

CALIFORNIA LAW REVISION COMMISSION

TENTATIVE RECOMMENDATION

Revocable Transfer on Death (TOD) Deed

August 2006

The purpose of this tentative recommendation is to solicit public comment on the Commission's tentative conclusions. A comment submitted to the Commission will be part of the public record. The Commission will consider the comment at a public meeting when the Commission determines what, if any, recommendation it will make to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made to it.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN **October 10, 2006.**

The Commission will often substantially revise a proposal in response to comment it receives. Thus this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission

4000 Middlefield Road, Room D-1

Palo Alto, CA 94303-4739

650-494-1335

<commission@clrc.ca.gov>

SUMMARY OF TENTATIVE RECOMMENDATION

In this recommendation the Law Revision Commission analyzes the revocable transfer on death deed (revocable TOD deed), or beneficiary deed as it is known in some jurisdictions, for possible adoption in California. The revocable TOD deed transfers real property to a named beneficiary on the death of the owner without probate; it is revocable until that time.

The recommendation includes a comparison of existing real property donative transfer devices under California law. The recommendation includes a review of experience in the nine jurisdictions that have enacted revocable TOD deed legislation. The recommendation also addresses in depth the legal incidents of the revocable TOD deed.

The Commission finds that existing real property donative transfer devices do not serve the same function as the revocable TOD deed. Experience with the revocable TOD deed is generally favorable in other jurisdictions. After weighing the advantages and disadvantages of the revocable TOD deed, the Commission concludes that revocable TOD deed legislation would be beneficial in California.

The Commission solicits public comment on the tentative recommendation.

The recommendation was prepared pursuant to Chapter 422 of the Statutes of 2005.

REVOCABLE TRANSFER ON DEATH (TOD) DEED

OUTLINE

BACKGROUND	3
Charge from Legislature	3
Terminology	4
EXISTING DEVICES	4
Overview	4
Lifetime Deed	7
Will or Intestate Succession	7
Intervivos Trust	9
Joint Tenancy	10
Community Property	11
Intervivos Transfer with Reserved Life Estate	12
Revocable Deed	13
Conveyance Pursuant to Nonprobate Transfer	15
NATURE OF REVOCABLE TRANSFER ON DEATH DEED	17
Jurisdictions that Recognize Revocable TOD Deed	17
Operation of Revocable TOD Deed	17
Experience in Other Jurisdictions	18
LEGAL INCIDENTS OF REVOCABLE TOD DEED	23
Operational Issues	23
Capacity	23
Execution of Deed	24
Delivery	25
Acceptance	26
Recordation	26
Battle of Recorded Deeds	27
Effect of Other Instruments	28
Effectuation of Transfer	31
Contest	31
Rights of Transferor	33
Ownership Interest Retained	33
Revocability	33
Multiple Owners	36
Subsequent Incapacity of Owner	37
Ownership Interest Conveyed	38
Common Interest Development	38
Permit, Lease, License, Easement, Extraction or Removal Right, or Other Lesser Interest	39
Rights of Beneficiary	39
Revocable TOD Deed Creates No Beneficiary Rights Until Transferor's Death	39
Who May Be a Beneficiary	40
Failure to Survive and Lapse	42
Deed Restrictions and Conditions	43
Multiple Beneficiaries	44
Covenants and Warranties	46
Proceeds of Property	46

Disclaimer of Interest.....	47
Rights of Family Members.....	47
Possession of Family Dwelling and Probate Homestead	47
Omitted Spouse or Child.....	48
Rights of Creditors.....	49
Creditor Rights During Transferor’s Life.....	50
Creditor Rights After Transferor’s Death.....	51
Rights of Third Party Transferee	53
Taxation.....	53
Gift Tax.....	53
Estate Tax and Generation Skipping Transfer Tax	54
Income Tax	55
Property Tax	55
Change of Tax Burdens	56
Medi-Cal Eligibility and Reimbursement	56
Implementation of Revocable TOD Deed.....	57
Statutory Form.....	57
Alternative Types of Transfer	58
Retroactivity	59
EVALUATION OF REVOCABLE TOD DEED	59
Adequacy of Other Instruments	59
Need for the Device	61
Concern About Revocable TOD Deed Concept	62
Balancing Need Against Concerns.....	64
Conclusion	65
PROPOSED LEGISLATION	67

1

BACKGROUND

2 **Charge from Legislature**

3 The Legislature has directed the Law Revision Commission to conduct a study
4 to determine whether legislation establishing a beneficiary deed should be enacted
5 in California.¹

6 “Beneficiary deed” is the term used in several jurisdictions that have adopted the
7 concept that an owner of real property may deed the property to a named
8 beneficiary, the transfer to become operative on the owner’s death and is
9 revocable until then. The effect of the deed is to pass the property directly to the
10 beneficiary without probate on the death of the owner.

11 The Legislature has identified specific issues for the Commission to address in
12 the study. They are:²

13 (1) Whether and when a beneficiary deed would be the most appropriate
14 nonprobate transfer mechanism to use, if a beneficiary deed should be recorded or
15 held by the grantor or grantee until the time of death, and, if not recorded, whether
16 a potential for fraud is created.

17 (2) What effect the recordation of a beneficiary deed would have on the
18 transferor’s property rights after recordation.

19 (3) How a transferor may exert his or her property rights in the event of a
20 dispute with the beneficiary.

21 (4) Whether it would be more difficult for a person who has transferred a
22 potential interest in the property by beneficiary deed to change his or her mind
23 than if the property were devised by will to the transferee or transferred through a
24 trust or other instrument.

25 (5) The tax implications of a beneficiary deed for the transferor, the transferee,
26 and the general public as a result of the nonprobate transfer, including whether the
27 property would be reassessed and if tax burdens would shift or decrease.

28 The Commission has identified many other issues that must be addressed to enable
29 it to make an informed recommendation to the Legislature. This study addresses
30 all the issues.

31 The Legislature’s charge includes the direction that the Commission review the
32 statutes of other states that establish a beneficiary deed as a means of conveying
33 real property through a nonprobate transfer.³ Nine jurisdictions now authorize a

1. See AB 12 (DeVore), enacted as 2005 Cal. Stat. ch. 422. The Commission’s report on the matter is due on or before January 1, 2007.

2. 2005 Cal. Stat. ch. 422 § 1(b).

3. 2005 Cal. Stat. ch. 422 § 1(a).

1 beneficiary deed.⁴ This study draws upon those statutes and experience under
2 them.

3 **Terminology**

4 Of the nine jurisdictions that have legislation of this type, five use the term
5 “beneficiary deed”⁵ and four use the term “transfer on death deed”.⁶

6 Much of this study is addressed to the question of what rights are retained by the
7 transferor and what rights are transferred to the beneficiary by a beneficiary deed
8 that remains revocable and does not become effective until the transferor’s death.

9 Confusion about the legal effect of this type of deed stems in part from use of
10 the name “beneficiary deed”. The term seems to imply that the named beneficiary
11 has an interest in the property as a result of recordation of the deed, whereas the
12 thrust of this study is that no such interest is created.⁷

13 Some of the confusion occasionally experienced concerning the effect of the
14 deed would be dispelled by use of “revocable transfer on death” terminology,
15 regardless of the awkwardness of the phrase. This study adopts revocable transfer
16 on death terminology. “Revocable transfer on death deed” is more descriptive of
17 the nature of the transfer device than “beneficiary deed”; the device may also be
18 referred to as a “revocable TOD deed”.

19 **EXISTING DEVICES**

20 **Overview**

21 A number of options are available under existing California law for passing real
22 property to a beneficiary at death. The major devices are:

- 23 • Lifetime Deed
- 24 • Will or Intestate Succession
- 25 • Intervivos Trust

4. The jurisdictions are Arizona, Arkansas, Colorado, Kansas, Missouri, New Mexico, Nevada, Ohio, and Wisconsin.

5. Arizona, Arkansas, Colorado, Missouri, and Nevada.

6. Kansas, New Mexico, Ohio, and Wisconsin.

7. See, e.g., Kirtland and Seal, *Beneficiary Deeds and Estate Planning*, 66 Ala. Law 118, 119 (March 2005):

What makes the deed most useful as an estate planning and/or probate avoidance technique is that the grantee-beneficiary has no vested interest in the property until the actual death of the current owner. The current owner is free to change the grantee-beneficiary at any time simply by executing a new deed (a beneficiary deed, quit claim deed, warranty deed or any other form of deed) and recording that new deed. Because the grantee-beneficiary does not have any current interest in the property, the current owner does not need the consent, signature, or cooperation of the grantee-beneficiary to revoke the beneficiary deed or execute a new deed.

- 1 • Joint Tenancy
- 2 • Community Property
- 3 • Intervivos Transfer with Reserved Life Estate
- 4 • Revocable Deed
- 5 • Conveyance Pursuant to Nonprobate Transfer

6 “If we were concerned to complete a taxonomy of will substitutes, we could
7 lengthen our list to include devices that are scorned by lawyers and financial
8 intermediaries but that still attract laymen. A substantial case law chronicles
9 laymen’s quixotic attempts to achieve will-like results by manipulating the
10 contingent estates and delivery rules of the law of deeds. The gift *causa mortis* is a
11 transparent will substitute, but it can be messy to prove, and it is difficult to keep
12 in force because of the rule that it self-destructs on the donor’s return to health.
13 These and other stray dogs of the American law of gratuitous transfers populate
14 the law school casebooks but have not been quantitatively important in the
15 nonprobate revolution.”⁸

16 This study reviews a few key considerations relating to each major device,
17 including ownership rights, revocability, cost and ease of transmission, privacy,
18 creditor rights, taxes, and Medi-Cal eligibility and reimbursement. The objective is
19 to determine whether the revocable TOD deed fills a need not filled by other real
20 property donative transfer devices.

21 For the purpose of this study:

22 “*Ownership Rights*” refers to the ownership interest retained by the transferor
23 during life. Some transfer devices allow a transferor to retain full ownership rights
24 during life; others transfer incidents of ownership immediately.

25 “*Revocability*” of the device refers to the owner’s ability to make a change to
26 the beneficiary designation, or to revoke the property disposition, so long as the
27 owner retains legal capacity. Some transfer devices are revocable, others are
28 irrevocable.

29 “*Cost and Ease of Transmission*” associated with a particular device refers to
30 implementation of the transfer of the real property to the beneficiary. The various
31 devices invoke widely disparate procedures and costs. Some involve recordation
32 of an affidavit of death; others require judicial action.

33 “*Privacy*” refers to the ability of the transferor to avoid public scrutiny of the
34 transfer. Some types of transfer at death require public court proceedings; others
35 are private and free of public scrutiny. In any event, a real property transfer must
36 ultimately be recorded and become a public record in order to be fully effectual.

37 A transferor may not wish to alert a potential beneficiary to the transferor’s
38 estate plan. Whether it is sound estate planning not to notify a beneficiary or

8. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1115 (1984).

1 publicize the transfer is another matter. A beneficiary that is aware of the
2 transferor's intentions and actions can take steps to implement the transfer in a
3 timely manner. There also may be some benefit from the publicity attendant on a
4 transfer — for example, fraud, duress, or undue influence may be exposed.

5 “*Creditor Rights*” addresses the fact that some types of transfer devices subject
6 the property to the transferor's creditors. Creditor rights are not recognized
7 against many nonprobate transfer techniques, or the law governing them may be
8 unclear. While that may be advantageous to a nonprobate transfer beneficiary, it is
9 questionable whether it represents sound public policy.

10 The ability of the beneficiary's creditors to reach the beneficiary's expectancy
11 interest in property that is the subject of a donative transfer likewise varies with
12 the type of transfer. A creditor may have an immediate right to reach the asset in
13 some cases; in other cases the creditor must wait until the transferor's death.

14 “*Taxes*” are the estate tax, generation skipping transfer tax, gift tax, income tax,
15 and property tax.⁹ Depending on the particular transfer device, the property may
16 or may not remain part of the transferor's taxable estate for estate tax and
17 generation skipping transfer tax purposes.¹⁰ Property that passes from a transferor
18 at death may receive a new basis (often stepped up) for income tax purposes.

19 With respect to property tax, real property passing from a transferor is
20 reassessed when a “change in ownership” occurs. Special rules apply if the
21 property passes to a spouse or domestic partner or is a personal residence passing
22 to a child. The time when a change in ownership, and reassessment, occurs
23 depends on the type of transfer used.

24 “*Medi-Cal Eligibility and Reimbursement*” refers to the fact that a transferor's
25 objective in making a transfer of real property may be to reduce assets in order to
26 achieve Medi-Cal eligibility, as well as to as to remove the property from the
27 transferor's estate so that it will be immune from the state's claim for
28 reimbursement of benefits provided to the transferor.¹¹

9. The state inheritance tax was repealed in 1982, and was replaced by a state pick up tax equal to the amount of the federal estate tax credit.

10. The federal taxation system is currently in flux. Under the Economic Growth and Tax Relief Reconciliation Act of 2001, the taxable estate exclusion increases steadily to \$3.5 million in 2009, and the estate tax and generation skipping transfer tax are repealed in 2010. The repeal sunsets in 2011 and a taxable estate exclusion of \$1 million is revived. Meanwhile the gift tax exclusion amount holds steady at \$1 million. Congress has considered, but not yet adopted, proposals to make the repeal permanent. For purposes of analysis, this recommendation assumes that the repeal will sunset in 2011.

11. Such a transfer may cause the transferor to lose Medi-Cal eligibility for a period of time. The decedent's principal residence is an exempt asset for Medi-Cal eligibility purposes, but may nonetheless be subject to the state's claim for reimbursement after the decedent's death.

The state may obtain reimbursement for the value of services provided to a Medi-Cal recipient from the recipient's “estate”. The term is broadly defined, and includes property that passes to a beneficiary at the decedent's death through a variety of devices, including joint tenancy, survivorship, living trust, “or other arrangement.” See 42 USC § 1396p(b)(4); see also Welf. & Inst. Code § 14009.5 (property of decedent passing by distribution or survival).

1 **Lifetime Deed**

2 A transferor may make a quick, inexpensive, and effective transfer of real
3 property by the simple device of a lifetime deed of the property to the beneficiary,
4 while retaining possession and control of the property until death.

5 That option has its limitations. An outright transfer of property during life is
6 irrevocable and it puts the owner's control and use of the property at risk if the
7 transferee becomes abusive — asserting a right to possession or borrowing on the
8 equity or transferring it to others. The lifetime deed leaves the property subject to
9 enforcement for the transferee's unrelated debts; it is impossible for the owner to
10 use the equity for the owner's own benefit, through a reverse mortgage, for
11 instance; and it can cause unfavorable tax consequences for the transferee.

12 The transferor may attempt to avoid some of the adverse consequences of a
13 lifetime deed by holding it unrecorded with other estate planning instruments, or
14 by giving the deed to the beneficiary with instructions to record it after the
15 transferor's death. These techniques may have unpredictable consequences.

- 16 • *Ownership Rights.* The transferor retains no ownership rights, and is at the
17 sufferance of the beneficiary.
- 18 • *Revocability.* Irrevocable.
- 19 • *Cost and Ease of Transmission.* Simple and efficient.
- 20 • *Privacy.* Public record of transfer.
- 21 • *Creditor Rights.* Creditors of transferor may not reach property. Creditors
22 of beneficiary may reach property.
- 23 • *Taxes.* Subject to gift tax and not part of transferor's taxable estate.
- 24 • *Medi-Cal Eligibility and Reimbursement.* Property not in transferor's
25 estate for eligibility determination but transfer may affect eligibility.

26 **Will or Intestate Succession**

27 A transferor may transfer property at death by will or intestate succession. A
28 will passes no interest in property until the transferor's death, and is revocable and
29 may be changed up to the moment of death.

30 The property passes by operation of law at the transferor's death. It is subject to
31 probate administration. The personal representative deeds the property to
32 distributees pursuant to court order.

33 ***Probate Administration***

34 Probate administration involves determination of heirs or devisees and
35 settlement of debts and taxes. Court supervision is involved, and the procedure
36 provides a forum in case of a dispute. Probate administration includes family
37 protections to ensure that the transferor's family is not left destitute, such as the
38 family allowance and the probate homestead. Because probate administration is a
39 judicial proceeding all acts and records are public. Probate fees include filing fees,
40 personal representative and legal fees, and probate referee fees.

1 A probate estate can seldom be closed more quickly than six months after the
2 transferor's death. Even for a routine estate, nine months may be more typical.

3 The cost of probate administration is based on the value of the estate. A probate
4 referee values the estate (for which the referee receives a commission plus
5 expenses). The personal representative is entitled to compensation on a sliding
6 scale, starting at 4% on the first \$100,000, going down to 1% of amounts between
7 \$1 million and \$10 million, and allowing smaller percentages for larger estates.
8 The estate attorney's compensation for ordinary services is on the same scale as
9 the personal representative's. There are also filing fees and other costs. A
10 reasonable estimate is that combined fees for a routine \$400,000 estate are about
11 \$23,000.

12 Costs can be reduced, and administration expedited, in a routine estate by use of
13 "independent administration" procedures. These procedures involve limited court
14 supervision. However, there is an irreducible minimum time required for notice to
15 creditors and processing of claims in probate administration.

16 Probate administration is similar in effect to a bankruptcy proceeding. It
17 discharges the transferor's debts and allows property to pass to beneficiaries free
18 of creditor claims. The same cannot be said of small estate procedures.

19 *Small Estate Procedures*

20 If the transferor's estate, or real property in it, is of relatively small value, it may
21 pass by will or intestate succession without probate administration:

- 22 • In the case of an estate having a gross value under \$100,000, the
23 beneficiary may obtain a court order determining that the beneficiary has
24 succeeded to the property. The proceeding may not be brought before 40
25 days have elapsed since the transferor's death. The beneficiary is liable for
26 the transferor's debts, not exceeding the value of the property received.
- 27 • In the case of real property valued at \$20,000 or less, the beneficiary may
28 file and record an affidavit of succession. The beneficiary must wait at
29 least six months after the transferor's death before using this procedure,
30 and the beneficiary remains personally liable for the transferor's debts
31 (limited to the value of the property and any income and interest generated
32 by it).

33 These devices are of little use for passing real property such as a family home
34 cheaply and expeditiously, since California real estate values have inflated in
35 many cases beyond the statutory limits.

- 36 • *Ownership Rights.* The transferor retains full ownership rights.
- 37 • *Revocability.* The transferor may change or revoke disposition.
- 38 • *Cost and Ease of Transmission.* Costly and time consuming, except for
39 small estate.
- 40 • *Privacy.* Privacy before death, publicity after death.

- 1 • *Creditor Rights*. Creditors of transferor may reach property in probate but
2 are precluded after probate, unless small estate procedures are used.
3 Creditors of beneficiary have no access to property until distribution.
- 4 • *Taxes*. Property is part of taxable estate. Beneficiary receives new tax
5 basis.
- 6 • *Medi-Cal Eligibility and Reimbursement*. Property remains in transferor's
7 estate for eligibility determination, and is subject to reimbursement claim
8 of state.

9 **Intervivos Trust**

10 There was a time when a will and probate was the standard means of passing
11 property at death, but that is no longer the case. The instrument of choice for an
12 estate planner today is the intervivos trust.

13 The concept of the living trust was popularized in the 1960's with the
14 publication of Dacey, *How to Avoid Probate* (1965). Under a Dacey Trust a settlor
15 would put all of the settlor's property into a revocable trust with the settlor as
16 trustee. The settlor would have full use of the property during the settlor's life. On
17 the settlor's death, the successor trustee would simply convey the property to the
18 beneficiary designated in the trust.

19 The technique was viewed as an antidote to the delay and expense of probate.
20 During the 1960's that was perhaps a more significant issue than it is today, with
21 the advent of independent administration and other techniques that have helped
22 speed up the probate process and have limited its cost.

23 The intervivos trust is now commonplace and trust instruments are more
24 sophisticated. One complaint about the trust as a device for transferring property at
25 death is that a lawyer-drawn trust can be lengthy and costly. Self help books and
26 software are available for the do it yourselfer; however, these may require some
27 sophistication. An inexpensive trust prepared by a "trust mill" often will be
28 inappropriate for the particular individual and may be used as a loss leader for sale
29 of other products to the consumer such as insurance.

30 The expense of a trust may be significantly less than the expense of probate
31 administration. A trust provides a more expeditious means of transferring property
32 at death than a will or intestate succession.

33 There are drawbacks to use of an intervivos trust. Family protections such as the
34 probate homestead are unavailable to dependents of the transferor. The
35 transferor's creditors may be able to reach the property if the estate is insufficient.
36 California law allows the trustee to conduct an optional creditor claims procedure,
37 parallel to the procedure available in a probate proceeding, enabling the trustee to
38 cut off creditor claims.

39 Often a trust is unfunded, i.e., the settlor fails to convey the property to the
40 trustee. The trustee (or successor trustee) must be the owner of the property in
41 order to make an effective conveyance of the property to the named beneficiary
42 after the transferor's death. There is case law in California to the effect that real

1 property may pass under a trust instrument even though the settlor has not
2 executed a deed in favor of the trustee.¹² Whether a title company would insure
3 title in such a case without a court determination of rights is questionable.

4 Trust property is included in the decedent's taxable estate for estate tax
5 purposes. The beneficiary gets an adjusted basis because the property is
6 considered as having been acquired from a decedent. Though technically the
7 transferor is not the owner of property transferred in trust, the transferor is
8 considered the owner for estate tax purposes because the transferor retains
9 revocation rights. Similarly, transfer of real property into trust does not trigger a
10 property tax reassessment; that occurs only on distribution from the trust.

- 11 • *Ownership Rights.* The transferor retains possession of the property
12 although technically the ownership rights are now in the trustee. The
13 transferor ordinarily acts as trustee.
- 14 • *Revocability.* The transferor may change or revoke the disposition.
- 15 • *Cost and Ease of Transmission.* Low cost both to create and implement a
16 trust.
- 17 • *Privacy.* Can be kept private before death, but better practice and economy
18 requires recordation of transfer during life (though not distribution scheme
19 of trust instrument), and failure to record transfer of real property in trust
20 necessitates court order to implement.
- 21 • *Creditor Rights.* Creditors of transferor may reach property during
22 transferor's life; after death they may reach property to extent estate is
23 inadequate. Procedure is available to flush out creditor claims after death.
24 Creditors of beneficiary have no access to property until distribution,
25 subject to spendthrift limitations.
- 26 • *Taxes.* Property is part of taxable estate. Beneficiary receives new tax
27 basis. Creation of trust does not trigger reassessment.
- 28 • *Medi-Cal Eligibility and Reimbursement.* Property is considered part of
29 transferor's estate for eligibility determination, and is subject to
30 reimbursement claim of state.

31 **Joint Tenancy**

32 A classical way to pass real property to a beneficiary on death outside of
33 property is through joint tenancy. That is a form of joint ownership of property,
34 consisting of equal and undivided interests of the joint tenants during life. After
35 death the surviving joint tenant acquires ownership of the whole by right of
36 survivorship. The surviving joint tenant records an affidavit of death in order to
37 establish ownership.

