on the signature page. Also, trusts are generally identified by the date they are created, not the date of any subsequent amendment or restatement. Accordingly, TEXCOM suggests changing the above language to something along the lines of "the date the trust was originally established."

b. Line 24 of the first page of Common Questions states, "IF I AM UNABLE TO SIGN THE DEED . . ." The word "DEED" should presumably be replaced with "TOD REGISTRATION."

c. Section 5872 refers to a "revocable transfer on death deed." Presumably, this should refer to a "TOD registration."

Thank you for your consideration of TEXCOM's comments regarding the April 21 Recommendation. If you have any questions, or if we may provide any additional information regarding TEXCOM's perspective on these matters, we invite you to contact either of us by e-mail or telephone at (DeAnne Parker: [dparker@dparkerlaw.com](mailto:dparker@dparkerlaw.com) / (530) 242-6025) (John Andersen: [jandersen@fcoplaw.com](mailto:jandersen@fcoplaw.com) / (805) 844-7950).

Respectfully submitted,



DeAnne E. Parker



John M. Andersen

Trusts and Estates Section Executive Committee  
California Lawyers Association

cc: Saul Bercovitch (via email to [saul.bercovitch@calawyers.org](mailto:saul.bercovitch@calawyers.org))  
Ellen McKissock (via email to [emckissock@hopkinscarley.com](mailto:emckissock@hopkinscarley.com))  
Matthew McMurtrey (via email to [mmcmurtrey@trustlitigation.la](mailto:mmcmurtrey@trustlitigation.la))



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## PROPOSED LEGISLATION

### **Prob. Code § 5610 (amended). “Real property” defined**

SECTION 1. Section 5610 of the Probate Code, as amended by 2021 Cal. Stat. ch. 215, is amended to read as follows:

5610. (a) Except as provided in subdivision (b), “real property” means either of the following:

(1) A parcel of land that is improved with one to four residential dwelling units.

(2) A residential separate interest and its appurtenant common area in a common interest development, regardless of the number of separate interests in the common interest development.

(b) “Real property” does not include ~~either of the following:~~

~~(1) A separate interest in a stock cooperative.~~

~~(2) A~~ a parcel of agricultural land that is greater than 40 acres in size. For the purposes of this ~~paragraph~~ subdivision, “agricultural land” means land that is designated for agricultural use by law or by a document that is recorded in the county in which the land is located.

(c) The definition of “real property” shall be construed pursuant to the circumstances that existed on the execution date shown on the revocable transfer on death deed.

**Comment.** Section 5610 is amended to include an interest in a stock cooperative within the meaning of “real property.”

### **Prob. Code § 5614 (amended). “Revocable transfer on death deed” defined**

SEC. 2. Section 5614 of the Probate Code is amended to read as follows.

(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.”

(c) A revocable transfer on death deed may be used to transfer real property even if ownership of the property is not typically evidenced or transferred by use of a deed.

**Comment.** Section 5614 is amended to make clear that a revocable transfer on death deed can be used to transfer real property of a type that is not typically transferred by use of a deed (e.g., an interest in a stock cooperative).

### **Prob. Code § 5614.5 (added). “Stock cooperative” defined**

SEC. 3. Section 5614.5 is added to the Probate Code, to read:

5614.5. “Stock cooperative” has the meaning provided in Section 4190 of the Civil Code.

**Comment.** Section 5614.5 is new. It is added for drafting convenience.

1 **Prob. Code § 5642 (amended). Excerpt from Frequently Asked Questions**

2 SEC. 4. Section 5642 of the Probate Code, as amended by 2021 Cal. Stat. ch. 215, is  
3 amended to read as follows:

4 5642. ...

5 COMMON QUESTIONS ABOUT THE USE OF THIS FORM

6 ...

7 CAN I USE THIS DEED TO TRANSFER NONRESIDENTIAL PROPERTY? No.  
8 This deed can only be used to transfer residential property. Also, the deed cannot be used  
9 to transfer ~~a unit in a stock cooperative~~ or a parcel of agricultural land that is over 40  
10 acres in size.

11 ...