38 Joint tenancy is problematic in a number of respects. Because it creates a present
39 interest in the beneficiary, the beneficiary has immediate ownership rights. The

12. See Estate of Hegstad, 16 CA 4th 943, 20 CR 2d 433 (1993).

1 gift is irrevocable and not subject to change by the transferor. The beneficiary may
2 have different ideas about use of the property, or may seek partition. The
3 beneficiary can encumber or sell the beneficiary's interest, and that interest is
4 subject to claims of creditors.¹³

5 Creation of a joint tenancy is a gift of a present interest, and therefore may
6 trigger a gift tax. At the transferor's death, the transferor's proportionate interest is
7 included in the transferor's estate; the beneficiary receives an adjusted basis for
8 the transferor's share.

- 9 • *Ownership Rights*. Immediate transfer of property interest.
- 10 • *Revocability*. Irrevocable.
- 11 • *Cost and Ease of Transmission*. Simple and economical.
- 12 • *Privacy*. Recordation of the deed is not necessary to create joint tenancy,
13 but is at risk of intervening interests if unrecorded.
- 14 • *Creditor Rights*. Beneficiary's creditors may reach beneficiary's share
15 during life. On death of transferor, transferor's creditors lose rights against
16 the property.
- 17 • *Taxes*. Taxable as gift on creation; includable in the transferor's estate;
18 new income tax basis on transferor's share.
- 19 • *Medi-Cal Eligibility and Reimbursement*. May cause loss of eligibility,
20 and fractional interest remains subject to state reimbursement.

21 **Community Property**

22 The principal focus of this analysis is transfer of real property to the next
23 generation or to a third party. Therefore passage of community property to the
24 surviving spouse on the death of the transferor is described only briefly.

25 Either spouse has the right of testamentary disposition of one half the
26 community property; absent a will the transferor's share passes to the surviving
27 spouse. Community property receives favorable tax treatment. Effectuating the
28 transfer is relatively efficient.

29 A new title form is authorized by statute — “community property with right of
30 survivorship”. It is intended that the new title form will combine the best attributes
31 of community property and joint tenancy for passing property to the surviving
32 spouse. Community property with right of survivorship is not subject to
33 testamentary disposition, and its passage may be confirmed to the surviving
34 spouse under the joint tenancy affidavit procedure. It is intended that the property
35 will receive the double step up in tax basis that is a characteristic of community
36 property, although federal treatment of the new form is not yet clear.

13. On the other hand, when the decedent dies, the beneficiary takes the decedent's interest free of claims of the decedent's creditors.

- 1 • *Ownership Rights.* Joint control. Limited to spouses and domestic
2 partners.
- 3 • *Revocability.* Transferor may revoke community property with right of
4 survivorship and dispose of interest by will.
- 5 • *Cost and Ease of Transmission.* Inexpensive and efficient.
- 6 • *Privacy.* Community property with right of survivorship must be recorded
7 before death; confirmation by recorded affidavit after death.
- 8 • *Creditor Rights.* Creditors of either spouse may reach entire property
9 before or after death.
- 10 • *Taxes.* Favorable tax treatment for both transferor and beneficiary.
- 11 • *Medi-Cal Eligibility and Reimbursement.* Interspousal transfer does not
12 affect eligibility. No reimbursement claim against surviving spouse during
13 survivor's life.

14 **Intervivos Transfer with Reserved Life Estate**

15 A technique that has been used to pass property at death outside probate but that
16 is not common is an intervivos transfer of the property to the beneficiary with the
17 transferor reserving a life estate. On the transferor's death, the life tenancy interest
18 is cleared by recordation of an affidavit of death.

19 Splitting title in this way may be problematic. Experience shows that conflicts
20 may arise between the life tenancy and the remainder interest. Creditors of the
21 remainder beneficiary may be able to reach the remainder interest, and perhaps
22 force partition. Rights of the transferor's creditors against the property are
23 terminated by the transferor's death. For tax purposes, the property is included in
24 the transferor's estate.

25 This device is apparently effective to transfer property without affecting Medi-
26 Cal eligibility, and without subjecting the property in the hands of the beneficiary
27 to Medi-Cal reimbursement.

- 28 • *Ownership Rights.* Transferor retains possession during life, but there are
29 difficult issues concerning waste and the like.
- 30 • *Revocability.* Irrevocable.
- 31 • *Cost and Ease of Transmission.* Simple and cost effective.
- 32 • *Privacy.* Transfer must be recorded to be fully effective.
- 33 • *Creditor Rights.* Remainder interest subject to beneficiary's creditors.
34 Death of the transferor terminates rights of creditors of the transferor.
- 35 • *Taxes.* Taxable in same manner as estate property.
- 36 • *Medi-Cal Eligibility and Reimbursement.* Apparently will preserve Medi-
37 Cal eligibility and will not subject the beneficiary to reimbursement
38 liability.

1 **Revocable Deed**

2 *California Law*

3 A revocable deed is a grant of real property subject to a life estate, with a
4 reserved power of revocation. The revocable deed was validated by the California
5 Supreme Court in the 1914 case of *Tennant v. John Tennant Memorial Home*.¹⁴ In
6 that case the grantor gave a revocable deed and did not exercise the power of
7 revocation during her life; the beneficiary took the property on the grantor's death.
8 Both the grantor's estate and her heirs sued to recover the property; the beneficiary
9 resisted on the ground that the deed made an effective nonprobate transfer of the
10 property. The court held in favor of the beneficiary:¹⁵

11 [The grantor] did then, in fact and in law, convey to the grantee the future estate
12 which, at her death, became an estate in possession, to said grantee. The deed was
13 not the same, in effect, as a will. It passed a present interest in the remainder,
14 upon the contingency that the grantor should not, during her life, convey to
15 another, or revoke the deed. The will would have had no such effect. The
16 contingencies did not happen, hence the estate is now absolute.

17 The revocable deed has remained in use in California. In the 2002 case of *Bonta*
18 *v. Burke*,¹⁶ for example, a Medi-Cal recipient executed a fee simple grant deed of
19 her house to her daughters, but retained a life estate in the property and the right to
20 revoke the remainder interest. The apparent intent was to reduce the grantor's
21 assets for qualification purposes but at the same time retain a beneficial interest in
22 the property and dispositional flexibility until death. On the death of the Medi-Cal
23 recipient, the state Director of Health Services filed a reimbursement claim against
24 the beneficiaries of the real property conveyed to them. The *Bonta* court held that
25 the revocable deed used in that case falls within the ambit of property that passes
26 at the transferor's death for Medi-Cal purposes:¹⁷

27 We conclude that Smith [the Medi-Cal recipient] retained a significant "interest
28 in property" until her death. As a life tenant she retained not only the enjoyment
29 of the property but also, as the holder of the right to revoke the remainder, the
30 unbridled power to divest her daughters of any interest whatsoever. As a
31 consequence, the property had no value to them until Smith died. Consistent with
32 the legislative policy of reaching assets not irrevocably transferred to
33 beneficiaries, Smith's interest in the real property passed to her daughters at the
34 time of her death, who took it by survival. The Department, therefore, is entitled
35 to recover from the recipients of her property the cost of the medical services

14. 167 Cal. 570, 140 P. 242 (1914).

15. 167 Cal. at 579, 140 P. at 247.

16. 8 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

17. 98 Cal. App. 4th at 794, 120 Cal. Rptr. 2d at 77.

1 rendered to Smith. She received the services she needed during her lifetime and
2 the State is entitled to reimbursement after her death.

3 This is a complex type of transfer that is relatively unknown. There may be
4 conflict between the life estate and contingent remainder. A transferor would be
5 ill-advised to try this without benefit of counsel. There may be self-help forms that
6 could make this an effectual nonprobate transfer device.

7 ***Other Jurisdictions***

8 Some other jurisdictions recognize the revocable deed as an “enhanced life
9 estate” or as a “Lady Bird Deed.”¹⁸ The deed takes the form of a quitclaim to a
10 named beneficiary, reserving to the owner an “enhanced” life estate that includes
11 the power to dispose of the property. If the owner transfers the property during life
12 to another person, the transfer prevails over the claim of the quitclaim beneficiary.
13 If there is no lifetime transfer, the property passes at death to the quitclaim
14 beneficiary free of probate.

15 This type of nonprobate transfer of real property has been validated in
16 Michigan.¹⁹ Under the Estate and Protected Individuals Code of Michigan the
17 transfer enables the grantor to retain control over transfer of the property during
18 life but avoids probate on the death of the grantor.²⁰

19 It has been said that in Florida the enhanced life estate is used, rather than other
20 forms of nonprobate transfer, because the transfer does not impact the transferor’s
21 Medicaid eligibility and the property is exempt from Medicaid recoupment and
22 other claims against the transferor.²¹ That would be different from the result in
23 California.

- 24 • *Ownership Rights.* Owner retains control; may also be free of control by
25 contingent remainder.
- 26 • *Revocability.* Owner may revoke transfer and execute transfer to new
27 beneficiaries.
- 28 • *Cost and Ease of Transmission.* Simple and cost effective.
- 29 • *Privacy.* Recordation before death apparently not necessary, but subject to
30 intervening interests.

18. It is said Texas law recognizes this type of deed, and that President Lyndon B. Johnson once used it to convey property to his wife Lady Bird.

19. See Opinion of Michigan Probate Court for the County of Wayne, In the Matter of the Estate of Dolores Ann Davis, Case No. 2004-684984 (March 29, 2005); noted in 18 Quinpiac Prob. L. J. 247 (2005).

20. See Calhoun County Courts, EPIC Questions and Answers, <<http://courts.co.calhoun.mi.us/epic0459.htm>> (“The grantor may want to make it clear that the power to convey includes the power to sell, gift, mortgage, lease and otherwise dispose of the property.”).

21. Florida Guardianship Practice § 2.23 (4th ed. 2003).

- 1 • *Creditor Rights*. Life estate subject to transferor’s creditors during life;
2 partition possible.
- 3 • *Taxes*. Includable in transferor’s estate.
- 4 • *Medi-Cal Eligibility and Reimbursement*. Does not affect eligibility, but
5 remainder interest subject to reimbursement.

6 **Conveyance Pursuant to Nonprobate Transfer**

7 It is possible that California law already authorizes a direct conveyance of real
8 property effective on death. The general nonprobate transfer law states:²²

9 A provision for a nonprobate transfer on death in an insurance policy, contract
10 of employment, bond, mortgage, promissory note, certificated or uncertificated
11 security, account agreement, custodial agreement, deposit agreement,
12 compensation plan, pension plan, individual retirement plan, employee benefit
13 plan, trust, *conveyance, deed of gift*, marital property agreement, or *other written*
14 *instrument of a similar nature* is not invalid because the instrument does not
15 comply with the requirements for execution of a will, and this code does not
16 invalidate the instrument.

17 The statute appears to address primarily an instrument in which the property
18 being transferred is under the control of a third person — insurance proceeds,
19 account, pension plan, trust, and the like — instances where a beneficiary
20 designation has classically been recognized and effectuated by the person holding
21 the asset. However, Probate Code Section 5000 as drafted is broader than that, and
22 it specifically refers to a conveyance and deed of gift.

23 The general nonprobate transfer statute is drawn from the Uniform Probate
24 Code. The Law Revision Commission’s Comment to it impliedly recognizes
25 application of the provision to a real property transfer.²³

22. Prob. Code § 5000(a) (emphasis added).

23. The Commission Comment states:

The phrase “or other written instrument of a similar nature” has been substituted in subdivision (a) of Section 5000 for the language “or any other written instrument effective as a contract, gift, conveyance, or trust” (which was found in the introductory portion of subdivision (a) of Section 160 of the repealed Probate Code). The Supreme Court of Washington read the replaced language to relieve against the delivery requirement of the law of deeds. See *In re Estate of O’Brien*, 109 Wash.2d 913, 749 P.2d 154 (1988). The substitution of the language in subdivision (a) makes clear that Section 5000 does not have this effect. See *First Nat’l Bank of Minot v. Bloom*, 264 N.W.2d 208, 212 (N.D.1978), in which the Supreme Court of North Dakota held that “nothing in ... the Uniform Probate Code [provision] eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another.”

The *O’Brien* case disapproved in the Comment involved unconditional deeds of real property executed by the donor to a named beneficiary (her daughter). The donor kept possession of the property throughout her life, and held the deeds undelivered in a safe deposit box with the intent to pass the property to her daughter at her death. The Washington court held that under the Uniform Act, delivery of the deeds was unnecessary and the donor’s intent to make a nonprobate transfer on death was effectuated.

1 Prof. McCouch suggests that the general nonprobate transfer law could be
2 improved by specifying formalities in the case of a nonprobate transfer of real
3 property:²⁴

4 The UPC drafters might consider authorizing a form of deed that would transfer
5 real property at the owner's death, relying on the recording system as a substitute
6 for probate formalities. Under such a statute, an owner would be able to execute
7 and record a deed which expressly conveys real property at death and has no
8 effect on legal ownership or control during the owner's life. Mechanically, such a
9 deathtime transfer is just as simple as a conventional joint tenancy or a lifetime
10 conveyance with retained life estate. It also raises no greater danger of fraud or
11 mistake than any other beneficiary designation. To preserve the integrity of the
12 recording system, however, the owner should be required to comply with the

The Comment's disapproval of *O'Brien* goes only to the delivery requirement, not the ability to make a nonprobate conveyance of real property effective at death. The dissenters in *O'Brien* make this point. "The majority's conclusion that the deeds meet the legal requirements of delivery should have ended the matter as a valid deed is effective to pass an interest at death. The majority, however, goes on to hold that these undelivered deeds effectively passed title to Robinson by operation of [the nonprobate transfer statute]." 109 Wash.2d at 921, 749 P.2d at 158.

The Comment cites with approval the *Bloom* case, which holds on similar facts that the nonprobate transfer statute does not validate an undelivered deed. "There is nothing in that section of the Uniform Probate Code or any other section of the Century Code which eliminates the necessity of delivery of a deed to effectuate a conveyance from one living person to another. In this case, we have upheld the finding of the district court that there was no actual or constructive delivery of the deed, and therefore the deed is not effective." 264 N.W.2d at 212 (citations omitted).

Prof. McCouch observes that "The fundamental problem is that the catch-all clause does not define its own scope with any precision. Indeed, it cannot do so if it is to remain sufficiently flexible to embrace new and evolving will substitutes. Although the UPC official comment expressly approves *Bloom* and disapproves *O'Brien*, it fails to identify any additional transactions that the revised statute is intended to validate." McCouch, *Will Substitutes Under the Revised Uniform Probate Code*, 58 Brooklyn L. Rev. 1123, 1135-36 (citations omitted).

Presumably, in either of these cases, if a real property deed conditioned to take effect at the donor's death had been delivered to the beneficiary, it would have been effective under the general nonprobate transfer statute. Michigan, for example, has the same language in its Estates and Protected Persons Code (EPIC). Michigan recognizes as valid a real property deed that provides a conveyance on death pursuant to the general nonprobate transfer statute. See Calhoun County Courts, *EPIC Questions and Answers*, <<http://courts.co.calhoun.mi.us/epic0220.htm>>.

The Michigan panel advises caution in the use of this device:

MCL 700.6101 should be used with caution because of the ramifications of the transaction. A deed transferring real estate on death is not a revocable transaction. The original owner cannot reclaim the property or cancel the designation. The original owner can no longer convey or mortgage the property without the consent of the designated taker on death. The execution and delivery (recording) of the deed has income, estate and gift tax implications which are beyond the scope of this panel. The transaction may also have implications for Medicaid purposes such as whether the real estate continues to be an exempt asset.

24. *Id.* at 1143 (citations omitted). As Professor McCouch suggested, the National Conference of Commissioners on Uniform State Laws at its 2006 conference decided to convene a drafting committee for the purpose of developing uniform revocable TOD deed legislation.

1 recording formalities in exercising any retained power of appointment under a
2 recorded deed.

3 The Commission cannot evaluate this device, assuming it is available in
4 California, because none of its attributes has been defined or tested. In fact, the
5 specification and evaluation of the attributes of a revocable transfer on death deed
6 is the subject of this study.

7 NATURE OF REVOCABLE TRANSFER ON DEATH DEED

8 **Jurisdictions that Recognize Revocable TOD Deed**

9 Nine jurisdictions now authorize a revocable transfer on death deed (or
10 beneficiary deed as it is referred to in five of these jurisdictions). They are, in
11 order of enactment:

12 Missouri (1989)²⁵

13 Kansas (1997)²⁶

14 Ohio (2000)²⁷

15 Arizona (2001)²⁸

16 New Mexico (2001)²⁹

17 Nevada (2003)³⁰

18 Colorado (2004)³¹

19 Arkansas (2005)³²

20 Wisconsin (2006)³³

21 **Operation of Revocable TOD Deed**

22 The revocable TOD deed is a deed of real property that designates a beneficiary
23 to which the property will pass on the transferor's death. The general operation of
24 this device is subject to some variation among the jurisdictions that have enacted
25 it. Generally speaking:

25. Mo. Rev. Stat. § 461.025.

26. Kan. Stat. Ann. § 59-3501.

27. Ohio Rev. Code Ann. § 5302.22.

28. Ariz. Rev. Stat. § 33-405.

29. N.M. Stat. Ann. § 45-6-401.

30. Nev. Rev. Stat. § 111.109.

31. Colo. Rev. Stat. § 15-15-401.

32. Ark. Code Ann. § 18-12-608.

33. Wisc. Stat. § 705.15.

- 1 • The deed must state prominently that no interest in the property is
2 conveyed until the transferor's death. The deed need not be delivered to
3 the beneficiary. The deed must be recorded before death to be effective
4 as a transfer, and the property passes to the beneficiary outside of
5 probate. Until that time the deed can be revoked, and a new revocable
6 TOD deed executed to a different beneficiary. A beneficiary has no
7 present interest in the property, which remains within the transferor's
8 absolute possession and control.
- 9 • The transfer on death is not affected by the transferor's will. But if the
10 beneficiary fails to survive the transferor, the property passes through
11 the transferor's estate.
- 12 • The property is subject to creditor claims against the transferor. A
13 secured obligation is enforceable against the property.
- 14 • The property is taxable in the same manner as property in the decedent's
15 estate. The Medicaid consequences vary from jurisdiction to
16 jurisdiction.
- 17 • To effectuate the transfer, the beneficiary records a death certificate.

18 **Experience in Other Jurisdictions**

19 Experience with the revocable TOD deed in other jurisdictions is compiled
20 here.³⁴

21 ***Missouri (1989)***

22 The Missouri statute has been in effect since 1989 and is the only statute under
23 which there is substantial experience. The beneficiary deed is widely used and has
24 become routine in Missouri. The most recent reliable estimate is that there are
25 some 350,000 beneficiary deeds currently of record in Missouri.

26 An estate planning attorney typically uses the beneficiary deed in a smaller
27 estate. However, an attorney that does sophisticated estate planning may use a
28 beneficiary deed on occasion, particularly where the client wishes to hold the main
29 residence in joint tenancy outside a living trust. The beneficiary deed has been felt
30 to be a useful addition to the Missouri estate planner's arsenal of tools.

31 The Missouri statute provides the formalities and rules necessary to make an
32 effective transfer outside of probate, and addresses many topics concerning the
33 effect of the transfer.³⁵ When the beneficiary deed legislation was first enacted,
34 title insurers were apprehensive about it. However, the concerns never
35 materialized and now a title company will insure a beneficiary deed title as a
36 matter of course.

34. The compilation is based on a review of the legal literature, together with information received from stakeholders within the jurisdiction.

35. See Missouri Estate Planning, Will Drafting and Estate Administration Forms § 3.7 (2005).

1 There has been relatively little litigation over the device.³⁶ There are no reports
2 of abuses of the device. The consensus of practitioners is that experience with it is
3 positive.

4 ***Kansas (1997)***

5 The Kansas statute was designed to aid elder law practitioners and clients in
6 providing an alternative to a will or nonprobate device such as a trust. It was felt
7 that clear statutory language would enable clients and practitioners to feel safe that
8 if the deed were formed according to the statute there would be no problems in its
9 operation.

10 The Kansas bar appears to find the revocable transfer on death deed preferable
11 to joint tenancy as a means of transferring property at death without probate:³⁷

12 A better alternative in many situations for transferring an interest in real estate a
13 death and avoiding probate is titling the real estate in transfer-on-death. A
14 transfer-on-death deed will transfer ownership of the interest upon the death of the
15 owner. The grantee designation may be changed or revoked at any time during the
16 life of the owner without the consent of the grantee.

17 The Kansas bar also has catalogued perceived advantages and disadvantages of the
18 revocable transfer on death deed:³⁸

19 The fact that a grantee beneficiary or beneficiaries has no ownership in the
20 property during the lifetime of the record owner affords the following advantages
21 that are not available under joint tenancy ownership.

- 22 • The owner does not need to have the signature of the beneficiary.
- 23 • The property is not subject to the grantee beneficiary's debts.
- 24 • The property is not subject to the rights of the grantee beneficiary's
25 spouse.

36. There have been a few cases under the Missouri statute. *Estate of Dugger*, 110 S.W. 3d 423 (2003), involved a beneficiary deed that was executed but unrecorded at the grantor's death. This was not a valid nonprobate transfer under the statute, which requires that the deed be recorded before death as a formality that takes the place of the delivery requirement.

Pippin v. Pippin, 154 S.W. 3d 376 (2004), involved a beneficiary deed that did not expressly state it was to become effective on the death of the owner. The deed said it was to become effective on the last to die of joint grantors. The court held the deed was not a valid nonprobate transfer under the statute, which requires a statement in the deed that it is effective on the death of the owner. (The dissent would have effectuated the deed, based on the clear intent of the grantor.) *Pippin* caused some consternation in practice; attorneys were advised to review previously executed deeds due to the possibility they could fail under the *Pippin* test, and to execute new deeds that included the magic words. Meanwhile, legislative action appears to have cured the problem.

37. Kansas Real Estate Practice and Procedure Handbook § 3.18 (Kan. Bar Ass'n 1999). See also Kansas Long Term Care Handbook § 1.48 (Kan. Bar Ass'n 2001) ("This new law is an estate planning tool solving the problem of transferring real estate without probate and without the pitfalls of joint tenancy.")

38. Kansas Long-Term Care Handbook § 1.48 (Kan. Bar Ass'n 2001).

- 1 • The property is not affected by the incapacity of the grantee beneficiary
- 2 or the grantee beneficiary's spouse.
- 3 • The grantee beneficiary does not need to know about the beneficiary
- 4 designation.
- 5 • The designation does not disqualify the owner for Medicaid.
- 6 • The designation can be revoked without the signature of the grantee
- 7 beneficiary.
- 8 • A new designation can be executed without having to revoke the old
- 9 one.
- 10 • The owner can pass property to a trust under the beneficiary
- 11 designation.
- 12 • The designation is a will substitute and avoids probate.

13 This is a relatively new law and there have been no reported cases. Some of the
14 disadvantages of using a transfer-on-death deed are:

- 15 • What happens to the contents of the home and items of personalty?
- 16 • Who is going to pay the bills?
- 17 • If there are minors, a conservator must be appointed to manage or sell
- 18 the property.
- 19 • If one of the grantee beneficiaries is incapacitated with no agent under a
- 20 financial durable power of attorney, a conservator must be appointed to
- 21 manage or sell the property.
- 22 • The real estate is subject to Estate Recovery.

23 No matter how real estate is passed, it may be subject to estate tax, and it is
24 taken subject to any mortgages and liens on the property.

25 *Ohio (2000)*

26 The revocable transfer on death deed appears to be used and useful in Ohio. It
27 has been said that it “adds to the arsenal” of methods to avoid probate. The “most
28 important advantage of a transfer-on-death (TOD) deed is that the beneficiary or
29 beneficiaries have no interest in the property during the lifetime of the owner of
30 the interest.”³⁹ The formalities must be complied with, however, and the transfer
31 fails if the transferor fails to record the deed before death.⁴⁰ It has been suggested
32 that one of the advantages of the device in Ohio is that it ensures continuing title
33 insurance coverage, unlike some other lifetime estate planning transfers such as a
34 spousal transfer or a transfer in trust.⁴¹

39. 1 Baldwin's Oh. Prac. Merrick-Rippner Prob. L. § 14:20 (2005).

40. In re Estate of Scott, 164 Ohio App. 3d 464, 842 N.E. 2d 1071 (2005).

41. Bidar, *One Step Forward and Two Steps Back?*, 13 Prob. L. J. of Ohio 61 (Jan./Feb. 2003) (“By using this form of ownership, both the tax planning and probate avoidance objectives are achieved, while title insurance coverage is preserved because the original insured remains the owner after the conveyance.”)

1 *Arizona (2001)*

2 The estate planning bar in Arizona appears to find that the device fills a need:⁴²

3 The beneficiary deed is an ideal tool for the married couple or person with a
4 simple, modest-sized estate. This typically would involve someone whose
5 primary asset is a paid-off home. The modest size of the estate usually does not
6 warrant the expense of a revocable trust. Because the equity in the home will
7 likely exceed \$50,000, a probate proceeding would normally have to be
8 commenced upon the death of the owner because the \$50,000 limitation for real
9 property affidavits has been exceeded. The good news is that the probate process
10 can now be avoided through the use of this new deed.

11 Practitioners have noted problems. If the transferor is a joint tenant, the survivor
12 may undo the beneficiary deed. There are technical requirements for recordation.
13 An improperly drafted deed or one that does not conform to all of the legal
14 requirements may create problems that are not discovered for quite some time,
15 when it may be too late to correct them.

16 Title companies have also been concerned. The Land Title Association of
17 Arizona notes the following issues under the Arizona statute, as originally enacted:

- 18 • Beneficiaries unaware that they need to record a death certificate.
- 19 • The consequences if the beneficiary predeceases the transferor.
- 20 • The effect of a conveyance or encumbrance by the transferor after
21 recordation of a beneficiary deed.
- 22 • Whether notice of the beneficiary deed must be given to the beneficiary.
- 23 • The effect of a beneficiary deed on property held in joint tenancy.
- 24 • How to designate successor beneficiaries.
- 25 • The effect of a deed to a class, such as heirs, rather than to a named
26 beneficiary.
- 27 • Whether a transfer to a beneficiary who is married requires any special
28 community property waiver.
- 29 • Can the beneficiary be an entity?
- 30 • How do multiple grantees hold title if the transferor fails to specify?

42. Murphy, *Drafting the New Beneficiary Deed*, 38 Arizona Attorney 30, 31 (June 2002) (footnote omitted). See also Ciupak and Forest, *Beneficiary Deeds: Potential & Problems*, Arizona Journal of Real Estate & Business p. 37 (Oct. 2001):

In short, Beneficiary Deeds are ideal for small estates wishing to avoid probate and associated costs, such as a single parent with a modest estate leaving the property to children at death. The Beneficiary Deed does not provide for posthumous control of the property, as would a trust, but does transfer ownership at death in an uncomplicated manner. There may be a relatively small niche best suited for the Beneficiary Deed, but it appears the Beneficiary Deed can be an effective, inexpensive estate planning tool when used correctly.

1 These issues were all either cured by 2002 legislation or are addressed by pending
2 legislation.⁴³

3 *New Mexico (2001)*

4 The revocable TOD deed appears to be functioning reasonably well in New
5 Mexico. Experienced New Mexico title insurers confirm this; the one problem
6 they identify is that the beneficiary's rights are subject to the statutory widow's
7 allowance and the statutory children's allowance, both provided by New Mexico's
8 probate law.

9 Other issues that have surfaced in connection with the New Mexico statute
10 include questions about what interests the beneficiary takes "subject to", the
11 authority of the transferor's agent, the priority of an encumbrance imposed after
12 recordation of a revocable TOD deed and before the transferor's death,
13 inappropriate use of a warranty deed, and notification of the tax assessor.

14 If the revocable TOD beneficiary wants to sell or mortgage the property after the
15 transferor's death, the title company will ask that a probate of the transferor's
16 estate be opened, if one is not already open, and a release obtained from the
17 personal representative.

18 Experts caution that a revocable transfer on death deed must be drafted and
19 recorded properly under the New Mexico statute. Adverse experience has been
20 reported where the deed was unrecorded at the transferor's death. Having an
21 attorney draft the deed is wise, and coordinating with an estate plan is also
22 important.⁴⁴ Nonetheless, many people execute revocable TOD deeds without
23 advice of counsel, using the statutory form which is available from forms
24 publishers through stationery stores.

25 *Nevada (2003)*

26 Preliminary indications from Nevada are that the device is infrequently used.
27 Most owners of real property have other assets as well, and for that purpose a trust
28 is the preferred device for disposing of the entire estate.

29 *Colorado (2004)*

30 The Colorado statute replaces an older transfer on death deed statute that had
31 left many questions unanswered. The Colorado Bankers Association worked with
32 the Colorado Bar Association to address concerns of financial institutions in

43. The Land Title Association of Arizona's legislative committee chair observes, "Bottom line — with the 2002 revisions, I think the beneficiary deed is working pretty well — at least, we haven't seen significant issues, other than the one LTAA is trying to fix this session. I think the bill is pretty comprehensive."

44. See Rudd, *Ask the Probate Judge — Transfer on Death Deeds*, Albuquerque Journal (2/27/2003). See also Senior Citizens' Law Office of Albuquerque, New Mexico, on line advice.

1 formulating the new 2004 beneficiary deed legislation. The issues were worked
2 out satisfactorily, and the statute now appears to be operating smoothly.

3 There is some indication from the practicing bar that the new statute, because it
4 answers many questions, will pave the way for increased use of the beneficiary
5 deed. It is believed that it will help avoid the need to probate a smaller estate that
6 includes real property.

7 *Arkansas (2005)*

8 Practitioners appear to be unfamiliar with the new device.⁴⁵ The deed is
9 untested.

10 *Wisconsin (2006)*

11 Wisconsin's TOD deed legislation is new. It is similar to other existing TOD
12 deed statutes. There is no experience yet under the statute.

13 LEGAL INCIDENTS OF REVOCABLE TOD DEED

14 If revocable TOD deed legislation were enacted in California, what would it
15 look like? How would it operate in practice? What would be its effect on the rights
16 of the owner, beneficiaries, family members, creditors, third party transferees?
17 How would it affect taxes and Medi-Cal? Would there be a statutory form? These
18 questions are addressed in detail below to enable an informed determination of the
19 merits of the revocable TOD deed and whether it provides a useful alternative to
20 other means of donative transfer of real property.⁴⁶

21 Operational Issues

22 **Capacity**

23 The revocable TOD deed is a will substitute. The legal capacity to make a will is
24 a lower standard than the legal capacity to make a real property transfer.

45. The Arkansas Law Review has not yet published anything concerning it.

46. The analysis does not separately address the interrelation of the issues with the domestic partnership laws. Its application to domestic partnership is important because it is likely that the revocable TOD deed would become a commonly used vehicle (preferable to joint tenancy) for use by domestic partners. However, the statutes governing property rights of registered domestic partners make those rights equivalent to the rights of spouses. See, e.g., Fam. Code § 297.5. To the extent a revocable TOD deed statute protects interests of a spouse, for example an omitted spouse or community property rights in a revocable TOD deed transfer, the statute would protect the interests of a registered domestic partner. To the extent a revocable TOD deed statute deals with the rights of a former spouse, for example an ex-spouse named as a beneficiary, the statute would deal with the rights of a former registered domestic partner.

1 To make a will, the decedent must understand the nature of the act, the nature of
2 the property, and the decedent's relationship to family members and others.⁴⁷ To
3 make a real property transfer, the transferor must have the capacity to contract;
4 that requires that the transferor understand the rights, duties, and responsibilities
5 created by the act being performed, the probable consequences of the act for the
6 transferor and other persons affected by it, and the significant risks, benefits, and
7 reasonable alternatives to the act.⁴⁸ There is some indication in the case law that to
8 made a gift deed, the transferor need only have testamentary capacity, not
9 contractual capacity.⁴⁹

10 None of the nine revocable TOD deed jurisdictions addresses the capacity issue.
11 Presumably in those jurisdictions it will be the higher contract standard that
12 prevails.

13 A person who does not have contractual capacity may be susceptible to fraud,
14 duress, and undue influence. That danger is addressed somewhat, in the will
15 context, by the requirement that the instrument be witnessed. A real property deed,
16 on the other hand, is not ordinarily witnessed. The authenticity of the deed is
17 protected by the notarization requirement.

18 If a decedent's will is challenged for lack of testamentary capacity, that issue is
19 resolved in a probate proceeding, before property is transferred to the beneficiary.
20 In the case of a revocable TOD deed, the property passes directly to the
21 beneficiary; any challenge to the transfer is retroactive. A post transfer challenge
22 is sufficient in the case of a real property transfer, since real property is immobile.

23 The revocable TOD deed, like a will, is a donative transfer of property that takes
24 effect on death and is revocable by the transferor until then. For that reason,
25 testamentary capacity should be sufficient to enable execution of a revocable TOD
26 deed. The possibility of fraud, duress, or undue influence is controlled by
27 execution formalities and the availability of a post death challenge.

28 **Execution of Deed**

29 Most states require that a revocable TOD deed be signed, dated, and
30 acknowledged by the record owner. These execution requirements are
31 straightforward and appropriate.

32 Most statutes state explicitly that the deed need not be supported by
33 consideration. Such a provision is probably unnecessary in California, where that
34 is already the general rule.⁵⁰

47. Prob. Code § 6100.5.

48. Prob. Code § 812.

49. *Goldman v. Goldman*, 116 Cal. App. 2d 227, 253 P. 2d 474 (1953).

50. See, e.g., Civ. Code § 1040.

1 Although the revocable TOD deed is a will substitute, no state requires that it be
2 witnessed. In California a witness is not required for any of the authorized types of
3 nonprobate transfer — e.g., creation of a trust or designation of a pay on death
4 beneficiary for an insurance policy, pension plan, securities account, or account in
5 a financial institution.⁵¹ Many of the authorized nonprobate transfer instruments
6 involve a third party intermediary that oversees the execution of a real property
7 deed. To some extent, acknowledgment before a notary serves a similar function
8 with respect to a real property deed.⁵²

9 **Delivery**

10 Ordinarily an executed deed of real property is not effective unless delivered to
11 the transferee, but it is unclear whether this requirement would apply to a
12 revocable TOD deed.⁵³ The only states that address the delivery question directly
13 are Missouri and Ohio. Their statutes provide explicitly that delivery is not
14 required.⁵⁴

15 The Missouri analysis appears sound. Delivery helps ensure that the transfer is
16 intentional. A person who executes a deed but never delivers it may have decided
17 against the transfer. But assuming a revocable TOD deed must be recorded before
18 the transferor's death to be effective, then delivery to the beneficiary should not be
19 necessary.⁵⁵

20 The Law Revision Commission's Comment to Probate Code Section 5000 —
21 the general nonprobate transfer statute — might be read to suggest that the
22 delivery requirement of the law of deeds is applicable.⁵⁶ Revocable TOD deed
23 legislation should negate such a reading.

51. Prob. Code § 5000.

52. However, a notary has no responsibility to assess the capacity of the decedent or the possibility of fraud, duress, or undue influence. One reason for requiring that a will be witnessed is that it may help impress on the decedent the significance of the act. Appearance before a notary would achieve a similar effect with respect to execution of a revocable TOD deed. A witness is not required for an outright gift of real property, which may have a greater impact on the decedent than a revocable gift effective at death.

53. In Arizona, title companies have expressed concern about whether they may insure title based on an undelivered revocable TOD deed. The Arizona statute is silent on the matter. Although the statute's silence may indicate that delivery is unnecessary, practitioners advise that the better course of action is to have the deed delivered to the beneficiary, who should sign and notarize it. That is apparently standard conveyancing practice in that state.

54. See *Estate of Dugger*, 110 S.W. 3d 423, 428 (2003) (“The requirement that the [beneficiary] deed be recorded before death is the formality that takes the place of the delivery requirement.”).

55. See discussion of “Recordation” *infra*.

56. See discussion of “Conveyance Pursuant to Nonprobate Transfer” *supra*.

1 **Acceptance**

2 Every state that has enacted revocable TOD deed legislation provides that the
3 signature, consent, or agreement of, or notice to, the beneficiary is not required for
4 any purpose during the life of the owner. Such a provision is perhaps necessary
5 due to the common law of deeds requirement of acceptance, although in California
6 acceptance is presumed if the deed is beneficial to the transferee. Acceptance
7 during the transferor’s life cannot be required in any event, since delivery is not
8 required.

9 The beneficiary may disclaim, if appropriate, after the transferor’s death.⁵⁷

10 **Recordation**

11 A transferor may execute a revocable TOD deed but hold it unrecorded for any
12 number of reasons, including reluctance to publicize it, uncertainty, a change of
13 mind, or simple disorganization or forgetfulness. Every state that has revocable
14 TOD deed legislation requires that the deed be recorded in the county where the
15 real property is located before the death of the owner.⁵⁸

16 The recording requirement may frustrate the transferor’s intent where the
17 transferor fails to act diligently. Experience in other jurisdictions suggests that the
18 transferor’s neglect is a problem.⁵⁹ Practitioners in Arizona have cautioned that the
19 attorney drafting the deed should assume the obligation of recording it.⁶⁰

20 The effect of failure to record the deed during the transferor’s life is that the
21 deed is ineffective. Presumably the property will then pass under the transferor’s
22 will, or by intestacy. None of the expected nonprobate transfer benefits will be
23 realized, and a person other than the intended beneficiary may receive the
24 property.

25 The Law Revision Commission believes that a revocable TOD deed should be
26 ineffective unless recorded before the transferor’s death. If the deed is not
27 recorded during the transferor’s life, there may be no assurance that the transferor
28 intended to go through with the transfer. It is said that recordation prevents
29 surprise through a “pocket deed”. It has also been argued that the requirement that
30 recordation be accomplished before death limits the possibility of undue influence
31 or a “deathbed transfer”.⁶¹

32 Recordation cannot eliminate the possibility of fraud, duress, or undue
33 influence. But it can minimize it by allowing fewer opportunities for manipulation.

57. See discussion of “Disclaimer” *infra*.

58. The original Nevada statute did not require recordation, but it has been since amended to require it.

59. The *Dugger* case in Missouri and the *Scott* case in Ohio illustrate the point. See “Experience in Other Jurisdictions” *supra*.

60. However, the deed may be executed without advice of counsel.

61. Kirtland & Seal, *supra* note 7, at 120.

1 Particularly if delivery is not required for an effective transfer, the formality of
2 recordation during the transferor's life will help ensure that the transferor's intent
3 is effectuated.

4 The transferor may well not want to publicize the donative transfer. There may
5 be issues among potential heirs about who should get the property. There may be a
6 concern that a beneficiary who learns of the deed will become idle. But these
7 concerns are overridden by the certainty of intention conferred by the act of
8 recordation.

9 The Commission has also considered a possible requirement that a revocable
10 TOD deed must be recorded within a short time after execution, for example 30 or
11 60 days. Considerations include:

- 12 • Prompt recordation could help expose fraud or undue influence before the
13 transferor dies. But it could also frustrate the transferor's desire to
14 maintain the privacy of the disposition.
- 15 • Prompt recordation would be evidence of the transferor's intent. However,
16 it could frustrate the intent of a transferor who desires to pass the property
17 to the beneficiary but is physically unable to record the instrument within
18 the required period.
- 19 • A prompt recordation requirement could invalidate an otherwise validly
20 recorded revocable TOD deed, surprising interested persons. That could
21 be addressed to some extent by a prominent warning on the revocable
22 TOD deed form that the deed must be recorded within the prescribed
23 period.
- 24 • A prompt recordation requirement could help ensure that the revocable
25 TOD deed is in fact recorded before the transferor's death, helping to
26 ameliorate the problem that could occur if the transferor holds off for
27 privacy reasons until it is too late.

28 **The Commission solicits comment on the question whether recordation of a**
29 **revocable TOD deed should be required within a short time after execution.**

30 **Battle of Recorded Deeds**

31 A transferor may execute a sequence of deeds, in favor of different beneficiaries.
32 Since a TOD deed is revocable, the later deed should have the effect of revoking
33 the earlier deed. But an earlier executed deed may in fact be recorded later.

34 Most jurisdictions seem to provide that the last executed deed, not the last
35 recorded, controls. There is some ambiguity in the drafting of the statutes.

36 Arizona provides the opposite rule — “If an owner executes and records more
37 than one TOD deed concerning the same real property, the last beneficiary deed
38 that is recorded before the owner's death is the effective beneficiary deed.”⁶² This

62. Ariz. Rev. Stat. § 33-405(G).

1 provision assumes the owner, rather than the beneficiary, records the deed.⁶³
2 Wisconsin also provides that the last recorded prevails.⁶⁴

3 The Law Revision Commission believes the majority rule is the better rule —
4 the last executed of the recorded deeds should prevail. That will help prevent
5 fraud.

6 Although recordation of a later deed revokes an earlier deed, is the earlier deed
7 revived by revocation of the later deed? In some instances the transferor might
8 have wanted to revive an earlier deed, in other instances, not. The safer rule is that
9 the earlier deed is revoked (not revocable) by the subsequent deed.

10 **Effect of Other Instruments**

11 Property that is the subject of a revocable TOD deed may be the subject of
12 another dispositive instrument that is intended to take effect on the decedent's
13 death. For example, the decedent's will may purport to dispose of the property, or
14 the decedent's trust, or the property itself may be held in joint tenancy form, or in
15 community property form with or without right of survivorship. Such conflicts are
16 inevitable.

17 *Testamentary Disposition*

18 Most jurisdictions provide that a revocable TOD deed cannot be revoked or
19 changed by will. The remainder are silent on the issue.

20 A significant problem with allowing a will to override a revocable TOD deed is
21 that it undermines the certainty of the deed. A title company will not insure title
22 absent an order of the probate court determining that there is no valid will
23 providing for a different disposition.⁶⁵

24 The majority rule is appropriate, and a revocable TOD deed should prevail over
25 a will.

26 *Trust*

27 In case of a conflict between a revocable TOD deed and a trust affecting the
28 same property, the considerations are somewhat different from those relating to a
29 will. A will is unrecorded. A transfer of property in trust may be recorded.

30 The primacy of the recorded instrument should be the determining factor. As
31 between a recorded revocable TOD deed and an unrecorded transfer in trust, the
32 revocable TOD deed should prevail. As between a recorded revocable TOD deed

63. The water is muddied by the fact that often the beneficiary will be acting at the transferor's direction and as the transferor's agent.

64. Wisc. Stat. § 705.15(3).

65. See, e.g., McCouch, *supra* note 23, at 1146-1147, 1149 ("In the absence of an express provision, however, a statutory presumption against amendment or revocation by will may be justified to preserve the autonomy of nonprobate transfers and avoid unnecessary entanglement with the probate system.")

1 and a recorded transfer in trust, the later executed instrument should prevail. But,
2 if the trust is irrevocable, a later executed revocable TOD deed should have no
3 effect on it.

4 ***Joint Tenancy***

5 If property is held in joint tenancy form, a revocable TOD deed of the property
6 raises the question whether the property passes by right of survivorship to the
7 surviving joint tenant or by revocable TOD deed to the named beneficiary. The
8 answer may depend on whether the revocable TOD deed was joined in by the
9 surviving joint tenant.⁶⁶

10 The revocable TOD deed can be viewed as an effort to achieve the advantageous
11 dispositional aspects of joint tenancy (simple and inexpensive passage of property
12 to the survivor outside of probate) without its adverse lifetime consequences
13 (creation of present interest in joint tenant).

14 Under joint tenancy law, a joint tenant may sever the joint tenancy right of
15 survivorship and make a disposition of that joint tenant's interest to a person other
16 than the surviving joint tenant.⁶⁷ There is no reason why a joint tenant, acting
17 alone, should not be able to sever a joint tenancy and pass that joint tenant's
18 interest in the property on death by a revocable TOD deed. The death of a joint
19 tenant who executes and records a revocable TOD deed should sever the interest
20 of that joint tenant and pass it to the TOD beneficiary.⁶⁸

21 This result appears to be unique among jurisdictions that have enacted revocable
22 TOD deed legislation. Arizona, Arkansas, and Colorado, for example, make clear
23 that a joint tenant may execute a revocable TOD deed without approval of other
24 joint tenants, but the revocable TOD deed is effective only if the transferor
25 survives all other joint tenants. In no case do these jurisdictions provide that a
26 TOD beneficiary takes an interest over a surviving joint tenant.

27 ***Community Property***

28 Spouses have an equal and undivided interest in community property, and equal
29 rights of management and control. However, neither spouse may make a gift of
30 community property without the consent of the other spouse, nor may either make
31 a conveyance of community real property without the joinder of the other. That
32 does not preclude a spouse from disposing of that spouse's one-half interest in

66. For analysis of the situation where all joint tenants join in a revocable TOD deed, see "Multiple Owners" *infra*.

67. A severance can be effectuated by a transfer of a joint tenant's interest, or simply by recordation of an instrument severing the joint tenancy. Civ. Code § 683.2.

68. This is analogous to severance of a joint tenancy on the death of a joint tenant in the case of a joint tenancy between former spouses. Prob. Code § 5601(a).

1 community property by will or nonprobate transfer.⁶⁹ A spouse may make a
2 nonprobate transfer of the entire community interest in a piece of property with the
3 joinder or written consent of the other spouse.⁷⁰ Absent a disposition by will or
4 nonprobate transfer, community property passes to the surviving spouse by right
5 of survivorship.

6 If a revocable TOD deed were authorized, it is likely that in many cases both
7 spouses would join in a revocable TOD deed of community property to a child or
8 other person. This type of transfer would be consistent with existing laws
9 governing passage of community property.

10 In theory, there would not be a problem with a spouse disposing of that spouse's
11 share of community property by revocable TOD deed, just as the spouse may
12 dispose of that spouse's share by will or nonprobate transfer. However, the
13 community property statutes require the joinder or consent of the other spouse for
14 a lifetime gift or conveyance of community property. Because the revocable TOD
15 deed must be recorded during life, those statutes could be read to apply. Revocable
16 TOD deed legislation should make clear that a revocable TOD deed executed by
17 one spouse acting alone is effective to transfer that spouse's interest in community
18 property at death.