12 WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary  
13 must do all of the following: (1) RECORD evidence of your death (Prob. Code § 210).  
14 (2) File a change in ownership notice (Rev. & Tax. Code § 480). (3) Provide notice to  
15 your heirs that includes a copy of this deed and your death certificate (Prob. Code §  
16 5681). If the property is in a stock cooperative, the beneficiary must also give notice to  
17 the stock cooperative. Determining who is an “heir” can be complicated. Your  
18 beneficiary should consider seeking professional advice to make that determination. (4)  
19 RECORD an affidavit affirming that notice was sent to your heirs (and, if necessary, to a  
20 stock cooperative) (Prob. Code § 5682(c)). (5) If you received Medi-Cal benefits, your  
21 beneficiary must notify the State Department of Health Care Services of your death and  
22 provide a copy of your death certificate (Prob. Code § 215). Your beneficiary may wish  
23 to consult a professional for assistance with these requirements.

24 ...

25  
26 **Comment.** Section 5642 is amended to reflect the fact that the revocable transfer on death deed  
27 can be used to transfer an interest in a stock cooperative. See Section 5614.5 (“stock cooperative”  
28 defined).

29 **Prob. Code § 5652 (amended). Effect of transfer**

30 SEC. 4. Section 5652 of the Probate Code, as amended by 2021 Cal. Stat. ch. 215, is  
31 amended to read as follows:

32 5652. (a) A revocable transfer on death deed transfers all of the transferor’s interest in  
33 the property on the transferor’s death according to the following rules:

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

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

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

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



1 (b) Property is transferred by a revocable transfer on death deed subject to any  
2 limitation on the transferor’s interest that is of record at the transferor’s death or that is  
3 recorded no later than 120 days after the affidavit required by subdivision (c) of Section  
4 5682 is recorded, ~~including, but~~ Limitations on the transferor’s interest may include but  
5 are not limited to, a lien, encumbrance, easement, lease, restriction on occupancy, option  
6 to purchase the property on the transferor’s death, limitation on the transfer value in a  
7 limited equity housing cooperative, or other instrument affecting the transferor’s interest,  
8 whether recorded before or after recordation of the revocable transfer on death deed. The  
9 holder of rights under that instrument may enforce those rights against the property  
10 notwithstanding its transfer by the revocable transfer on death deed. An enforceable  
11 restriction on the use of the transferred property does not affect the transfer of title to the  
12 property by a revocable transfer on death deed.

13 (c) If a stock cooperative exercises an option to purchase property transferred by a  
14 revocable transfer on death deed on the transferor’s death, the result is as follows:

15 (1) The property is transferred to the stock cooperative rather than the beneficiary.

16 (2) The purchase price is paid to the beneficiary. Unless the law or the governing  
17 documents of the stock cooperative provide otherwise, the purchase price is the fair  
18 market value of the property, less the amount of any liens or encumbrances on the  
19 property at the time of the owner’s death and less any amount that the decedent owed the  
20 stock cooperative.

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

23 **Comment.** Subdivision (b) of Section 5652 is amended to refer to types of limitations that may  
24 exist in a stock cooperative. Such limitations may also exist in other types of developments. or  
25 other type of real property development.

26 Subdivision (c) is added to provide guidance on the steps to be followed when a stock  
27 cooperative exercises an option to purchase an interest that was transferred by revocable transfer  
28 on death deed. Paragraph (2) makes clear that the price paid to purchase property in a stock  
29 cooperative may be limited by law or the governing documents of the stock cooperative. For  
30 example, in a limited equity housing cooperative, the amount paid will be based on a specified  
31 transfer value, rather than fair market value. See Civ. Code § 817. See also Section 5614.5  
32 (“stock cooperative” defined).

33 **Prob. Code § 5660 (amended). Conflicting instruments**

34 SEC. 6. Section 5660 of the Probate Code, as amended by 2021 Cal. Stat. ch. 215, is  
35 amended to read as follows:

36 5660. (a) If a revocable transfer on death deed recorded on or before 60 days after the  
37 date it was acknowledged before a notary public and another instrument both purport to  
38 dispose of the same property:

39 ~~(a) If the other instrument is not recorded within 120 days after the affidavit required~~  
40 ~~by subdivision (c) of Section 5682 is recorded, the revocable transfer on death deed is the~~  
41 ~~operative instrument.~~

42 ~~(b) If the other instrument is recorded within 120 days after the affidavit required by~~  
43 ~~subdivision (c) of Section 5682 is recorded and~~

1     (1) If the other instrument makes a revocable disposition of the property, the later  
2 executed of the revocable transfer on death deed or the other instrument is the operative  
3 instrument.