19 Community property with right of survivorship (CPWROS) is a new form of
20 title created in 2000. Unlike ordinary community property, CPWROS may not be
21 disposed of by will but "shall, upon the death of one of the spouses, pass to the
22 survivor, without administration, pursuant to the terms of the instrument, subject
23 to the same procedures, as property held in joint tenancy."⁷¹ CPWROS is
24 apparently effective without recordation. CPWROS title is revocable by either
25 spouse acting alone, in which case the property reverts to ordinary community
26 property subject to ordinary means of testamentary and nontestamentary
27 disposition. The CPWROS statute indicates that termination of the right of
28 survivorship may be accomplished pursuant to the same procedures by which a
29 joint tenancy may be severed.⁷² A revocable TOD deed of record should terminate
30 the CPWROS survivorship right on the death of the spouse executing the
31 revocable TOD deed and pass that spouse's interest to the TOD beneficiary, just as
32 in the case of joint tenancy property.⁷³

69. See, e.g., *Estate of Miramontes-Najera*, 118 Cal. App. 4th 750, 13 Cal. Rptr. 3d 240 (2004).

70. Prob. Code §§ 5010-5032.

71. Civ. Code § 682.1.

72. Civ. Code § 682.1(a).

73. Cf. Prob. Code § 5601(d) (termination of CPWROS on death of former spouse).

1 **Effectuation of Transfer**

2 Unlike other nonprobate transfer mechanisms, the revocable TOD deed employs
3 no third party intermediary such as a financial institution, broker, or insurance
4 company to transfer the property to the beneficiary after the transferor's death.
5 The conveyance of title to the beneficiary is self-executing on the transferor's
6 death.

7 As a practical matter more is required to effectuate the revocable TOD deed
8 transfer. A beneficiary that seeks to encumber the property, or sell it, may
9 encounter resistance absent some assurance that the transferor has in fact died, that
10 the revocable TOD deed was validly executed, that there are no other claims
11 against the property, and the like. Because there is no probate proceeding, there is
12 no definitive determination of these matters. The mechanism of title insurance is
13 necessary to make the revocable TOD deed operate efficiently as intended.

14 Passage of property by revocable TOD deed is analogous to passage of property
15 by right of survivorship pursuant to a joint tenancy or community property. In
16 those circumstances, the beneficiary records an affidavit of death together with a
17 certified copy of the death certificate. The procedure is authorized by statute, and
18 it is standard practice for a title insurer to act in reliance on it.⁷⁴

19 Under legislation enacted in 2001, dissolution or annulment of a marriage
20 operates as a severance of joint tenancy or CPWROS of the spouses.⁷⁵ The law
21 provides for an affidavit of facts on which a third person may rely, and protects the
22 rights of a bona fide purchaser or encumbrancer that acts in reliance on the
23 affidavit.⁷⁶

24 The same procedures applicable to joint tenancy or CPWROS should be made
25 applicable to effectuate a transfer of property that passes under a revocable TOD
26 deed. That also appears to be the process used in other jurisdictions that have
27 enacted revocable TOD deed legislation.⁷⁷

28 **Contest**

29 Because the revocable TOD deed operates automatically outside probate, there
30 is no opportunity for a claimant to the property to contest the transfer before the
31 property passes to the beneficiary by operation of law. Standard nonprobate

74. Cf. Prob. Code §§ 210-212. This procedure applies equally well to passage of community property with right of survivorship; the statute specifically provides that the property passes to the survivor "subject to the same procedures, as property held in joint tenancy." Civ. Code § 682.1(a).

75. Prob. Code § 5601.

76. Prob. Code §§ 5601(c), 5602.

77. See Murphy, *Drafting the New Beneficiary Deed*, 38 Arizona Attorney 30, 31 (June 2002):

The emerging consensus is to use something akin to the termination-of-joint-tenancy form used upon the death of a joint tenant. The form should be signed by the beneficiary stating that the sole or last surviving owner has died and that the beneficiary now accepts ownership of the property.

1 transfer practice is to make the transfer of property quick, simple, and efficient. If
2 there is a contrary claim, the conflict is resolved later but the resolution does not
3 ordinarily interfere with the effort to effectuate the transaction.⁷⁸ A disappointed
4 claimant's remedy is against the beneficiary, not against the property.

5 ***Proceedings***

6 The jurisdictions that have enacted revocable TOD deed legislation generally do
7 not address a challenge to the transfer. They apparently leave the logistics to
8 general law. The Colorado statute specifies a statute of limitations — the right of
9 an heir, devisee, or personal representative to recover property or its value from
10 the beneficiary is barred three years after the owner's death, or one year after
11 recordation of a certificate of death, except in the case of fraud.⁷⁹ Missouri
12 provides somewhat more guidance. Fraud, duress, or undue influence voids a
13 beneficiary designation and may be judicially determined on petition of an
14 interested person in a proceeding in which a jury trial is available and in which the
15 relief awarded may be mitigated as the trier of fact determines that justice
16 requires.⁸⁰ Property wrongfully received by the beneficiary, or its value, is subject
17 to restitution.⁸¹

18 The core procedural issues are the grounds for a contest, nature of the
19 proceeding, venue, pleadings, statute of limitations, and remedies. The
20 Commission recommends use of the existing Probate Code Section 850 procedure
21 providing for court resolution of a disputed conveyance or transfer of property
22 involving a decedent.⁸² An interested person may petition the court for relief,
23 serving each person that claims an interest in or has title to or possession of the
24 property. The court may grant appropriate relief, including an order that authorizes
25 or directs the person having title to or possession of the property to execute a
26 conveyance or transfer to the person entitled. This is an established and reasonably
27 expeditious procedure that is readily adaptable as a means to contest passage of
28 title pursuant to a revocable TOD deed.

29 ***Grounds for Contest***

30 Presumably common law principles of fraud, mistake, duress, and undue
31 influence would apply to the revocable TOD deed as they would to any other deed
32 of gift or transfer under California law. Missouri law makes clear that these

78. These general principles are stated in California's nonprobate transfer law. See Prob. Code § 5003.

79. Colo. Rev. Stat. § 15-15-411.

80. Mo. Rev. Stat. § 461.054.

81. Mo. Rev. Stat. § 461.067.

82. See Prob. Code §§ 850-859.

1 principles apply to a nonprobate transfer. California revocable TOD legislation
2 should include a comparable provision.⁸³

3 ***Statute of Limitations***

4 A contest should be brought within a reasonably short period after the
5 transferor's death. Otherwise the property will be unmarketable until the statute of
6 limitations runs. To the extent the beneficiary's title may be voided by court order,
7 a title company will not be willing to issue title insurance.

8 The remedies available in a challenge to a revocable TOD deed should be
9 limited, depending on the timing of the challenge. If the challenge is brought and a
10 lis pendens recorded within 40 days after the transferor's death, the available
11 remedies should include revocation of the transfer. This is analogous to the 40 day
12 limitation applicable in small estate collection.⁸⁴

13 **Rights of Transferor**

14 **Ownership Interest Retained**

15 A revocable TOD deed is not effective until the transferor's death and the
16 transferor retains full ownership rights until death. That is the rule in every
17 jurisdiction that has revocable TOD deed legislation, and it is central to the
18 determination of the rights of the transferor, the beneficiary, and third persons,
19 including creditors.

20 A corollary of the principle that a transferor who executes a revocable TOD
21 deed retains full rights in the property during life is that the beneficiary has no
22 rights until the transferor's death. Arizona and New Mexico have experienced
23 problems such that a transferor must revoke a revocable TOD deed in order to
24 refinance or sell the property. That should not be necessary if the law makes clear
25 that the beneficiary has no right until the transferor's death.

26 **Revocability**

27 A key incident of retained ownership by a transferor during life is the right to
28 revoke the TOD deed. Every jurisdiction that has enacted TOD deed legislation
29 has made the deed revocable.

83. Cf. Prob. Code § 5015 ("Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a written consent to a provision for a nonprobate transfer of community property on death.")

84. See, e.g., Prob. Code §§ 13100 (collection or transfer of personal property by affidavit if 40 days have elapsed since death of decedent), 13151 (petition for court order determining succession to property if 40 days have elapsed since death of decedent), 13540 (right of surviving spouse to dispose of property after 40 days from death of spouse).

1 Revocability renders the TOD deed ambulatory. The transferor may make
2 changes, or make a different disposition of the property, at any time before death.
3 The revocability of the deed reinforces the concept that a designated beneficiary
4 has no interest in the property until the deed is finalized by the transferor's death.⁸⁵

5 Revocation implies modification. Revocable TOD legislation should not invite a
6 modifying instrument, since a modifying instrument will create constructional
7 problems. The better approach is for the transferor to record a new revocable TOD
8 deed that revokes the earlier deed.

9 The TOD deed should be revocable notwithstanding language within the deed
10 itself purporting to make it irrevocable.⁸⁶ An irrevocable TOD deed would be
11 litigation breeding and implicate rights in the beneficiary. The owner may have a
12 contractual or court-ordered obligation to transfer the property to the beneficiary.
13 In the analogous situation of a joint will, a disposition inconsistent with an
14 "irrevocable" devise is ordinarily recognized, but a suit in equity is required to
15 enforce the contractual commitment.

16 ***Revocation Procedure***

17 The enabling legislation for this study asks:⁸⁷

18 Whether it would be more difficult for a person who has transferred a potential
19 interest in the property by beneficiary deed to change his or her mind than if the
20 property were devised by will to the transferee or transferred through a trust or
21 other instrument.

22 A number of the states with revocable TOD deed legislation address the
23 revocation procedure expressly. Arizona, Arkansas, Colorado, and Kansas all
24 provide that a revocation must be executed by the transferor, must identify the
25 property and otherwise comply with the general requirements for a recorded
26 instrument, and must be recorded in the county in which the real property is
27 situated before the transferor's death. Several states add the probably unnecessary
28 but perhaps helpful remark that "The joinder, signature, consent, agreement of, or
29 notice to, the grantee-beneficiary is not required for the revocation to be
30 effective." Presumably the transferor may act through an agent.⁸⁸

85. Because the TOD deed is revocable, the property is considered part of the transferor's estate for estate tax purposes. See discussion of "Estate Tax and Generation Skipping Transfer Tax" *infra*.

86. See, for example, *Bolz v. Hatfield*, 41 S.W. 3d 566 (2001) ("This deed is hereby expressly made irrevocable and not subject to change unless ... Grantor suffers a financial emergency which requires the sale of this property to cure the financial emergency.")

87. 2005 Cal. Stat. ch. 422 § 1(b)(4).

88. Revocation by the transferor's agent under a power of attorney must be properly authorized under Probate Code Section 4264. That provision should be revised to cover a revocable TOD deed.

1 Three states prescribe a statutory form that may be used for revocation of a TOD
2 deed.⁸⁹

3 California revocable TOD deed legislation should provide that revocation may
4 be achieved by recordation of an instrument that cancels or revokes the TOD deed.
5 A purported revocation should be ineffective unless executed by a transferor
6 having legal capacity and recorded before the transferor's death.⁹⁰

7 ***Acts that Cause Revocation***

8 The law should recognize other acts that cause or have the effect of revocation
9 of a TOD deed. These include changing a beneficiary designation or making a
10 subsequent conveyance of the property.⁹¹

11 *Change of Beneficiary.* The mechanism by which the transferor makes a change
12 of beneficiary varies among the jurisdictions. A number of jurisdictions provide
13 that the transferor may change the beneficiary designation by recordation of a
14 subsequent instrument that has the effect of a revocation of the previous
15 instrument.⁹² In Kansas, the statutory revocable TOD deed form makes clear that a
16 new deed revokes a previous beneficiary designation.⁹³

17 New Mexico provides that recordation of a subsequent revocable TOD
18 beneficiary designation revokes a previous beneficiary designation "to the extent
19 there is a conflict between the two designations."⁹⁴ The Commission believes such
20 a qualification is inadvisable. It would generate interpretive questions about
21 whether the subsequent beneficiary designation conflicts with the earlier one or is
22 simply an effort to create a co-ownership interest. California should follow the
23 lead of jurisdictions that provide a subsequent revocable TOD deed revokes an
24 earlier one for the same property.

89. See discussion of "Statutory Forms" *infra*.

90. If the transferor becomes incapacitated, the revocable TOD deed would become irrevocable as a practical matter.

91. The effect of a subsequent will or trust on a revocable TOD deed is dealt with in "Effect of Other Instruments" *supra*. The effect of dissolution of the transferor's marriage to the TOD beneficiary is dealt with in "Who May Be a Beneficiary" *infra*.

92. Colorado, Kansas, New Mexico, Ohio, and Wisconsin among them. See, e.g., Colo. Rev. Stat. § 115-15-405(2) ("A subsequent beneficiary deed revokes all prior grantee-beneficiary designations by the owner for the described real property in their entirety even if the subsequent beneficiary deed fails to convey all of the owner's interest in the described real property.").

93. Kan. Stat. Ann. § 59-3502 ("This transfer on death deed is revocable. It does not transfer any ownership until the death of the owner. It revokes all prior beneficiary designations by this owner for this interest in real estate.").

94. N.M. Stat. Ann. § 45-6-401(E).

1 *Subsequent Conveyance.* The revocable TOD deed statutes generally make clear
2 that a subsequent conveyance of the property acts as a revocation of a TOD deed.⁹⁵
3 The basic principle of these statutes is correct, but revocation should not be
4 accomplished by an off-record instrument.⁹⁶ A subsequent conveyance must be
5 recorded before the transferor’s death if it is to override a revocable TOD deed.

6 **Multiple Owners**

7 Multiple ownership of property creates special challenges for the revocable
8 TOD deed. Issues concerning execution of a deed by one co-owner without the
9 joinder of others are complex.⁹⁷

10 The revocable TOD deed law should be clear that all co-owners may join in a
11 revocable TOD deed of their property. However, a joint revocable TOD deed
12 raises issues with respect to revocability and other exercise of ownership rights
13 during the lives of the co-owners as well as during the period between the deaths
14 of the co-owners.

15 Suppose both spouses join in a revocable TOD deed of their community
16 property or joint tenancy property, naming their child as beneficiary. Suppose
17 further that after the first spouse dies the survivor remarries and wishes to revoke
18 the revocable TOD deed and make a disposition of the property to the new spouse.
19 Is that permissible? Or should the survivor be allowed to revoke only as to the
20 survivor’s interest? Or should a jointly executed TOD deed become irrevocable?

21 A number of jurisdictions have tried to deal with these issues. Under the law of
22 Arizona, Arkansas, and Nevada, any co-owner may revoke a revocable TOD deed
23 joined in by all, unless the co-owners hold the property as joint tenants or
24 community property with right of survivorship (or tenancy by the entireties in
25 Arkansas), in which case the revocation is effective only if joined in by all co-
26 owners or by the last to die of the co-owners. Missouri offers a compromise — a
27 revocation or change of a beneficiary designation involving property of joint
28 owners may only be made with the agreement of all owners then living.

29 The Uniform TOD Security Registration Act, which is enacted in California,⁹⁸
30 provides that a security registration in beneficiary form may only be changed by
31 all then surviving owners.⁹⁹

95. See, e.g., Mo. Rev. Stat. § 461.033 (“A transfer during the owner’s lifetime of the owner’s interest in the property, with or without consideration, terminates the beneficiary designation with respect to the property transferred.”); see also Nev. Rev. Stat. § 111.109(4).

96. That would undermine the efficacy of the revocable TOD deed by making it impossible for a beneficiary to obtain title insurance.

97. See discussion of “Joint Tenancy” and “Community Property” *supra*. In addition, an owner of property as a tenant in common should be able to make a revocable TOD deed of that owner’s interest in the property without the joinder of other cotenants.

1 Those approaches complicate ownership rights until the death of the last of the
2 surviving owners, and create possible unfairness to beneficiaries of the first to die
3 of the co-owners. An alternative would be to pass an interest to the revocable TOD
4 beneficiary immediately on death of a co-owner, and allow revocation of the
5 revocable TOD deed as to the surviving co-owner's interest.¹⁰⁰

6 General principles of California law govern a nonprobate transfer of community
7 property with the joinder or written consent of spouses.¹⁰¹ Whether these
8 principles are appropriately applied to a revocable TOD deed is not clear.

9 **The Commission solicits public comment as to the appropriate**
10 **consequences where co-owners jointly execute a revocable TOD deed.**

11 Alternatives include:

- 12 1. The interest of each co-owner passes to the named beneficiary on the
13 death of that co-owner, with the interest of the surviving co-owner being
14 revocable.
- 15 2. The interest of each co-owner passes to the surviving co-owner and then to
16 the named beneficiary on the death of the surviving co-owner, with the
17 interest of the surviving co-owner being (A) revocable or (B) irrevocable.
- 18 3. There could be different rules depending on whether the property is held
19 as joint tenancy, as community property, as community property with right
20 of survivorship, or as tenancy in common.

21 **Subsequent Incapacity of Owner**

22 What should be the authority of a conservator, or an agent under a durable
23 power of attorney, to deal with the property or even revoke a revocable TOD deed
24 following the incapacity of the owner?

25 A revocable TOD deed would not create any special problems that do not
26 already exist with respect to any other estate planning instrument of a conservatee,
27 including a nonprobate transfer instrument. Under general principles of substituted
28 judgment, the conservatee's estate plan must be taken into account, and notice
29 must be given to a beneficiary.¹⁰²

30 California law precludes an agent under a durable power of attorney from
31 making, amending, or revoking the principal's will.¹⁰³ The law allows an agent to

98. Prob. Code §§ 5500-5512.

99. Prob. Code § 5506.

100. The effect of such a provision would be that the surviving co-owner becomes a co-owner with the TOD beneficiary of the first to die. That would perhaps diminish the attractiveness of the revocable TOD deed for some people.

101. Prob. Code §§ 5010-5032.

102. See, e.g., Prob. Code §§ 2580-2586.

103. Prob. Code § 4265.

1 create, modify, or revoke the principal's trust, make or revoke a gift of the
2 principal's property, create or change survivorship interests in the principal's
3 property, and designate or change a beneficiary to receive property on the
4 principal's death, provided that the principal expressly authorizes the act in the
5 power of attorney.¹⁰⁴ That would appear to cover revocation of a revocable TOD
6 deed as well, but the power of attorney law should be revised to make the
7 coverage explicit.

8 The jurisdictions that have enacted revocable TOD legislation do not deal with
9 these issues, except for Missouri. The Missouri statute appears to be generally
10 consistent with California law on this matter.¹⁰⁵

11 **Ownership Interest Conveyed**

12 Generally a revocable TOD deed transfers the owner's entire interest in the
13 property, although some jurisdictions appear to allow an owner to transfer less
14 than all of the ownership interest. The Law Revision Commission believes such
15 flexibility would be inadvisable. It creates constructional, as well as procedural,
16 problems.¹⁰⁶

17 The revocable TOD deed should pass all of the transferor's interest in the real
18 property that is the subject of the deed. That will facilitate the transfer. The
19 revocable TOD deed is in essence a quitclaim by the transferor. A deed that
20 purports to limit the transfer of some but not all of the transferor's interest in the
21 property should be void and the property should instead pass under another
22 instrument such as a will or trust, or by intestacy to the transferor's heirs.

23 Property passes under a revocable TOD deed subject to any limitations on the
24 transferor's interest of record at the time of the transferor's death. Every
25 jurisdiction that has revocable TOD deed legislation makes that rule clear.¹⁰⁷

26 **Common Interest Development**

27 The revocable TOD deed transfers "real property" on the death of the transferor.
28 That should include a unit in a common interest development.¹⁰⁸

104. Prob. Code § 4264. With respect to possible self dealing by the TOD transferor's agent, see "Evaluation of Revocable TOD Deed" *infra*.

105. Mo. Rev. Stat. § 461.035.

106. For example, a revocable TOD deed that passes a partial interest to a beneficiary may become entangled with a probate of the remainder of the interest that passes under the residuary clause of the transferor's will.

107. A few jurisdictions also subject the revocable TOD deed to off-record limitations. See, e.g., Colo. Rev. Stat. § 15-15-407(3) (giving effect to an instrument unrecorded at the transferor's death, so long as the instrument is recorded within four months after death). The Commission does not recommend adoption of a rule that recognizes a limitation not of record; that would hinder the insurability and efficacy of a revocable TOD deed title.

1 An ownership interest in a common interest development consists of an
2 exclusive right of occupancy of a portion of a real property development, coupled
3 with an undivided interest in the common area or membership in an association
4 that owns the common area. A common interest development can take various
5 forms, including a community apartment, condominium, planned development, or
6 stock cooperative.¹⁰⁹ All of these interests, including membership in an association
7 or ownership of a share in a stock cooperative, are defined as real property under
8 common interest development law.¹¹⁰

9 **Permit, Lease, License, Easement, Extraction or Removal Right, or Other Lesser Interest**

10 There are many varieties of less than fee interest in real property that a person
11 may seek to pass at death. Examples include use and occupancy permits, leases,
12 licenses, easements, and extraction and removal rights (such as oil and gas,
13 minerals, timber, grazing). These property interests or contract rights may relate to
14 private land as well as to public land, whether state or federal.

15 The variety and circumstances of these less than fee interests make it impossible
16 to address individual types. The key considerations in determining whether these
17 interests should be susceptible to passage by revocable TOD deed are (1) whether
18 the interest is a recordable interest in real property and (2) whether the interest by
19 its nature or terms is transmissible on the death of the interest holder. If both those
20 conditions are satisfied, the interest should be transmissible by revocable TOD
21 deed.

22 **Rights of Beneficiary**

23 **Revocable TOD Deed Creates No Beneficiary Rights Until Transferor's Death**

24 Execution and recordation of a revocable TOD deed creates no rights in the
25 beneficiary; the deed remains subject to modification or revocation by the
26 transferor at any time before death. Lack of clarity on this point may have caused
27 confusion in some jurisdictions.¹¹¹ Revocable TOD deed legislation should make

108. The Commission estimates that common interest developments constitute 25% of California's housing stock. See *Common Interest Development Ombudsperson*, 35 Cal. L. Revision Comm'n Reports 123 (2005) (available from the Commission, www.clrc.ca.gov).

109. Civ. Code §§ 1351-1352.

110. This issue was unsettled before enactment of the Davis-Stirling Act — California courts had distinguished between an owner of an undivided interest in a condominium or apartment project and a shareholder in a stock cooperative, who was held to be a lessee of the corporation that owns the property. See C. Sproul & K. Rosenberry, *Advising California Common Interest Communities* § 1.12, at 14 (Cal. Cont. Ed. Bar 2005).

111. The California Land Title Association has indicated that in many of the states that have created these instruments, "the problems that the title industry has encountered all flow from the fact that *no one seems to*

1 clear that the revocable TOD deed creates no rights in the beneficiary during the
2 transferor's life.

3 **Who May Be a Beneficiary**

4 *Drafter of Revocable TOD Deed*

5 Probate Code Section 21350 provides that an instrument is not valid to make a
6 donative transfer to the drafter of the instrument or another related person.¹¹² This
7 provision is self executing and would apply to the drafter of a revocable TOD deed
8 as well as to any other donative transfer.

9 *Ex-Spouse*

10 The statutes of other jurisdictions generally do not deal with the effect of
11 dissolution of marriage on a revocable TOD deed. Arkansas provides that in the
12 event of a divorce, the revocable TOD deed is treated as a revocable trust. In
13 Missouri, divorce revokes a nonprobate transfer generally.¹¹³

14 California law, like that of Missouri, deals with the effect of dissolution of
15 marriage on a nonprobate transfer generally.¹¹⁴ Under the California scheme a
16 nonprobate transfer fails if, at the time of the transferor's death, the beneficiary is
17 not the transferor's surviving spouse. This rule may be overridden by clear and
18 convincing evidence that the transferor intended to preserve the nonprobate
19 transfer to the former spouse. Property that fails to pass to the nonprobate transfer
20 beneficiary because of dissolution of the marriage passes in the same manner as if
21 the named beneficiary had predeceased the transferor.¹¹⁵

22 One difficulty with application of these provisions to a revocable TOD deed is
23 that they bring into play off-record information — whether the beneficiary is the
24 spouse of the transferor, and whether the parties are still married at the time of the
25 transferor's death. The statute addresses these concerns by (1) protecting a bona
26 fide purchaser or encumbrancer that lacks knowledge of the failure of a
27 nonprobate transfer under the statute and (2) providing for a recorded affidavit of
28 facts on which a bona fide purchaser or encumbrancer may rely.

understand what, if any, present interest is created in favor of the grantees" of a TOD deed. Cal. Land Title Ass'n, *Letter re AB 12 (DeVore)* (3/25/05) (emphasis in original).

112. The law makes a number of exceptions to this rule, including an exception for (1) a person who is related to the transferor by blood, marriage, cohabitation, or domestic partnership, (2) a transfer that is reviewed by independent counsel, and (3) a transfer that is found by the court to be free of fraud, menace, duress, and undue influence. Prob. Code § 21350.5.

113. See Mo. Rev. Stat. § 461.051.

114. See Prob. Code §§ 5600-5604.

115. See discussion of "Failure to Survive and Lapse" *infra*.

1 Whether that scheme would by its terms apply to a revocable TOD deed is
2 slightly ambiguous.¹¹⁶ Revocable TOD deed legislation should make clear that the
3 general statute covers a revocable TOD deed.

4 *Automatic Temporary Restraining Order*

5 A marital dissolution summons includes an automatic temporary restraining
6 order (ATRO) that precludes either party from creating a nonprobate transfer or
7 modifying a nonprobate transfer in a manner that affects the disposition of
8 property subject to the transfer, without the written consent of the other party or an
9 order of court.¹¹⁷ That restraint does not preclude revocation of a nonprobate
10 transfer, provided that notice of the change is filed and served on the other party
11 before the change takes effect.¹¹⁸ This provision should state clearly that it applies
12 to a revocable TOD deed that names a spouse as beneficiary.

13 The ATRO has the potential to disrupt the operation of a revocable TOD deed
14 due to the fact that it is an off-record restraint on transfer of the property. The
15 statute accommodates this by protecting a bona fide purchaser or encumbrancer
16 for value.¹¹⁹

17 *Trust*

18 A few state statutes include a provision to the effect that, “A transfer on death
19 deed may be used to transfer an interest in real property to the trustee of a trust
20 even if the trust is revocable.” Such a provision would not technically be necessary
21 in California.¹²⁰ However, due to possible confusion of a revocable TOD deed
22 beneficiary with a trust beneficiary,¹²¹ such a provision would be useful.¹²²

23 *Homicide*

24 A beneficiary is not entitled to receive property from a decedent if the
25 beneficiary “feloniously and intentionally” kills the decedent.¹²³ This rule could

116. See Prob. Code § 5600(e) (“nonprobate transfer” defined).

117. Fam. Code § 2040(a)(4).

118. Fam. Code § 2040(b)(2).

119. Fam. Code § 2041.

120. See, e.g., Prob. Code § 56 (“person” includes trust).

121. See Prob. Code § 24 (“beneficiary”, as it relates to a trust, means a person who has a present or future interest, vested or contingent).

122. General rules of construction would be applicable in the case of a trust that is revoked before the transferor’s death. See Prob. Code § 21111 (failure of transfer).

123. Prob. Code §§ 250-258. These provisions would apply to a revocable TOD deed. See Prob. Code §§ 250 (will, trust, intestate succession, other selected transfers), 251 (joint tenancy), 252 (bond, insurance, other contractual arrangement), 253 (“any case not described in Section 250, 251, or 252”).

1 impair the efficacy of a transfer under a revocable TOD deed by making the right
2 of a beneficiary subject to an off-record factual determination (conviction of
3 homicide). The general statute addresses such concerns by protecting a bona fide
4 purchaser of the property.¹²⁴

5 If property fails to pass to a beneficiary under the homicide rule the beneficiary
6 is treated as having predeceased the transferor.¹²⁵ This provision is derived from
7 the Uniform Probate Code, but may be problematic in some circumstances.¹²⁶

8 ***Minor or Incapacitated Person***

9 It is possible the transferor could name as revocable TOD deed beneficiary a
10 minor child or an adult who otherwise lacks capacity at the time of the transferor's
11 death. That is not a problem. The general California statutes on appointment of a
12 guardian or conservator to manage property for a minor or otherwise incapacitated
13 person are adequate to handle the situation, just as they handle any other form of
14 transfer to such a person.

15 **Failure to Survive and Lapse**

16 Under general principles of California law a beneficiary must survive the
17 transferor in order to take.¹²⁷ If the beneficiary fails to survive, the disposition of
18 the property may depend on whether the transferor has named an alternate
19 beneficiary and on anti-lapse principles.

20 ***Alternate Beneficiary***

21 The transferor may wish to specify an alternate beneficiary in the event the
22 named beneficiary fails to survive the transferor. A number of states recognize this
23 option for a revocable TOD transferor. Reports of experience with this procedure
24 under Arizona law indicate that it is satisfactory, and title companies approve of it.
25 That would also be the result under general California rules of construction.¹²⁸

26 ***Antilapse***

27 If the transferor does not name an alternate beneficiary, general lapse (and
28 antilapse) principles would come into play. The California antilapse statute

124. See Prob. Code § 255. This provision of existing law is inadequate for a revocable TOD deed. As currently drafted, it protects purchasers but not encumbrancers and doesn't give a title insurer the security of reliance on recorded information. The Commission would supplement it by a general provision in any revocable TOD deed statute. See "Rights of Third Party Transferee" *infra*.

125. Prob. Code § 250(b).

126. See McCouch, *supra* note 23, at 1164-1168. See "Failure to Survive and Lapse" *infra*.

127. See Prob. Code § 21109.

128. See Prob. Code § 21111(a)(1) (failed transfer passes as provided in the instrument).

1 provides that a gift to a predeceased transferee that is kindred of the transferor or
2 of the transferor's spouse does not lapse but passes to the transferee's issue.¹²⁹
3 This provision would appropriately be applied to a revocable TOD deed.

4 Several states have specifically prohibited application of antilapse principles to a
5 revocable TOD deed.¹³⁰ The rationale for the departure from general antilapse
6 principles is not clear.¹³¹ Presumably it is to simplify matters for a title insurer.¹³²

7 The Commission believes equity demands application of anti-lapse principles.
8 These would apply by operation of law unless the transferor specifies another
9 consequence in the deed.¹³³

10 **Deed Restrictions and Conditions**

11 Some jurisdictions allow a revocable TOD deed transferor to name a beneficiary
12 to take on any specified condition.¹³⁴ Here is an example of a conditional transfer
13 construed in a reported Missouri case:¹³⁵

14 This Beneficiary Deed is executed pursuant to Chapter 561 R.S.Mo. It is not
15 effective to convey title to the above-described real estate until Grantor's death or
16 the death of the last to die of two or more Grantors. This deed is hereby expressly
17 made irrevocable and not subject to change *unless Grantee fails to pay the*
18 *property tax due on the property within thirty days of the yearly payment date for*

129. Prob. Code § 21110.

130. See, e.g., Colo. Rev. Stat. § 15-15-407(5) ("The provisions of any anti-lapse statute shall not apply to beneficiary deeds. If one of multiple grantee-beneficiaries fails to survive the owner, and no provision for such contingency is made in the beneficiary deed, the share of the deceased grantee-beneficiary shall be proportionately added to, and pass as a part of, the shares of the surviving grantee-beneficiaries."); N.M. Stat. Ann. § 45-6-401(K) ("If a grantee beneficiary dies prior to the death of the record owner and an alternative grantee beneficiary has not been designated on the deed, the transfer shall lapse.") The same rule also appears to have been adopted in Missouri and Ohio.

131. Professor McCouch states:

The rationale of the antilapse statute applies with equal force to nonprobate transfers. In view of the close analogy between a specific devise and a beneficiary designation, the 1990 [Uniform Probate Code] revisions introduce a separate statute for deathtime transfers of nonprobate assets which mirrors the antilapse statute. The [Uniform Probate Code] drafts speculate that the nonprobate statute may be especially helpful because many beneficiary designations are drafted without the assistance of a lawyer. As a practical matter, however, many institutional payors use standardized governing instruments that expressly provide for the contingency of a predeceased beneficiary. The impact of the nonprobate statute should closely approximate that of the antilapse statute.

McCouch, *supra* note 23, at 1157 (footnotes omitted).

132. Under antilapse principles a beneficiary not specifically referred to in the deed may be entitled to the property.

133. See Prob. Code §§ 21101, 21110.

134. See, e.g., Ariz. Rev. Stat. § 33-405(C) ("A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary deed designates a successor grantee beneficiary, the deed shall state the condition on which the interest of the successor grantee beneficiary would vest.")

135. See *Bolz v. Hatfield*, 41 S.W. 3d 566 (2001) (emphasis added).

1 *said tax* or Grantor suffers a financial emergency which requires the sale of this
2 property to cure the financial emergency.

3 It is inadvisable to invite a revocable TOD transferor to address a condition
4 other than survival. A conditional grant would complicate interpretation of the
5 instrument, require reference to off-record information, and cause a title company
6 to refuse to issue title insurance absent a court determination of ownership. Other
7 instruments than the revocable TOD deed are available to a transferor who wishes
8 to make a complex estate plan.

9 If the revocable TOD transferor nonetheless includes a restriction or condition in
10 a revocable TOD deed, the net result is likely to be that the instrument will require
11 judicial construction and will not pass to the named beneficiary quickly, cheaply,
12 or free of court involvement.

13 **Multiple Beneficiaries**

14 *Named Beneficiaries*

15 Every jurisdiction that has enacted revocable TOD deed legislation authorizes
16 the transferor to name multiple beneficiaries, with¹³⁶ or without¹³⁷ detail as to the
17 manner of tenure.¹³⁸ Only a few simple rules are necessary. The main issues are
18 the manner of tenure among the named beneficiaries and the consequences of
19 some but not all surviving the transferor.¹³⁹ The statute should make clear that a
20 transferor may name more than one beneficiary of property and that, unless the
21 instrument otherwise provides, the beneficiaries take the property as tenants in

136. See, e.g., Ariz. Rev. Stat. § 33-405(B) (“A beneficiary deed may designate multiple grantees who take title as joint tenants with right of survivorship, tenants in common, a husband and wife as community property or as community property with right of survivorship, or any other tenancy that is valid under the laws of this state.”)

137. See, e.g., Kan. Stat. Ann. § 59-3501(a) (emphasis added) (“An interest in real estate may be titled in transfer-on-death, TOD, form by recording a deed signed by the record owner of such interest, designating a grantee beneficiary *or beneficiaries* of the interest.”).

138. Missouri provides the most elaborate detail. See Mo. Rev. Stat. § 461.061 (“If two or more beneficiaries survive, there is no right of survivorship among the beneficiaries in the event of death of a beneficiary thereafter unless the beneficiary designation expressly provides for survivorship among them, and, unless so expressly provided, surviving beneficiaries hold their separate interests in the property as tenants in common. The share of any subsequently deceased beneficiary belongs to that beneficiary’s estate.”); Mo. Rev. Stat. § 461.062(5) (“Unless a different percentage or fractional share is stated for each beneficiary, surviving multiple primary beneficiaries or multiple contingent beneficiaries share equally. When a percentage or fractional share is designated for multiple beneficiaries, either primary or contingent, surviving beneficiaries share in the proportion that their designated shares bear to each other.”).

139. Subordinate issues relate to rights among surviving beneficiaries — management rights, liability for taxes, right to partition, and the like. No special provisions are necessary. The rights of cotenants under a revocable TOD deed transfer would be no different from rights of cotenants who take by will, intestate succession, or trust.

1 common. If a named beneficiary fails to survive, that beneficiary’s interest may
2 terminate, or may go to that beneficiary’s heirs, depending on application of
3 antilapse principles.

4 *Class Gift*

5 A revocable TOD transferor may wish to make a class gift, for example “to my
6 children” rather than naming individual beneficiaries. However, a title company
7 cannot ascertain from the record who the actual beneficiaries of a class gift are.
8 Moreover, a class gift generally is subject to more complex constructional issues
9 than a gift to a named beneficiary.¹⁴⁰

10 The various revocable TOD deed statutes appear not to permit a class gift, but
11 rather require that a beneficiary be “named” or “identified in the deed by name”.
12 Missouri alone among the states explicitly allows a class gift, and provides some
13 rules of construction.¹⁴¹

14 The law should discourage a revocable TOD deed to a class. A class gift results
15 in delay, expense, and complication — the matters of concern that ordinarily
16 prompt a transferor to use a revocable TOD deed in the first place.¹⁴²

17 *Divided Interests*

18 While a transferor should be able to transfer the property to multiple
19 beneficiaries, the property should pass to the beneficiaries as an undivided interest.
20 The transferor should not be permitted to fractionate the property into present and
21 future interests, for example. That would generate questions of interpretation
22 requiring a court order to confirm the specific interest acquired by each transferee.
23 The revocable TOD deed should in essence be a quitclaim deed by the transferor.

24 Missouri law expressly allows the transferor to fractionate present and future
25 interests in the property.¹⁴³ In one reported Missouri case, the transferor executed a
26 beneficiary deed that conveyed a life estate in real property to the transferor’s

140. For example, does a class gift to children include only children alive at the time the gift is made, or does it include afterborn children? Does it include an out of wedlock child, adopted child, step child, or child in law? Is it intended that antilapse principles apply where no specific beneficiary is named, or that the share of a deceased class member go to enlarge the shares of surviving class members? See also McCouch, *supra* note 23, at 1151.

141. Mo. Rev. Stat. § 461.059(2) (“A beneficiary designation designating the children of the owner or any other person as a class and not by name shall include all children of the person, whether born or adopted before or after the beneficiary designation is made.”).

142. If a California revocable TOD deed transferor were nonetheless to make a class gift, general constructional rules would apply to it by operation of law. Prob. Code § 21101. See, for example, Prob. Code §§ 21114 (transfer to heirs interpreted under intestate succession rules), 21115 (inclusion of halfbloods, adopted persons, persons born out of wedlock, step children, foster children, and their issue, in class).

143. Mo. Rev. Stat. §§ 461.003(12), 461.025(1).

1 spouse and a remainder in fee simple to the transferor's son. The deed was
2 challenged because it provided for transfer of the remainder on the death of the life
3 tenant, not on the death of the transferor as required by the Missouri Nonprobate
4 Transfers Law. The Missouri Court of Appeals, over a dissent, held that the
5 beneficiary deed was ineffective.¹⁴⁴ The holding has been overturned by
6 legislation.

7 A rule against fractionating interests could frustrate a transferor that wishes to
8 pass a life estate to the surviving spouse and the remainder to children of a
9 previous marriage. In that circumstance, however, there may be problems in
10 harmonizing present and future interests. The remainder interests, for example,
11 may have concern about maintenance, waste, or encumbrances by the life tenant.
12 A trust might be a preferable instrument for this situation, where conditions can be
13 imposed and a trustee may serve as an intermediary.

14 **The Commission solicits comment on whether the transferor should be**
15 **allowed to fractionate the interests that pass under a revocable TOD deed**
16 **between a life estate and remainder interest.**

17 **Covenants and Warranties**

18 Although a revocable TOD deed is a real property deed, it is not generally
19 thought to carry with it the implied covenants and warranties of a grant deed.¹⁴⁵
20 The revocable TOD deed is more akin to a quitclaim in that whatever interest the
21 transferor has in the property is transferred to the beneficiary subject to all
22 encumbrances. One state makes this explicit in its statute.¹⁴⁶

23 Experience in other jurisdictions suggests that a transferor, acting without advice
24 of counsel, may include “warranty” language into a revocable TOD deed.¹⁴⁷ The
25 property should pass free of warranties and covenants and notwithstanding a
26 provision otherwise in the revocable TOD deed.

27 **Proceeds of Property**

28 Property subject to a revocable TOD deed may no longer exist at the time of the
29 transferor's death, although there may be a fund representing the property.¹⁴⁸

144. Pippin v. Pippin, 154 S.W. 3d 376 (2004).

145. Typical implied covenants and warranties include title and freedom from encumbrance.

146. Colo. Rev. Stat. § 15-15-404(2) (“Unless the owner designates otherwise in a beneficiary deed, a beneficiary deed shall not be deemed to contain any warranties of title and shall have the same force and effect as a conveyance made using a bargain and sale deed.”)

147. The transferor evidently gets that language from the deed by which the transferor originally acquired the property.

148. For example, there may be insurance proceeds, an eminent domain award, sale proceeds, or the like.

1 Should the beneficiary be entitled to the fund? General principles of construction
2 in California address this question in some detail.¹⁴⁹

3 **Disclaimer of Interest**

4 A revocable TOD deed beneficiary may not wish to receive the property.¹⁵⁰
5 Ordinarily, a beneficiary may avoid a donative transfer of property by executing a
6 disclaimer.

7 California law includes detailed provisions governing the disclaimer, including
8 manner of execution, time of execution, filing, and effect.¹⁵¹ These provisions
9 would apply to a revocable TOD deed beneficiary.¹⁵²

10 **Rights of Family Members**

11 The California probate system incorporates a number of protections for family
12 members of a decedent, including probate homestead and family allowance, as
13 well as protection of a spouse or child inadvertently omitted from the decedent's
14 estate plan. The probate system's treatment of family protection developed in the
15 context of probate administration and doesn't comprehend passage of property
16 entirely outside of probate, such as by a revocable TOD deed.

17 **Possession of Family Dwelling and Probate Homestead**

18 The decedent's surviving spouse and minor children are entitled to remain in
19 possession of the family dwelling for a period of time during probate
20 administration.¹⁵³ The probate court may also set apart a probate homestead for as
21 long as the life of the surviving spouse or the minority of children.¹⁵⁴

22 The interaction of these provisions with real property transferred under a
23 revocable TOD deed is unclear. The provisions operate in the context of probate
24 administration, and a revocable TOD deed makes a direct transfer of property
25 outside of probate.

149. See Prob. Code §§ 21133, 21134 (right of at-death transferee to proceeds of specific gift).

150. The property may be contaminated and carry significant liability with it. Or tax considerations may suggest that the beneficiary step aside in favor of another person. Or the beneficiary may not wish the property to be subject to claims of the beneficiary's creditors.

151. See Prob. Code §§ 260-295. Under these provisions, the TOD beneficiary would be required to act within a "reasonable" time; action within nine months after death is conclusively presumed to be reasonable. Prob. Code § 279. The disclaimer is recordable. Prob. Code § 280. The consequence of a disclaimer is that the property is treated as if the named beneficiary had predeceased the transferor. Prob. Code § 282.

152. Prob. Code § 267. The statute should be made explicit on this point.

153. Prob. Code § 6500.

154. Prob. Code §§ 6520, 6524.

1 If the decedent's personal representative claims the TOD family dwelling for the
2 estate, the surviving spouse and minor children could retain temporary possession
3 of the family dwelling pending a court order determining the claim. The ability to
4 retain temporary possession would not affect the passage of title pursuant to the
5 revocable TOD deed. No adjustment to the statute should be made for a revocable
6 TOD deed.

7 The probate homestead likewise does not affect title to the property, though
8 possession of the probate homestead may endure for many years. The probate
9 homestead statute is limited by its terms to property passing by will or intestate
10 succession.¹⁵⁵

11 The existing statute should not be extended to property passing by a revocable
12 TOD deed. The probate homestead statute requires further review in light of the
13 contemporary use of a trust or other instrument that transfers property outside
14 probate. The matter should not be addressed piecemeal in the context of the
15 revocable TOD deed.

16 **Omitted Spouse or Child**

17 A decedent who executes a will or trust before marriage or before the birth of a
18 child may neglect to later change the instrument to reflect the change in family
19 circumstances. The law protects an inadvertently omitted spouse or child by
20 awarding that person the equivalent of an intestate taker's share of the decedent's
21 probate or trust estate.¹⁵⁶

22 The decedent's use of a nonprobate transfer instrument can effectively negate
23 this scheme. Enactment of revocable TOD deed legislation could accentuate that
24 result, since real property may be the decedent's major asset.

25 Professor McCouch argues that a nonprobate transfer of an individual asset,
26 such as a revocable TOD deed of real property, should not be subject to omitted
27 spouse and child protection:¹⁵⁷

28 The provisions protecting an omitted spouse or child apply only to probate
29 assets and operate essentially as constructional rules for wills. They take will
30 substitutes into account solely for the purpose of determining whether a testator's
31 failure to provide for a spouse or child in the will is intentional. In interpreting a
32 will, which normally disposes of a decedent's residual property, it makes sense to
33 inquire into the testator's overall dispositive plan. By contrast, the same inquiry
34 with respect to each separate will substitute makes no sense as a practical matter.
35 The [Uniform Probate Code] properly does not attempt to extend the provisions
36 protecting an omitted spouse or child beyond the will context.

155. Prob. Code § 6522(b).

156. See Prob. Code §§ 21600-21630.

157. McCouch, *supra* note 23, at 1180.

1 Missouri law states explicitly that, “No law intended to protect a spouse or child
2 from unintentional disinheritance by the will of a testator shall apply to a
3 nonprobate transfer.”¹⁵⁸

4 The Law Revision Commission agrees that the omitted spouse and child
5 provisions should not extend to a revocable TOD deed. Although something needs
6 to be done with the family protection statutes in light of the nonprobate revolution,
7 the problem should be addressed globally, not in the context of an individual type
8 of nonprobate transfer instrument. That is particularly true where the nonprobate
9 transfer instrument is a real property deed whose efficacy must depend on a clear
10 statement of title in the record; the property should not be subjected to an off-
11 record interest established by a court at a later time.

12 Rights of Creditors

13 Probate is essentially a bankruptcy process — the decedent’s assets are
14 collected, creditors notified and debts discharged, and the remainder is distributed
15 to beneficiaries. The Probate Code includes detailed procedures for notifying
16 creditors, allowing or disallowing and prioritizing claims, and liquidating assets to
17 pay debts.

18 A nonprobate transfer passes property outside the probate system. There is at
19 present no consistent treatment of creditor rights for a nonprobate transfer in
20 California. Each type of transfer is subject to unique rules.