4     ~~(c) If the other instrument is recorded within 120 days after the affidavit required by~~  
5 ~~subdivision (c) of Section 5682 is recorded and~~

6     (2) If the other instrument makes an irrevocable disposition of the property, the other  
7 instrument and not the revocable transfer on death deed is the operative instrument.

8     (b) A claim that a revocable transfer on death deed is inoperative pursuant to this  
9 section is grounds for a contest under Chapter 5 (commencing with Section 5970).

10     **Comment.** Section 5660 is amended to remove the requirement that a conflicting instrument  
11 be recorded in order to be effective and to make clear that a claim that a revocable transfer on  
12 death deed is invalid pursuant to this section is grounds for a contest.

13     **Prob. Code § 5681 (amended). Required notice**

14     SEC. 6. Section 5681 of the Probate Code, as added by 2021 Cal. Stat. ch. 215, is  
15 amended to read as follows:

16     5681. (a) After the death of the transferor, the beneficiary of a revocable transfer on  
17 death deed shall serve notice on the transferor’s heirs, along with a copy of the revocable  
18 transfer on death deed and a copy of the transferor’s death certificate. If the property  
19 governed by the revocable transfer on death deed is an interest in a stock cooperative, the  
20 beneficiary shall also serve those documents on the stock cooperative.

21     (b) The notice required by subdivision (a) shall be in substantially the following form:

22             “NOTICE OF REVOCABLE TRANSFER ON DEATH DEED

23     The enclosed revocable transfer on death deed was created by: [name of deceased  
24 transferor].

25     It affects the following property: [description of property used on revocable transfer on  
26 death deed].

27     It names the following beneficiaries: [beneficiary(ies) named on the revocable transfer  
28 on death deed].

29     As a result of the death of [name of deceased transferor], the deed will transfer the  
30 described property to the named beneficiaries, without probate administration.

31     If you believe that the revocable transfer on death deed is invalid and you wish to stop  
32 it from taking effect, you have only 120 days from the date of this notice to file a fully  
33 effective challenge. You should act promptly and may wish to consult an attorney.”

34     (c) For the purposes of this section, if the beneficiary has actual knowledge of a final  
35 judicial determination of heirship for the deceased transferor, the beneficiary shall rely on  
36 that determination. Otherwise, the beneficiary shall have discretion to make a good faith  
37 determination, by any reasonable means, of the heirs of the transferor.

38     (d) The beneficiary need not provide a copy of the notice to an heir who is either of the  
39 following:

40     (1) Known to the beneficiary but who cannot be located by the beneficiary after  
41 reasonable diligence.

42     (2) Unknown to the beneficiary.

1 (e) The notice shall be served by any of the methods described in Section 1215 to the  
2 last known address.

3 (f) If a revocable transfer on death deed names more than one beneficiary, only one of  
4 the beneficiaries is required to comply with this section.

5 (g) (1) A beneficiary who fails to serve the notification required by this section on an  
6 heir who is not a beneficiary and whose identity is known to the beneficiary shall be  
7 responsible for all damages caused to the heir by the failure, unless the beneficiary shows  
8 that they made a reasonably diligent effort to comply. For purposes of this subdivision,  
9 “reasonably diligent effort” means that the beneficiary has delivered notice pursuant to  
10 Section 1215 to the heir at the heir’s last address actually known to the beneficiary.

11 (2) A beneficiary is not liable under this subdivision if that beneficiary reasonably  
12 relied, in good faith, on another beneficiary’s statement that the other beneficiary would  
13 satisfy the requirements of this section.

14 (3) A beneficiary is not to be held to the same standard as a fiduciary.

15 **Comment.** Section 5681 is amended to require that notice be given to a stock cooperative  
16 when an interest in the stock cooperative would be transferred by a revocable transfer on death  
17 deed. See Section 5614.5 (“stock cooperative” defined).