21 For example, a surviving joint tenant takes the property free of the decedent’s
22 debts. Presumably the same principle would apply to the surviving spouse of
23 community property with right of survivorship.¹⁵⁹ A trust estate is liable for debts
24 to the extent the probate estate is inadequate.¹⁶⁰

25 The law governing many types of nonprobate transfers is uncertain. The general
26 California statute authorizing nonprobate transfers provides that “Nothing in this
27 section limits the rights of creditors under any other law.”¹⁶¹ The same rule applies

158. Mo. Rev. Stat. § 461.059(1).

159. However, there is some indication in the legislative history of the community property with right of survivorship statute that creditors would have the same rights against CPWROS as against ordinary community property.

160. There is now in the law an optional system whereby a trustee may notify creditors in the same manner as probate, thereby enabling discharge of debts and passage of title to trust beneficiaries free of creditor claims. But if the optional procedure is not used, the method of subjecting a trust beneficiary to a transferor’s debts is vague. May a creditor sue a beneficiary? If so, may the beneficiary cross complain against other beneficiaries? Against beneficiaries of other nonprobate transfers such as a POD account? If creditor claims exceed the value of property distributed, may creditors who are unable to collect seek apportionment from those that have collected? May a probate be opened and the former trust property recalled?

161. Prob. Code § 5000(c).

1 to securities that pass pursuant to a TOD security registration.¹⁶² But there is no
2 general state law governing rights of a creditor where a decedent's property passes
3 outside of probate.

4 The State Bar Trusts & Estates Section observes with respect to the revocable
5 TOD deed that, "An informal inquiry among attorneys around the country reveals
6 that the treatment of creditors is a major issue, and a major area of differentiation
7 among the states that have adopted some form of statute sanctioning beneficiary
8 deeds."¹⁶³

9 **Creditor Rights During Transferor's Life**

10 *Creditors of Transferor*

11 A TOD deed is revocable and ambulatory, like a will; it has no effect on the
12 transferor's ownership interest or rights in the property until the transferor dies. As
13 such, the rights of the transferor's creditors to reach the property are not affected
14 by the deed. Revocable TOD deed legislation should make that explicit.

15 *Creditors of Beneficiary*

16 A revocable TOD deed creates no present interest in the beneficiary and the
17 beneficiary's creditors should acquire no access to the property during the
18 transferor's life.¹⁶⁴ Revocable TOD deed legislation should make that principle
19 explicit.

20 *After-Acquired Title*

21 A revocable TOD deed beneficiary may attempt to make an encumbrance or
22 transfer in anticipation of acquiring title. In that circumstance, the encumbrance or
23 transfer would affect the property by operation of law when title is acquired.¹⁶⁵

24 The beneficiary's acts would not affect rights of the transferor's creditors. A
25 beneficiary may encumber or transfer only what the beneficiary ultimately
26 receives from the transferor, subject to all the transferor's encumbrances and
27 liabilities.

162. Prob. Code § 5509(b).

163. See Cal. State Bar Trust & Estates Section, *Letter re AB 12 (DeVore) (4/26/05)*.

164. One of the advantages of a revocable TOD deed over another form of nonprobate transfer such as joint tenancy is that joint tenancy creates a present interest in the joint tenants and a joint tenant's creditors acquire immediate access to the joint tenant's interest in the property.

165. See, e.g., Civ. Code §§ 2390 (mortgage), 1106 (transfer). That situation could occur where the beneficiary of a transferor has an expectancy of receiving property and desires to convert the expectancy to cash. Cf. Civ. Code § 2883 (agreement by beneficiary of probate estate to create a lien on estate property creates no lien until distribution of property; any expectancy of lien is extinguished by sale of the property in probate).

1 General principles adequately address any after-acquired title issues that may
2 affect a revocable TOD deed.

3 ***Secured Creditors***

4 Questions have arisen concerning the effect of a revocable TOD deed on
5 encumbered property. Must the trustee under a deed of trust notify the beneficiary
6 of a trustee's sale? If the transferor wishes to refinance, must a quitclaim or
7 subordination agreement be obtained from the beneficiary, or the revocable TOD
8 deed revoked and re-recorded after imposition of the encumbrance?

9 Ohio addresses the matter explicitly:¹⁶⁶

10 No rights of any lienholder, including, but not limited to, any mortgagee,
11 judgment creditor, or mechanic's lien holder, shall be affected by the designation
12 of a transfer on death beneficiary pursuant to this section and section 5302.22 of
13 the Revised Code. If any lienholder takes action to enforce the lien, by foreclosure
14 or otherwise through a court proceeding, it is not necessary to join the transfer on
15 death beneficiary as a party defendant in the action unless the transfer on death
16 beneficiary has another interest in the real property that is currently vested.

17 That level of statutory detail would not be necessary in California. The general
18 principle that the deed is revocable and has no effect on the rights of the transferor
19 or beneficiary should be adequate to handle these issues.

20 For the same reason, execution and recordation of a revocable TOD deed would
21 not trigger an acceleration clause on a loan secured by the property, whether in a
22 regular mortgage or in a reverse mortgage.¹⁶⁷ Revocable TOD deed legislation
23 should reinforce the concept that execution and recordation of the deed do not
24 constitute a transfer or conveyance of any right, title, or interest in the property
25 until the transferor's death.

26 **Creditor Rights After Transferor's Death**

27 ***Secured Creditors***

28 The beneficiary takes property under a revocable TOD deed subject to the
29 transferor's encumbrances.¹⁶⁸ Execution and recordation of a revocable TOD deed
30 does not trigger an acceleration clause, but passage of the property to the
31 beneficiary on the transferor's death does. On transfer of the property to the

166. Ohio Rev. Code Ann. § 5302.23(B)(7).

167. An acceleration clause on a reverse mortgage, as on a regular mortgage, would only be triggered by the death of the owner and the passage of title to the TOD deed beneficiary.

168. That rule is consistent with the general constructional principle that a specific gift of property carries with it an existing mortgage, deed of trust, or other lien; the underlying debt is not discharged out of the transferor's other assets but is a liability of the beneficiary. See Prob. Code § 21131 (no exoneration).

1 beneficiary a secured creditor could take steps to enforce its security interest. The
2 revocable TOD deed statute should include express language on the point.

3 ***Unsecured Creditors***

4 The rights of an unsecured creditor of the transferor following the transferor's
5 death are not clear. The property passes outside probate and its system for
6 satisfying debts. Public policy should not enable a transferor to defeat creditors by
7 the device of a revocable TOD transfer.

8 Possible approaches to protecting creditor rights, based on existing California
9 models include:

- 10 • The property is liable to the extent the transferor's estate is inadequate.
- 11 • The property is subject to recapture by the transferor's estate to the extent
12 the estate is inadequate.
- 13 • The beneficiary is liable to the extent of the value of the property.
- 14 • The liability of the property or beneficiary is limited to a pro rata share of
15 the transferor's debts based on the value of the property.
- 16 • Liability is limited to the general one year period for claims against a
17 decedent.

18 Colorado and New Mexico take the approach that, if the probate estate is
19 insufficient to satisfy claims of creditors, the estate may recapture the property to
20 satisfy the claims.¹⁶⁹ Colorado also allows the estate to assess the beneficiary for
21 the value of the property, as does Missouri. The Colorado assessment procedure is
22 subject to a one-year limitation period, and permits the beneficiary to seek
23 contribution from beneficiaries of other nonprobate transferees.¹⁷⁰ The Missouri
24 assessment process is subject to an 18 month limitation period; all nonprobate
25 transfer beneficiaries are assessed proportionately based on the value of property
26 received.¹⁷¹

27 The Uniform Probate Code deals comprehensively with creditor rights in the
28 event of a nonprobate transfer.¹⁷² Under the Uniform Probate Code, if the probate
29 estate is insufficient to cover debts of the transferor, beneficiaries of a nonprobate
30 transfer are liable, not to exceed the value of the property transferred. The estate
31 must first seek recovery from the transferor's revocable trust before proceeding
32 against nonprobate transfer beneficiaries, pro rata. The statute of limitations for
33 such a proceeding is one year after the transferor's death.

169. Colo. Rev. Stat. § 15-15-409; N.M. Stat. Ann. § 45-6-401(J).

170. Colo. Rev. Stat. §§ 15-15-409, 411.

171. Mo. Rev. Stat. § 461.300.

172. See UPC § 6-102 (1998 addition).

1 Ideally California law would deal comprehensively with creditor claims against
2 nonprobate transfers. It is problematic to specify creditor rights against revocable
3 TOD deed property or against the beneficiary when the law does not specify
4 creditor rights against other nonprobate transfers. Ultimately California law should
5 treat the matter comprehensively, as the Uniform Probate Code does.

6 Meanwhile, revocable TOD deed legislation should not be enacted without
7 creditor protection. The Commission would follow the existing California model
8 applicable to a successor who takes property of a decedent without probate under
9 the affidavit procedure for real property of small value.¹⁷³ Under this model a
10 beneficiary is personally liable for the transferor's unsecured debts, limited by the
11 value of the property received, and subject to a one year statute of limitations.¹⁷⁴
12 The liability is enforceable against the beneficiary in a direct action by a creditor,
13 or indirectly by the transferor's personal representative seeking restoration of the
14 property or its value to the estate for the benefit of creditors. The beneficiary may
15 avoid liability by restoring the property to the transferor's estate. The beneficiary
16 may also avoid liability by disclaiming.¹⁷⁵

17 Rights of Third Party Transferee

18 A third party that in good faith purchases or encumbers real property that has
19 passed to a beneficiary under a revocable TOD deed should take the property free
20 of any adverse claims. Any other rule would make the property uninsurable and
21 frustrate the purpose of the revocable TOD deed.

22 The Missouri and Colorado statutes state this rule expressly.¹⁷⁶ California law
23 should reinforce this basic principle.¹⁷⁷

24 Taxation

25 Gift Tax

26 A revocable TOD deed has no present effect — the transferor retains full
27 ownership rights and the beneficiary acquires no ownership rights. Gift tax
28 liability arises only on a completed gift.¹⁷⁸ Execution and recordation of a
29 revocable TOD deed would not be a taxable event for gift tax purposes.

173. Prob. Code §§ 13200-13210.

174. See Code Civ. Proc. § 366.2.

175. See Prob. Code § 275.

176. See Mo. Rev. Stat. § 461.067; Colo. Rev. Stat. § 15-15-410.

177. Cf. Prob. Code § 13203(a) (affidavit procedure for real property of small value).

178. Int. Rev. Reg. § 25.211-2.

1 **Estate Tax and Generation Skipping Transfer Tax**

2 The future of the estate tax and the generation skipping transfer tax is uncertain.
3 Under existing federal law the estate tax exclusion amount is currently \$2 million.
4 The exclusion amount increases to \$3.5 million in 2009, and the estate tax is
5 eliminated completely in 2010. But the estate tax is reinstated in 2011 with an
6 exclusion amount of \$1 million. Similarly the generation skipping transfer tax will
7 be repealed in 2010 but reinstated in 2011 with a 55% rate.

8 Given the uncertainty over the future of the estate tax and the generation
9 skipping transfer tax, this study proceeds on the assumption that these taxes will
10 continue to exist in the future and will look something like the current taxes.

11 Property included in the decedent's gross estate for estate tax purposes includes
12 property in which the decedent had a beneficial interest transferable at death.¹⁷⁹
13 That describes the revocable TOD deed. Property that passes by revocable TOD
14 deed would be included in the transferor's taxable estate.

15 Similarly, a revocable TOD deed to a grandchild would be considered a taxable
16 distribution on the transferor's death and subject to generation skipping transfer
17 tax liability.¹⁸⁰

18 Under the California law, proration of the estate tax is required "in the
19 proportion that the value of the property received by each person interested in the
20 estate bears to the total of all property received by all persons interested in the
21 estate."¹⁸¹ A revocable TOD deed beneficiary is a person interested in the estate
22 for that purpose.¹⁸²

23 A similar rule applies to equitable proration of the generation skipping transfer
24 tax.¹⁸³

25 The beneficiary of a revocable TOD deed would be liable for a proportionate
26 share of estate and generation skipping transfer taxes under these general
27 provisions.

179. Int. Rev. Code § 2033; Int. Rev. Reg. § 2033-1.

180. Int. Rev. Code §§ 2611-2613; Int. Rev. Reg. § 26.2612-1.

181. Prob. Code § 20111.

182. Prob. Code §§ 20100(b) ("person interested in the estate" means person that receives property by reason of death of decedent), 20100(d) ("property" means property included in gross estate for federal estate tax purposes). See also the Law Revision Commission Comment to Section 20100 — "The definition of 'person interested in the estate' in subdivision (b) includes but is not limited to persons who receive property by nonprobate transfer, such as a joint tenant or the beneficiary of a trust."

183. Prob. Code §§ 20211 (proration based on value of property), 20200(b) ("property" defined), 20200(c) ("transferee" defined).

1 **Income Tax**

2 In California, real property passing under a revocable TOD deed would
3 commonly have appreciated in value since the time of its acquisition by the
4 transferor.

5 The basis of property acquired from a decedent is generally the fair market value
6 of that property on the date of the decedent's death.¹⁸⁴ That results in a stepped up
7 basis to the decedent's beneficiary. The increased value of the real property is
8 recognized in the decedent's gross estate and recaptured through the estate tax.

9 Property is deemed to pass from a decedent if it is acquired by reason of death,
10 form of ownership, or other condition and is required for that reason to be
11 included in the decedent's gross estate.¹⁸⁵

12 Under these principles, real property that passes to a beneficiary under a
13 revocable TOD deed is entitled to a stepped up basis for income tax purposes, at
14 least under the law as it exists now. But if the estate tax is permanently repealed,
15 the beneficiary would not be entitled to an adjustment in basis. Instead, the
16 beneficiary would receive the property with a carryover basis from the
17 transferor.¹⁸⁶

18 These rules are determined by federal law. It is unnecessary to adjust revocable
19 TOD deed legislation to accommodate them.

20 **Property Tax**

21 One of the specific questions the Legislature has asked is whether property
22 transferred by revocable TOD deed would be reassessed.¹⁸⁷

23 Under California law a reassessment is triggered when there is a change in
24 ownership. That occurs when there is "a transfer of a present interest in real
25 property, including the beneficial use thereof, the value of which is substantially
26 equal to the value of the interest."¹⁸⁸ The statutes identify transfers that are not a
27 change in ownership for reassessment purposes, including a transfer to a revocable
28 trust, a transfer reserving a life estate, and a transfer in which proportional
29 ownership interests remain the same before and after the transfer.¹⁸⁹

30 Under these principles, execution and recordation of a revocable TOD deed
31 would not constitute a change in ownership so as to trigger a reassessment. A
32 change in ownership would occur on the transferor's death, when the beneficiary
33 acquires the property. However, there are special exemptions for transfers between

184. Int. Rev. Code § 1014(a)(1).

185. Int. Rev. Code § 1014(b)(9).

186. Int. Rev. Code § 1015.

187. 2005 Cal. Stat. ch. 422 § 1(b)(5).

188. Rev. & Tax. Code § 60.

189. Rev. & Tax. Code § 62.

1 spouses and between registered domestic partners, as well as transfers from a
2 parent to a child or grandchild.¹⁹⁰

3 A transferee of real property is required to file a change in ownership statement
4 within 150 days of the transferor's death.¹⁹¹ Ordinarily the personal representative
5 or trustee files a change in ownership statement on the decedent's death. Because a
6 TOD transfer passes outside of probate and the beneficiary may be unaware of this
7 obligation, revocable TOD deed legislation should highlight the duty.

8 **Change of Tax Burdens**

9 The Legislature has asked the Commission whether tax burdens would shift or
10 decrease as a result of revocable TOD deed legislation.¹⁹²

11 Assuming that the revocable TOD deed has the basic attributes recommended in
12 this study, the answer is "No". A transfer under a revocable TOD deed would be
13 treated the same as a transfer under a will for tax purposes.

14 **Medi-Cal Eligibility and Reimbursement**

15 Medicaid is a federal program that provides medical assistance to eligible low-
16 income persons. It is administered by the states under a cooperative federal-state
17 funding scheme. A state's participation in Medicaid is voluntary, but participating
18 states must comply with the federal Medicaid Act. California participates through
19 its Medi-Cal program.

20 Medi-Cal is particularly useful for long term care in a skilled nursing facility,
21 which Medicare does not cover. Strict asset guidelines govern Medi-Cal
22 eligibility. On the death of a person that has received Medi-Cal assistance, the
23 state has a claim against the person's estate for reimbursement.

24 A transfer or gift of real property is a technique commonly used to help a person
25 achieve or maintain Medi-Cal eligibility. It is particularly favored by estate
26 planners because that may put the property out of the transferor's estate and
27 immunize it from the state's reimbursement claim. A transfer without
28 consideration made in advance of the transferor's application for Medi-Cal
29 benefits may cause a loss of eligibility for a period of time. Generally, a transfer of
30 the family home, a transfer to a spouse or registered domestic partner, or a transfer
31 to a disabled child is exempt.

32 A transfer occurs when a person's control over an asset is relinquished or
33 diminished. Because a revocable TOD deed does not affect the transferor's control
34 of the property, it would not be considered a transfer for Medi-Cal purposes. It

190. See Rev. & Tax. Code §§ 62-63.

191. Rev. & Tax. Code § 480(b).

192. 2005 Cal. Stat. ch. 422 § 1(b)(5).

1 would neither diminish the transferor’s assets for qualification purposes, not
2 would it cause a loss of eligibility for Medi-Cal benefits.

3 On a Medi-Cal recipient’s death, the state has a claim for reimbursement against
4 the decedent’s “estate” or against a recipient of the decedent’s property “by
5 distribution or survival”.¹⁹³ For that purpose, the decedent’s estate includes
6 property in which the decedent had any legal title or interest at the time of death
7 including “assets conveyed to a survivor, heir, or assignee of the deceased
8 individual through joint tenancy, tenancy in common, survivorship, life estate,
9 living trust, or other arrangement.”¹⁹⁴ Under this standard, real property that a
10 transferor gave by deed to the transferor’s children while reserving a life estate
11 and the right to revoke the transfer has been held to be part of the transferor’s
12 estate for reimbursement purposes.¹⁹⁵

13 A revocable TOD deed would not operate to divest the transferor’s “Medi-Cal
14 estate” of the property. On the transferor’s death, the property would be subject to
15 the state’s Medi-Cal reimbursement claim. The Arkansas, Colorado, and Nevada
16 revocable TOD deed laws make this rule explicit by statute. California law should
17 do the same.

18 There is a three-year limitation period for recovery, running from the time the
19 state is given written notice of the decedent’s death under Probate Code Section
20 215. The beneficiary or person in possession of the decedent’s property must
21 notify the Department of Health Services. That would be the revocable TOD deed
22 beneficiary; revocable TOD deed legislation should state that clearly.

23 Implementation of Revocable TOD Deed

24 **Statutory Form**

25 Six of the nine states that have revocable TOD deed legislation prescribe a
26 statutory form for creation of the deed. Three of those states also prescribe a form
27 for revocation of a revocable TOD deed.

28 The statutory form is typically a “safe harbor” form — a revocable TOD deed in
29 substantially the prescribed form is sufficient. A few states appear to mandate the
30 statutory form — the revocable TOD deed must be in substantially the prescribed
31 form.¹⁹⁶

193. Welf. & Inst. Code § 14009.5.

194. 42 U.S.C. § 1396p(b)(4); Cal. Code Regs., tit. 22, § 50960(b)(1).

195. *Bonta v. Burke*, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

196. See the statutory forms prescribed by Kansas, New Mexico, and Ohio.

1 A statutory form has a number of attractions. It provides a model for a type of
2 deed new to the law. It helps standardize usage.¹⁹⁷ It also serves an educational
3 purpose by including language that describes the rights of the transferor and
4 beneficiary under the deed.

5 A significant concern with a statutory form is that it could encourage
6 uninformed self-help use of the revocable TOD deed. Whether a revocable TOD
7 deed would achieve the transferor's objectives with respect to taxes, creditors,
8 Medi-Cal, family protection, and like, is not apparent on the face of the deed. The
9 revocable TOD deed should be viewed as one of a number of estate planning
10 devices, each of which has advantages and disadvantages. A statutory form could
11 make uninformed use of the revocable TOD deed deceptively simple.

12 Whether or not the statute prescribes a form, it is probable that forms publishers
13 will provide both printed and electronic revocable TOD deed forms to consumers.
14 If there is a statutory form, that is likely to serve as a basis for private forms.¹⁹⁸ A
15 statutory form can thus serve as a model for best practices.

16 The Law Revision Commission believes that revocable TOD deed legislation
17 should include a model statutory form. That will be informative and help
18 effectuate the transfer.

19 A transferor would still be able to make a revocable TOD deed without using the
20 statutory form. However, the beneficiary might have trouble getting a title
21 company to recognize a variant form, and a court order might be required to
22 confirm title in the beneficiary.

23 **Alternative Types of Transfer**

24 A simple revocable TOD deed statutory form, accompanied by a well articulated
25 statute that lays out the incidents of the revocable TOD deed is likely to become
26 the preferred means by which a decedent might transfer real property to a
27 beneficiary effective on death. However, the law should be clear that the revocable
28 TOD deed is not exclusive. For example, California law would continue to
29 recognize the validity of a revocable transfer of property with a reserved life
30 estate¹⁹⁹ or a variant type of nonprobate transfer under Probate Code Section 5000.
31 Such a safety valve may be necessary to effectuate the transferor's intent in case of
32 a defectively executed revocable TOD deed.

197. For example, it may deter a transferor from putting into the deed a special covenant, condition, or other unique language that would cause constructional problems.

198. In New Mexico the forms publishers reprint the statutory form for sale in stationery stores, and that is the form people use.

199. *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914).

1 **Retroactivity**

2 Instruments purporting to be revocable TOD deeds exist and have been recorded
3 in California, perhaps using a form deed from another jurisdiction. Revocable
4 TOD deed legislation should deal with a preexisting instrument that purports to
5 make a nonprobate transfer of real property effective on the death of the transferor.

6 If the instrument conforms to the requirements of the revocable TOD deed law,
7 the instrument should be recognized as a revocable TOD deed under the law. That
8 would clarify the rules applicable to the instrument.²⁰⁰

9 If the instrument does not conform to the requirements of the revocable TOD
10 deed law, it may nonetheless still be a valid transfer on death under Probate Code
11 Section 5000.²⁰¹ Such an instrument would be governed by the applicable law in
12 effect at the time.²⁰²

13 **EVALUATION OF REVOCABLE TOD DEED**

14 **Adequacy of Other Instruments**

15 A revocable TOD deed passes real property to a beneficiary outside of probate.
16 The argument typically made for it is that it is cheaper and quicker than probate,
17 less expensive than a lawyer-prepared trust, and preferable to a joint tenancy.

18 But are existing devices available under California law inadequate for that
19 purpose? This study has surveyed the available transfer techniques, including a
20 lifetime deed, a will or intestate succession, an intervivos trust, joint tenancy,
21 community property (including community property with right of survivorship),
22 intervivos transfer with reserved life estate, revocable deed, and conveyance
23 pursuant to a nonprobate transfer.

24 The study catalogues the principal consequences of each device, including
25 ownership rights, revocability, cost and ease of transmission, privacy, creditor
26 rights, taxes, and Medi-Cal eligibility and reimbursement. Each device has a

200. That approach would also be consistent with the general approach of the Probate Code to make a revision of the law applicable retroactively, to the extent practicable. See Prob. Code § 3 (new law applies to all matters governed by it regardless of whether an event occurred or circumstance existed before, on, or after operative date of new law).

201. See Prob. Code § 5000(a) (emphasis added):

A provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account agreement, custodial agreement, deposit agreement, compensation plan, pension plan, individual retirement plan, employee benefit plan, trust, *conveyance, deed of gift*, marital property agreement, or *other written instrument of a similar nature* is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument.

202. See Prob. Code § 3(g) (if new law does not apply to a matter that occurred before the operative date, old law continues to govern the matter notwithstanding amendment or repeal by new law).

1 unique constellation of legal incidents that may perhaps make it more suitable for
2 the circumstances of a particular transferor than another device.

3 It has been suggested that better educational opportunities for seniors and
4 unsophisticated consumers on how best to achieve their goals would be a more
5 effective means of helping transferors than creating a new form of title such as a
6 revocable TOD deed. The revocable TOD deed may appear deceptively simple,
7 yet cause problems not anticipated by a transferor who uses it.

8 While uninformed use of any of these instruments, including the revocable TOD
9 deed, is inadvisable, that does not answer the question whether the revocable TOD
10 deed serves a purpose not served by the other instruments. At the risk of
11 oversimplifying, the Commission believes that each of these instruments has a few
12 salient and distinguishing characteristics that make it less desirable than the
13 revocable TOD deed in some circumstances:

- 14 • Lifetime deed — transferor immediately and irrevocably gives up
15 ownership and control of the property.
- 16 • Will or intestate succession — cost and delay of probate significant.
- 17 • Intervivos trust — may be complex and expensive for transfer of a single
18 piece of property.
- 19 • Joint tenancy — immediate transfer of undivided interest, subject to
20 creditors of transferee.
- 21 • Community property — only available for transfer to surviving spouse or
22 domestic partner, and requires shared concurrent ownership.
- 23 • Intervivos transfer with reserved life estate — irrevocable and subject to
24 conflicts between present and future interest holders.
- 25 • Revocable deed — little known or understood.
- 26 • Conveyance pursuant to nonprobate transfer — not explicitly recognized
27 by the law and no clear legal incidents established.

28 In summary the advantages the revocable TOD deed offers over other options
29 include:

- 30 • The deed avoids probate — it is substantially cheaper and quicker. It also
31 ensures more privacy than a public probate proceeding, although
32 ultimately the deed must be recorded to be effective.
- 33 • Like a will, the deed is revocable, preserving flexibility for the transferor
34 to change the beneficiary designation, revoke the deed, or sell or
35 encumber the property.
- 36 • The deed is less expensive than a trust, and is also self-executing,
37 requiring no intermediary to effectuate the transfer.
- 38 • Unlike joint tenancy the property is protected against claims of the
39 beneficiary's creditors during the transferor's life, does not incur potential
40 gift tax liability, and the entire property receives a stepped up basis.
- 41 • The deed does not impact the transferor's Medi-Cal eligibility.

1 A revocable TOD deed cannot be processed the same way other nonprobate
2 transfers are processed. Other forms of nonprobate transfer typically involve a
3 third party to effectuate the transfer or to issue new title — a bank, a transfer
4 agent, a trustee. In a probate proceeding a court issues a decree of title, or a court
5 appointed personal representative transfers title. To a significant extent the rights
6 of a transferee under a revocable TOD deed must depend on the mechanism of
7 title insurance. The Commission’s recommendations in this study are designed to
8 make the transfer of real property under a revocable TOD deed insurable without
9 the need for judicial proceedings.

10 **Need for the Device**

11 The Commission has received numerous communications that make the general
12 point that a homeowner should be able to deed property directly to heirs without
13 the expense of a trust or a probate proceeding, and they urge a favorable report to
14 the Legislature on this matter. The authors of the communications argue that
15 seniors on a limited income cannot afford legal services. Points typically made in
16 the communications urging adoption of the revocable TOD deed include:

- 17 • It is a straightforward, efficient, direct, private, and trouble-free way to
18 transfer property to an heir.
- 19 • It avoids capital gains tax on transfer to a beneficiary.
- 20 • It avoids the cost of an attorney to prepare a will or trust.
- 21 • It avoids the cost and delay of a probate proceeding.
- 22 • This is a consumer-friendly device. Its low cost is important to a senior on
23 a fixed income or a person of limited means who finds it difficult to pay
24 for an attorney.
- 25 • The simplicity of a one page deed is preferable to the complexity of a
26 multi-page trust document prepared by a lawyer that is difficult to
27 understand.
- 28 • If all of a person’s other property passes outside probate through
29 beneficiary designations, why should it be necessary to have a probate
30 proceeding for this one item?
- 31 • Why should Californians be denied a device that is available to residents
32 of other states?

33 The Commission has received considerable input during this study from
34 attorneys and agencies that provide senior legal services. Many of them make the
35 point that their clients have limited resources and need a simple, understandable,
36 and inexpensive device such as a revocable TOD deed that will enable them to
37 pass their family home to their heirs. Sample quotations are reproduced below:

1 The proposal for a simple, one page state-recognized beneficiary deed that we
2 could use at the Senior centers and elsewhere would be a real benefit to California
3 seniors.²⁰³

4 Large portions of these citizens live on small pensions that leave them no
5 discretionary funds for which to hire an attorney to draft a revocable trust to avoid
6 probate. However, most, if not all, of these citizens wish to avoid the possibility
7 of their estates being subjected to the probate court system where from \$11,000 to
8 \$20,000 of their estate is eaten up in attorney's fees for simply passing a single
9 family house to heirs.²⁰⁴

10 Over my 20 years in practice I have often seen expensive living trusts, bought
11 from trust mills by senior clients. Some of the trusts were useless, and all of them
12 cost the senior too much of his/her very limited resources. These elders simply
13 wanted to pass their homes to their children outside of probate. If revocable
14 transfer-on-death deeds had been available, all of those clients could have used
15 that much simpler method, and would not have been such easy prey for the trust
16 salespeople.²⁰⁵

17 Many senior citizens have little in liquid assets and most of their estate is in
18 their residence. When they find out that they have to incur the expense and
19 administrative burdens of a revocable trust, or subject their heirs to the cost and
20 delays of probate they sometimes try to use other devices to pass on their
21 property. One of the most frequent is to retitle their property in joint tenancy with
22 the heirs. That is very risky since they subject the property to liabilities incurred
23 by the joint tenants. Often they execute an undated quitclaim deed that is not
24 recorded with the hope that it can be used to transfer the property after their death.
25 In other situations they deed the property to the heirs and reserve a life estate.
26 That creates complications because the transfer is not revocable. In addition it is
27 difficult to deal with that situation when the life tenant is no longer capable of
28 living on the property. Such devices also trigger elder abuse concerns when the
29 relationship between the parties becomes strained.²⁰⁶

30 **Concern About Revocable TOD Deed Concept**

31 Professionals who would be in the position of implementing the revocable TOD
32 deed, including attorneys, judges, lenders, and title companies, have expressed

203. James A. Giblin, emeritus attorney volunteering with Contra Costa Senior Legal Services.

204. Contra Costa County Advisory Council on Aging.

205. Sarah Shena, Kings/Tulare Area Agency on Aging. Ms. Shena notes that she is the only attorney in her agency, which offers free services to 65,000 elderly. She argues that real property should be able to pass free of probate in most instances. "Probate is a highly complicated and expensive process that can take years; the court supervision it involves is unnecessary in nearly all of the cases I see. My office cannot handle probate cases because of the time involved. A beneficiary deed would help simplify and expedite the transfer of homeowners' property without forcing heirs to endure the costly and time-consuming probate process."

206. John A. Cape, pro bono legal services volunteer.

1 concerns. They have noted that the revocable TOD deed may lend itself to use by
2 a real property owner without adequate counseling. While the revocable TOD
3 deed is a way to cheaply and quickly transfer property, it is not necessarily the
4 safest or most reliable method of accurately ensuring the transferor's wishes are
5 carried out as the transferor intended.

6 Historically, a "quick and easy" conveyancing document such as a quitclaim
7 deed is often the instrument of choice of a perpetrator of fraud who preys on
8 seniors and unsophisticated consumers. Because it is easy to use, cheap to record,
9 and doesn't require the use of an attorney or other third party intermediary, it
10 facilitates fraud. The ease and simplicity of use associated with the revocable TOD
11 deed suggest that it may lend itself to similar abuse.

12 Comments made by the professionals about the revocable TOD concept include:

- 13 • The revocable TOD deed would create and encourage an estate planning
14 substitute that is likely to be a self-help device for the elderly, resulting in
15 (1) inappropriate use where another device might be more suited to the
16 transferor's circumstances, (2) an increase in title problems caused by lay
17 drafting and execution of the instrument, (3) susceptibility to elder abuse,
18 and (4) avoidance of competent estate planning advice and assistance,
19 resulting in adverse consequences. "It would create more opportunities
20 than presently exist for non-lawyers to give inadequate or poor advice to
21 persons wishing to avoid probate, and more opportunities for abusers to
22 obtain title to property from the elderly, without the court overseeing the
23 transfer."²⁰⁷
- 24 • The privacy inherent in the revocable TOD deed "does not allow heirs at
25 law or creditors to know real property has passed to named designees upon
26 the death of a family member, and as a result the property may be sold or
27 refinanced before possible abuse claims can be raised."²⁰⁸
- 28 • The revocable TOD deed would add an ad hoc device to the proliferation
29 of other types of estate planning mechanisms, particularly nonprobate
30 transfers that are not controlled by a will or trust. "This proliferation
31 results in confusion, inconsistency, litigation, and frustration for all
32 involved. It makes it increasingly difficult to prepare estate plans for
33 people and have any assurance that the plan will be consistently
34 implemented by all the beneficiary choices that people make."²⁰⁹
- 35 • The revocable TOD deed would be a new and untested estate planning
36 device that is unnecessary because existing devices are available to
37 achieve the same purpose.

207. Sacramento County Bar Association.

208. State Bar Conference of Delegates, Resolutions Committee.

209. State Bar Trusts & Estates Section.

- 1 • In states that have adopted the revocable TOD deed there has been
2 confusion about rights as between the transferor and beneficiary during the
3 transferor's life.

4 **Balancing Need Against Concerns**

5 The experience in states that have adopted revocable TOD deed legislation has
6 been generally favorable, although there have been problems that have required
7 corrective legislation. These types of problems can be resolved by clearly drafted
8 legislation, and this study in large part attempts to do that.

9 The Law Revision Commission disagrees with the argument that the revocable
10 TOD deed is unnecessary because California already recognizes the functional
11 equivalent — a revocable deed with reserved life estate — which has been the law
12 for nearly a century.²¹⁰ That device is little known, and its legal effect and
13 consequences are unclear. It would be preferable for the law to provide a simple,
14 understandable device with clear rules, such as the revocable TOD deed, than to
15 encourage people to rely on a shadowy device such as the revocable deed with
16 reserved life estate.

17 California law has allowed nonprobate transfer devices to proliferate without
18 consistent standards or consistent consequences. At some point this area of law
19 must be treated comprehensively. However, consideration of the revocable TOD
20 deed concept should not be deferred until that can be done. It is not clear when
21 such a comprehensive overview could happen. And to the extent appropriate and
22 clearly expressed solutions for revocable TOD deed issues are developed, that will
23 facilitate sensible treatment of nonprobate transfer issues generally by providing a
24 model.

25 The probate system has due process protections built into it. It is designed to
26 provide notice to the decedent's heirs and would be beneficiaries, and to provide
27 them an opportunity to challenge the decedent's will or other dispositional plan, or
28 lack of it. The privacy of a transfer by a revocable TOD deed, without notice to
29 interested persons and an opportunity to intervene in the transfer, is to some extent
30 troubling. But that is inherent in the concept of the nonprobate transfer. The
31 revocable TOD deed has the safeguard that it must be recorded before the
32 transferor's death to be effective. The law should include a moderate limitation
33 period after the transferor's death during which a person wronged by the transfer
34 could challenge it and, if not recapture the property, at least be compensated by
35 damages.

36 The most cautionary issues surrounding the revocable TOD deed relate to the
37 likelihood of uninformed self-help use of the device, leading to adverse estate
38 planning consequences for the transferor, improperly drafted instruments that
39 defeat the transferor's intent, failure to make the required recordation, and

210. See *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914).

1 manipulation and financial abuse against the transferor. The revocable TOD deed
2 enables a seductively simple transfer of what could well be the transferor's major
3 asset without any neutral guidance or assistance.

4 While the potential for misuse and abuse of the revocable TOD deed is real, the
5 existence of the device will not generate problems that do not already exist if an
6 individual is inclined to avoid counsel and to avoid probate.²¹¹ An outright transfer
7 of the property, or creation of a joint tenancy, is likely to be a greater source of
8 problems than a revocable TOD deed. The revocable TOD deed is a relatively
9 benign instrument. Unlike a standard deed, there is no immediate transfer of the
10 property and the deed is revocable. Unlike a will that may remain private until the
11 transferor's death, the required recording of the revocable TOD deed provides
12 public exposure.

13 The problem of uninformed use of the revocable TOD deed can be addressed to
14 some extent by a statutory deed form that is clear and informative to the transferor
15 and beneficiary. Even with a statutory form, a person should seek competent
16 advice before attempting to use a revocable TOD deed.

17 **Conclusion**

18 The nonprobate revolution has largely bypassed real property. Nearly all other
19 significant assets, including life insurance, securities, bank accounts, and pension
20 plans pass commonly by beneficiary designation outside the probate system. Real
21 property is the last significant holdout, although substantial amounts of real
22 property pass by right of survivorship under joint tenancy or community property
23 or under a trust. It has been observed that ownership of real property is the factor
24 most likely to determine whether a death will lead to a probate proceeding.²¹²

25 California law does not adequately deal with the many types of nonprobate
26 transfer and their consequences. Comprehensive treatment of the area is necessary,
27 much as Missouri has done with its nonprobate transfer law and as the Uniform
28 Probate Code has done with creditor rights issues. But the need for comprehensive
29 treatment of nonprobate transfer law should not be cause for delay in considering
30 the concept of the revocable TOD deed on its merits.

31 After having surveyed existing transfer devices and reviewed the experience in
32 other jurisdictions, and after having considered the legal incidents of the revocable
33 TOD deed, the Law Revision Commission recommends adoption of the device in

211. "Deeds, wills, trusts, equity loans, co-signing for credit and other instruments are already used abusively far too often. Law enforcement, attorneys and others have their hands full in dealing with the problem. But I can't imagine how the existence of a TOD deed form would trigger abuse by a motivated criminal who would otherwise not act. The methods are there for the using." David Mandel, Senior Legal Hotline.

212. Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1119 (1984).

1 California as prescribed in the “Proposed Legislation” below. The Commission
2 solicits public comment on this recommendation. After reviewing public
3 comment, the Commission will develop a final report on the matter for submission
4 to the Legislature.²¹³

213. The report is due by January 1, 2007.

PROPOSED LEGISLATION
Contents

PART 4. REVOCABLE TRANSFER ON DEATH DEED..... 69

 CHAPTER 1. GENERAL PROVISIONS 69

 Article 1. Preliminary Provisions 69

 § 5600. Application of part..... 69

 § 5602. Effect on other forms of transfer 69

 § 5604. Effect of other law 70

 Article 2. Definitions 70

 § 5606. Application of definitions 70

 § 5608. Beneficiary 70

 § 5610. Real property 71

 § 5612. Record 71

 § 5614. Revocable transfer on death deed..... 71

 § 5616. Transferor..... 72

 CHAPTER 2. EXECUTION AND REVOCATION..... 72

 Article 1. Execution..... 72

 § 5620. Capacity to make deed 72

 § 5622. Beneficiary 72

 § 5624. Execution 73

 § 5626. Recordation, delivery, and acceptance..... 73

 § 5628. Multiple deeds 74

 Article 2. Revocation..... 74

 § 5630. Revocability 74

 § 5632. Revocation of deed..... 74

 Article 3. Statutory Forms..... 75

 § 5640. Statutory forms permissive 75

 § 5642. Statutory form revocable TOD deed 75

 § 5644. Statutory form revocation of revocable TOD deed 77

 CHAPTER 3. EFFECT 78

 Article 1. General Provisions 78

 § 5650. Effect during transferor’s life 78

 § 5652. Effect at death..... 79

 § 5654. Medi-Cal eligibility and reimbursement..... 79

 § 5656. Property taxation 80

 Article 2. Other Instruments and Forms of Tenure 80

 § 5660. Conflicting dispositive instruments..... 80

 § 5662. Co-owned property 80

 § 5664. Joint tenancy property 81

 § 5666. Community property 81

 Article 3. Creditors 82

 § 5670. Priority of secured creditor of transferor 82

 § 5672. Liability for unsecured debts 82

 § 5674. Limitation on liability 83

 § 5676. Return of property to estate for benefit of creditors..... 83

 CHAPTER 4. EFFECTUATION OF TRANSFER..... 84

 § 5680. Beneficiary rights and duties 84

 § 5682. BFP protection..... 85

CHAPTER 5. CONTEST	85
§ 5690. Contest of transfer	85
§ 5692. Time for contest.....	86
§ 5694. Remedies.....	86
§ 5696. Fraud, undue influence, duress, mistake, or other invalidating cause.....	86
CONFORMING REVISIONS	86
Fam. Code § 2040 (amended). Automatic temporary restraining order.....	86
Prob. Code § 250 (amended). Effect of homicide	88
Prob. Code § 267 (amended). Disclaimable interest	89
Prob. Code § 279 (amended). Time for exercise of disclaimer	90
Prob. Code § 4264 (amended). Authority that must be specifically granted	91
Prob. Code § 5000 (amended). Nonprobate transfer	91
Prob. Code §§ 5040-5048 (added). Nonprobate transfer to former spouse	92
CHAPTER 3. NONPROBATE TRANSFER TO FORMER SPOUSE.....	92
Prob. Code § 5302 (amended). Multiple party account.....	94

1 **Prob. Code §§ 5600-5604 (repealed). Nonprobate transfer to former spouse**

2 SEC. ____ Part 4 (commencing with Section 5600) of Division 5 of the Probate
3 Code is repealed.

4 **Comment.** Former Sections 5600-5604 are continued without change, other than renumbering,
5 in Chapter 3 (commencing with Section 5040) of Part 1. The sections are relocated to make room
6 for new Part 4 (commencing with Section 5600), relating to the revocable TOD deed.

7 **Prob. Code §§ 5600-5696 (added). Revocable transfer on death deed**

8 SEC. ____ Part 4 (commencing with Section 5600) is added to Division 5 of the
9 Probate Code, to read:

10 PART 4. REVOCABLE TRANSFER ON DEATH
11 DEED

12 CHAPTER 1. GENERAL PROVISIONS

13 Article 1. Preliminary Provisions

14 **§ 5600. Application of part**

15 5600. (a) This part applies to a revocable transfer on death deed made by a
16 transferor who dies on or after January 1, 2008, whether the deed was executed or
17 recorded before, on, or after January 1, 2008.

18 (b) Nothing in this part invalidates an otherwise valid transfer under Section
19 5602.

20 **Comment.** Section 5600 implements the general rule that a new provision of the Probate Code
21 applies retroactively. See Section 3. However, this part does not interfere with rights of a
22 decedent's successors acquired by reason of the decedent's death before the operative date of this
23 part. An instrument of a decedent who dies before the operative of this part, or an instrument of a
24 decedent who dies after the operative date of this part that was not executed in compliance with
25 this part, is governed by other law. See Sections 3(g) (application of old law), 5602 (effect on
26 other forms of transfer).

27 **§ 5602. Effect on other forms of transfer**

28 5602. (a) This part does not preclude use of any other method of conveying real
29 property that is permitted by law and that has the effect of postponing enjoyment
30 of the property until the death of the owner.

31 (b) This part does not invalidate a deed of real property, otherwise effective to
32 convey title to the property, that is not recorded until after the death of the owner.

33 **Comment.** Subdivision (a) of Section 5602 recognizes the possibility of other devices that may
34 achieve an effect similar to the revocable TOD deed, such as a revocable deed under *Tennant v.*
35 *John Tennant Memorial Home*, 167 Cal. 570, 140 P. 242 (1914), or another instrument under
36 Section 5000 (nonprobate transfer).

1 Although a revocable TOD deed is ineffective unless recorded before the owner's death (see
2 Section 5626), subdivision (b) makes clear that the pre-death recordation requirement does not
3 apply to other types of deed. As between a revocable TOD deed recorded before the transferor's
4 death and another instrument recorded after the transferor's death, the revocable TOD deed
5 prevails. See Section 5660 (conflicting dispositive instruments).

6 **§ 5604. Effect of other law**

7 5604. (a) Nothing in this part affects the application to a revocable transfer on
8 death deed of any other statute governing a nonprobate transfer on death,
9 including but not limited to any of the following provisions that by its terms or
10 intent would apply to a nonprobate transfer on death:

11 (1) Division 2 (commencing with Section 100) (general provisions).

12 (2) Part 1 (commencing with Section 5000) of this division (provisions relating
13 to effect of death).

14 (3) Division 10 (commencing with 20100) (proration of taxes).

15 (4) Division 11 (commencing with Section 21101) (construction of wills, trusts,
16 and other instruments).

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

20 **Comment.** Section 5604 makes clear that the revocable TOD deed law is supplemented by
21 general statutory provisions governing a nonprobate transfer. The specific cross references in this
22 section are illustrative and not exclusive. General provisions referenced in this section include
23 effect of death on community property, establishing and reporting fact of death, simultaneous
24 death, effect of homicide or abuse, disclaimer, provisions relating to effect of death, nonprobate
25 transfers of community property, nonprobate transfer to former spouse, proration of taxes, rules
26 for interpretation of instruments, and limitations on transfers to drafters.

27 This part may in some instances limit the effect of a provision otherwise applicable to a
28 nonprobate transfer on death. See, e.g., Section 5620 & Comment (capacity to make deed).

29 **Article 2. Definitions**

30 **§ 5606. Application of definitions**

31 5606. Unless the provision or context otherwise requires, the definitions in this
32 article govern the construction of this part.

33 **Comment.** Although Section 5606 limits the application of these definitions, a defined term
34 may also be used in another statute in its defined sense. See, e.g., Section 5000(a) (nonprobate
35 transfer includes revocable TOD deed).

36 The definitions in this article are supplemented by those in Part 2 (commencing with Section
37 20) of Division 1. See, e.g., Sections 24 (beneficiary), 28 (community property), 39 (fiduciary),
38 45 (instrument), 48 (interested person), 56 (person), 58 (personal representative), 62 (property),
39 68 (real property), 81 (transferor), 81.5 (transferee), 82 (trust), 84 (trustee), 88 (will).

40 **§ 5608. Beneficiary**

41 5608. "Beneficiary" means a person named in a revocable transfer on death deed
42 as transferee of the property.

1 **Comment.** Section 5608 is a specific application of Section 24 (“beneficiary” defined). The
2 beneficiary must be identified by name. Section 5622 (beneficiary).

3 **§ 5610. Real property**

4 5610. “Real property” means the fee or an interest in real property. The term
5 includes but is not limited to any of the following interests in real property:

6 (a) A leasehold.

7 (b) An interest in a common interest development within the meaning of Section
8 1351 of the Civil Code.

9 (c) An easement, license, permit, or other right in property to the extent the right
10 is both (1) a recordable interest in property and (2) transferable on death of the
11 owner of the right.

12 **Comment.** Section 5610 supplements the definition of real property found in Section 68 (“real
13 property” includes leasehold). Any interest in real property may be the subject of a revocable
14 TOD deed.

15 Under subdivision (b), an interest in a CID includes a community apartment project, a
16 condominium project, a planned development, and a stock cooperative. The provision makes
17 clear that these forms of tenure are real property for the purpose of a revocable TOD deed,
18 regardless of whether elements of the interest are contractual in nature.

19 Subdivision (c) would apply to such an interest as a use or occupancy permit or an extraction
20 or removal right (e.g., oil and gas, minerals, timber, or grazing). A property interest under
21 subdivision (c) may relate to private land as well as to public land (whether state or federal). If
22 the interest is both recordable and transferable at death, by will or otherwise, the interest may be
23 the subject of a revocable TOD deed.

24 **§ 5612. Record**

25 5612. “Record” has the meaning provided in Section 1170 of the Civil Code.

26 **Comment.** Section 5612 adopts the rule that an instrument is deemed to be recorded when,
27 being duly acknowledged or proved and certified, it is deposited in the recorder’s office, with the
28 proper officer, for record. See Civ. Code § 1170 (recorded).

29 **§ 5614. Revocable transfer on death deed**

30 5614. (a) “Revocable transfer on death deed” means an instrument that makes a
31 donative transfer of real property effective on the death of the transferor under this
32 part.

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

35 **Comment.** Section 5614 adopts revocable TOD deed terminology, rather than “beneficiary
36 deed” terminology used in some jurisdictions that have enacted comparable legislation.

37 A revocable TOD deed may be made for real property or any interest in real property. See
38 Section 5610 (“real property” defined).

39 The beneficiary must be identified by name in a revocable TOD deed. See Section 5622
40 (beneficiary).

41 For a revocable TOD deed statutory form see Section 5642. For construction of a revocable
42 TOD deed see Part 1 (commencing with Section 21101) of Division 11 (rules for interpretation of
43 instruments).

1 **§ 5616. Transferor**

2 5616. “Transferor” means an owner of real property who makes a revocable
3 transfer on death deed of the property.

4 **Comment.** Section 5616 is a specific application of Section 81 (“transferor” defined).

5 CHAPTER 2. EXECUTION AND REVOCATION

6 Article 1. Execution

7 **§ 5620. Capacity to make deed**

8 5620. An owner of real property who has testamentary capacity may make a
9 revocable transfer on death deed of the property.

10 **Comment.** Under Section 5620 testamentary, rather than contractual, capacity is required for
11 execution of a revocable transfer on death deed. The standard of testamentary capacity is
12 prescribed in Section 6100.5. This is an exception to the general rule of Section 812 (capacity to
13 make a decision, other than health care or will). This section is consistent with case law that to
14 make a gift deed, the transferor need only have testamentary capacity, not contractual capacity.
15 *Goldman v. Goldman*, 116 Cal. App. 2d 227, 253 P. 2d 474 (1953).

16 **§ 5622. Beneficiary**

17 5622. (a) The transferor shall identify the beneficiary by name in a revocable
18 transfer on death deed.

19 (b) The transferor may name an alternate beneficiary to take property if a named
20 beneficiary fails to survive the transferor.

21 (c) The transferor may name more than one beneficiary or alternate beneficiary.
22 Unless the instrument otherwise provides, beneficiaries take the property as
23 tenants in common.

24 (d) The transferor may name as beneficiary the trustee of a trust even if the trust
25 is revocable.

26 **Comment.** Subdivision (a) of Section 5622 makes explicit the requirement that a beneficiary
27 be identified by name in the instrument. A class gift is not permissible.

28 Subdivision (b) makes explicit the right of a transferor to name an alternate beneficiary. The
29 transferor may name more than one alternate beneficiary. Subdivision (c); see also Section 10
30 (singular includes plural).

31 Subdivision (c) makes explicit the right of a transferor to name multiple beneficiaries. A
32 beneficiary must survive the transferor in order to take an interest under this section. Section
33 21109. For the consequence of a named beneficiary’s failure to survive the decedent, see Section
34 21110 (antilapse).

35 Subdivision (d) makes clear that the beneficiary under a revocable TOD deed may be a trustee
36 and need not be the trust beneficiary. If a trust named as beneficiary is revoked before the
37 transferor’s death, general rules of construction applicable to such a gift would govern. See
38 Section 21111 (failure of transfer).

39 **Note.** The Commission solicits comment on whether the transferor should be statutorily
40 authorized to fractionate the beneficial interests that pass under a revocable TOD deed
41 between a life estate and remainder interest.

1 § 5624. Execution

2 5624. (a) Except as provided in subdivision (b), a revocable TOD deed is not
3 effective unless the transferor signs and dates the deed and acknowledges the deed
4 before a notary public.

5 (b) A revocable transfer on death deed may be signed and dated in the
6 transferor's name by a person other than the transferor at the transferor's direction
7 and in the transferor's presence but shall be acknowledged by the transferor.

8 **Comment.** Section 5624 prescribes execution requirements. A revocable TOD deed is not
9 invalid because it does not comply with the requirements for execution of a will. See Section
10 5000(a) (provision for nonprobate transfer on death in written instrument).

11 A properly executed revocable TOD deed is ineffective unless recorded before the transferor's
12 death. See Section 5626 (recordation, delivery, and acceptance).

13 § 5626. Recordation, delivery, and acceptance

14 5626. (a) A revocable transfer on death deed is not effective unless the deed is
15 recorded before the transferor's death.

16 (b) The transferor need not deliver a revocable transfer on death deed to the
17 beneficiary during the transferor's life.

18 (c) The beneficiary need not accept a revocable transfer on death deed from the
19 transferor during the transferor's life.

20 **Comment.** Subdivision (a) of Section 5626 requires recordation of the revocable TOD deed
21 before the transferor's death, but does not require recordation by the transferor — an agent or
22 other person authorized by the transferor may record the instrument. The deed is considered
23 recorded for purposes of this section when it is deposited for record with the county recorder. See
24 Section 5612 ("record" defined).

25 Subdivision (b) makes clear that delivery of a revocable TOD deed is not necessary,
26 notwithstanding a Law Revision Commission Comment to Section 5000 to the effect that Section
27 5000 does not relieve against the delivery requirement of the law of deeds. The recordation
28 requirement for a revocable TOD deed makes delivery unnecessary. Consideration is not required
29 for a revocable TOD deed. See Civ. Code § 1040.

30 Subdivision (c) states the rule that, unlike an inter vivos deed, a revocable TOD deed does not
31 require acceptance. Acceptance of a donative transfer is presumed. Disclaimer procedures are
32 available to a beneficiary. See Sections 267, 279 (disclaimer).

33 A revocable TOD deed has no effect, and confers no rights on the beneficiary, until the
34 transferor's death. See Section 5650 (effect during transferor's life).

35 **Note.** The Commission particularly solicits comment on the question whether
36 recordation of a revocable TOD deed should be required within a short time after execution
37 by the transferor, for example within 30 or 60 days after execution. Considerations include:

38 • Prompt recording could help expose fraud or undue influence before the transferor dies.
39 However, such a requirement could frustrate the transferor's desire to maintain the privacy of the
40 disposition.

41 • Prompt recording would be evidence of the transferor's intent. However, such a requirement
42 could frustrate the intent of a transferor who seeks to pass the property to the beneficiary but is
43 physically unable to record the instrument within the required period or where there is a failure of
44 prompt recording for another reason.

45 • A prompt recording requirement could help ensure that the revocable TOD deed is in fact
46 recorded before the transferor's death, helping to ameliorate the problem that could occur if the
47 transferor holds off for privacy reasons until it is too late.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35
36

Article 3. Statutory Forms

§ 5640. Statutory forms permissive

5640. (a) A transferor may make or revoke a revocable transfer on death deed by an instrument in substantially the form provided in this chapter.

(b) Nothing in this chapter limits the right of a transferor to make or revoke a revocable transfer on death deed by an instrument not in substantially the form provided in this chapter.

Comment. Section 5640 makes clear that use of the statutory forms provided in this chapter are permissive and are not mandatory. The statutory forms are sufficient to create or revoke a revocable TOD deed.

§ 5642. Statutory form revocable TOD deed

5642. A transferor may make a revocable transfer on death deed by an instrument in substantially the following form:

Revocable Transfer on Death (TOD) Deed

[California Probate Code Section 5600]

Notice to Owner. This deed may have significant and unintended consequences for your estate plan; you should consult a professional before using it. This deed **MUST** be recorded before you die in order to be effective. You may revoke this deed by recording another instrument before you die. If you hold this property in joint tenancy or as community property with right of survivorship, this deed will pass your interest in the property to the beneficiary and not to the surviving joint tenant or spouse.

Notice to Beneficiary. This deed does not transfer ownership of the property to you until the owner dies, and you acquire no rights in the property until then. The owner may revoke this deed at any time. When the owner dies you should record evidence of death under Probate Code Section 210 and you must (1) file the change in ownership notice required by Revenue and Taxation Code Section 480 and (2) notify the Department of Health Services if required by Probate Code Section 215. If you do not wish to receive the property, you may disclaim it under Probate Code Section 275.

IDENTIFYING INFORMATION

Name of Owner: _____
Co-Owners Who Join in this Deed: _____
Address or Other Description of Property: _____
Name(s) of Beneficiary(ies): _____

1 **Name of Survivor Entitled to Occupancy [optional]:** _____

2 **TRANSFER ON DEATH**

3 I transfer all my interest in the described property to the named beneficiary on
4 my death. If I name more than one beneficiary, the beneficiaries shall take equal
5 shares as tenants in common. If a named beneficiary dies before me, the share that
6 would otherwise go to that beneficiary shall pass in accordance with applicable
7 provisions of the California Probate Code.

8 If I name a survivor entitled to occupancy, property transferred on my death to
9 the named beneficiary or beneficiaries is subject to the right of the survivor to
10 occupy the property for life as a life tenant.

11 This revocable TOD deed revokes any previous revocable TOD deed I have
12 made for the described property. This deed is revocable at any time before my
13 death.

14 **SIGNATURE AND DATE**

15 **Signature of Owner:** _____

16 Signatures of Co-Owners Who Join in this Deed: _____

17 **Date:** _____

18 **ACKNOWLEDGMENT**

19 State of California)

20 County of _____)

21 On _____ before me, (here insert name and title of the officer), personally
22 appeared _____, personally known to me (or proved to me on the basis of
23 satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the
24 within instrument and acknowledged to me that by his/her/their signature(s) on the
25 instrument the person(s) executed the instrument.

26 WITNESS my hand and official seal.

27 Signature _____ (Seal)

28

29 **Comment.** Section 5642 prescribes a form for creation of a revocable TOD deed. Use of the
30 form is not mandatory. See Section 5640 (statutory forms permissive).

31 **Note. The Commission particularly requests public comment on several matters in**
32 **connection with the statutory form:**

- 33 • Rather than a single all-purpose statutory form, should there be a number of single-
34 purpose statutory forms, e.g., a form for use when only one beneficiary is named, a
35 form for use when a life estate will be granted, etc.? A single-purpose form would be
36 shorter and simpler than an all-purpose form, but there is a risk that a person could
37 inadvertently use the wrong form.
- 38 • Should the statutory form provide for a transfer subject to a life estate? A typical
39 transfer of this type might pass the property to the transferor’s surviving spouse for life
40 and then to the transferor’s children of a former marriage. Such a transfer could cause
41 conflict between the surviving spouse and children over matters such as maintenance
42 of the property, waste, encumbrance of the property, and the like. Should a more

1 complex estate planning device such as a will or trust be used, or is a revocable TOD
2 deed adequate for that purpose?
3 • Should use of the statutory form be mandatory rather than permissive? A mandatory
4 form would help standardize usage. However a mandatory form would have to be more
5 complex, with a greater number of options and alternatives available to the transferor,
6 and a lengthier explanation of consequences.

7 **§ 5644. Statutory form revocation of revocable TOD deed**

8 5644. A transferor may revoke a revocable transfer on death deed by an
9 instrument in substantially the following form:

10 **Revocation of**
11 **Revocable Transfer on Death (TOD) Deed**
12 [California Probate Code Section 5600]

13 **Notice to Owner.** This revocation **MUST** be recorded before you die in order to
14 be effective.

15 **IDENTIFYING INFORMATION**

16 **Owner of Property:** _____

17 Co-Owners Who Join in this Revocation: _____

18 **Address or Other Description of Property:** _____

19 **Recording Information for Revocable TOD Deed:**

20 County: _____

21 Date of Recordation: _____

22 _____

23 Book and Page or Series Number: _____

24 **REVOCACTION**

25 I revoke the described revocable TOD deed.

26 **SIGNATURE AND DATE**

27 **Signature of Owner:** _____

28 Signatures of Co-Owners Who Join in this Revocation: _____

29 **Date:** _____

30 **ACKNOWLEDGMENT**

31 State of California)

32 County of _____)

33 On _____ before me, (here insert name and title of the officer), personally
34 appeared _____, personally known to me (or proved to me on the basis of
35 satisfactory evidence) to be the person(s) whose name(s) is/are subscribed to the

1 within instrument and acknowledged to me that by his/her/their signature(s) on the
2 instrument the person(s) executed the instrument.

3 WITNESS my hand and official seal.

4 Signature _____ (Seal)

5
6 **Comment.** Section 5644 prescribes a form for revocation of a revocable TOD deed. Use of the
7 form is not mandatory, since other recorded instruments may revoke a TOD deed. See Sections
8 5628 (multiple deeds), 5640 (statutory forms permissive), 5660 (conflicting dispositive
9 instruments).

10 CHAPTER 3. EFFECT

11 Article 1. General Provisions

12 § 5650. Effect during transferor's life

13 5650. During the transferor's life, execution and recordation of a revocable
14 transfer on death deed:

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

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

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

23 **Comment.** Section 5650 makes clear that a revocable TOD deed is effective only on the
24 transferor's death and not before. A revocable TOD deed remains revocable until that time. See
25 Section 5630 (revocability).

26 The transferor's execution and recordation of a revocable TOD deed has no effect on the
27 ability of the transferor's creditors to subject the property to an involuntary lien or execution of a
28 judgment.

29 The reference to the transferor's agent or other fiduciary in subdivision (a) includes a
30 conservator. The authority of the fiduciary is subject to the qualification that the specific
31 transaction entered into on behalf of the transferor must be within the scope of the fiduciary's
32 authority. See, e.g., Section 4264 (power of attorney).

33 Subdivision (b) makes clear that the transferor's execution and recordation of a revocable TOD
34 deed does not enable the creditors of a beneficiary to subject the property to an involuntary lien or
35 execution of a judgment. The beneficiary is not entitled to notice of a trustee's sale, nor is the
36 beneficiary's consent required to enable the transferor to refinance.

37 The beneficiary's joinder, consent, or agreement to any transaction by the transferor is
38 unnecessary and irrelevant. If an obligation of the beneficiary incurred before the transferor's
39 death attaches to the property on the transferor's death as a result of the doctrine of after-acquired
40 title, that obligation is subordinate to any limitations on the transferor's interest in the property.
41 See Sections 5652 (effect at death), 5670 (priority of secured creditor of transferor).

42 Subdivision (c) reinforces the concept that a revocable TOD deed does not effectuate a transfer
43 before the transferor's death. Creation of a revocable TOD deed should not have the effect of a
44 default on a loan secured by the property, since it is not a disposition of the property.

1 **§ 5652. Effect at death**

2 5652. (a) A revocable transfer on death deed transfers all of the transferor’s
3 interest in the property to the beneficiary on the transferor’s death. A revocable
4 transfer on death deed that purports to transfer less than all of the transferor’s
5 interest in the property is void, and the instrument does not transfer the property
6 on the transferor’s death.

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

14 (c) Notwithstanding a contrary provision in the deed, a revocable transfer on
15 death deed transfers the property without covenant or warranty of title.

16 **Comment.** Under subdivision (a) of Section 5652, whatever interest the transferor owned at
17 death in the property passes to the beneficiary. It should be noted, however, that this provision is
18 not limited to the fee interest. If the transferor’s ownership interest is a less than fee interest, the
19 transferor’s entire less than fee ownership interest passes to the beneficiary on the transferor’s
20 death.

21 Under subdivision (b), a beneficiary takes only what the transferor has at death. This is a
22 specific application of the general rule that recordation of a revocable TOD deed does not affect
23 the transferor’s ownership rights or ability to deal with the property until death. See Section 5650
24 (effect during transferor’s life). Likewise, if an obligation of the beneficiary attaches to the
25 property as a result of the doctrine of after-acquired title, that obligation is subordinate to any
26 limitations on the transferor’s interest in the property, and a transfer by the beneficiary financed
27 by a purchase money mortgage is subject to the priority of a recorded encumbrance on the
28 transferor’s interest notwithstanding Civil Code Section 2898 (priority of purchase money
29 encumbrance).

30 Subdivision (c) emphasizes the point that a revocable TOD deed is basically a quitclaim,
31 passing whatever interest the transferor had at death to the beneficiary. A covenant or warranty of
32 title included by the transferor in the deed has no effect.

33 **§ 5654. Medi-Cal eligibility and reimbursement**

34 5654. (a) For the purpose of determination of eligibility for health care under
35 Chapter 7 (commencing with Section 14000) or Chapter 8 (commencing with
36 Section 14200) of Part 3 of Division 9 of the Welfare and Institutions Code,
37 execution and recordation of a revocable transfer on death deed is not a lifetime
38 transfer of the property.

39 (b) For the purpose of a claim of the Department of Health Services under
40 Section 14009.5 of the Welfare and Institutions Code, property transferred by a
41 revocable transfer on death deed is a part of the estate of the decedent, and the
42 beneficiary is a recipient of the property by distribution or survival.

43 **Comment.** Subdivision (a) of Section 5654 is a specific application of the general rule that
44 execution and recordation of a revocable TOD deed divests the transferor of no interest in the
45 property, and invests the beneficiary with no rights in the property, during the transferor’s life.
46 Section 5650 (effect during transferor’s life).

1 Subdivision (b) is consistent with case law interpretation of the meaning and purpose of
2 Welfare and Institutions Code Section 14009.5, providing for reimbursement to the state for
3 Medi-Cal payments made during the decedent's life. See *Bonta v. Burke*, 98 Cal. App. 4th 788,
4 120 Cal. Rptr. 2d 72 (2002).

5 **§ 5656. Property taxation**

6 5656. For the purpose of application of the property taxation provisions of the
7 Revenue and Taxation Code:

8 (a) Execution and recordation of a revocable transfer on death deed of real
9 property is not a change in ownership of the property.

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

12 **Comment.** Section 5656 prescribes the effect of a revocable TOD deed for purposes of
13 property tax reassessment. Although a transfer of property by a revocable TOD deed is a change
14 in ownership for reassessment purposes, the transfer may qualify for exclusion under the Revenue
15 and Taxation Code, depending on the nature of the parties to the transfer. See, e.g., Rev. & Tax.
16 Code §§ 62-63.1.

17 **Article 2. Other Instruments and Forms of Tenure**

18 **§ 5660. Conflicting dispositive instruments**

19 5660. If a revocable transfer on death deed recorded before the transferor's
20 death and another instrument both purport to dispose of the same property:

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

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

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

29 **Comment.** Section 5660 establishes the general rules governing a conflicting disposition of
30 property that is subject to a recorded revocable TOD deed. A revocable TOD deed has no effect
31 unless recorded. Section 5626 (recordation, delivery, and acceptance). A conflicting instrument
32 may not affect a revocable TOD deed under this section unless recorded before the transferor's
33 death.

34 Under this section the transferor's will does not override a revocable TOD deed,
35 notwithstanding a devise of the property in the will and regardless of the date of execution of the
36 will. This section does not apply if the transferor revokes a recorded revocable TOD deed before
37 death. See Section 5630 (revocability).

38 Absent a total disposition of the property before death, the revocable TOD deed passes
39 property subject to conflicting interests of record. See Section 5652 (effect at death).

40 **§ 5662. Co-owned property**

41 5662. (a) If co-owners of real property jointly make a revocable transfer on
42 death deed of the property, the property passes [in a manner to be determined].

1 (b) If fewer than all co-owners join in a revocable transfer on death deed, the
2 property passes [in a manner to be determined]. This subdivision does not apply to
3 property held in joint tenancy or as community property.

4 **Comment.** For the rules governing disposition of an individual interest in joint tenancy
5 property or community property, see Sections 5664 (joint tenancy property) and 5666
6 (community property).

7 **Note.** The Commission particularly requests public comment on alternative approaches
8 to treatment of a revocable TOD deed made by co-owners of property:

- 9 • The interest of each co-owner passes to the named beneficiary on the death of that co-
10 owner, with the deed of the surviving co-owner being revocable.
- 11 • The interest of each co-owner passes to the surviving co-owner and then to the named
12 beneficiary on the death of the surviving co-owner, with the deed of the surviving co-
13 owner being either revocable or irrevocable.
- 14 • There could be different rules depending on whether the property is held as joint tenancy,
15 as community property, as community property with right of survivorship, or as tenancy
16 in common.
- 17 • Regardless of the answers to these questions, should an individual co-owner acting alone
18 have a revocation right before the death of any co-owner? If so, should there be a
19 notification requirement?

20 **§ 5664. Joint tenancy property**

21 5664. If a revocable transfer on death deed is made by an owner of property held
22 in joint tenancy:

23 (a) The death of the transferor severs the joint tenancy as to the interest of the
24 transferor.

25 (b) The interest of the transferor passes pursuant to the revocable transfer on
26 death deed and not by right of survivorship pursuant to the joint tenancy.

27 **Comment.** Section 5664 addresses the conflict between a revocable TOD deed and an earlier
28 joint tenancy in the property, where fewer than all joint tenants join in the revocable TOD deed.
29 In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660
30 (conflicting dispositive instruments). If all joint tenants join in the revocable TOD deed, the
31 disposition of the property is governed by Section 5662 (co-owned property).

32 Because a revocable TOD deed is revocable until the transferor's death, execution and
33 recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when
34 the transferor dies with the revocable TOD deed still in effect. If another joint tenant predeceases
35 the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the
36 combined interest passes pursuant to the revocable TOD deed. See Section 5652(a) (transferor's
37 entire interest in property passes at death).

38 In the case of simultaneous death, Section 223 (joint tenants) controls. The proportionate
39 interest of each joint tenant passes under the revocable TOD deed or other dispositive instrument
40 of that joint tenant.

41 **§ 5666. Community property**

42 5666. (a) A revocable transfer on death deed of community property made by
43 one spouse acting alone is effective only as to the transferor's one-half interest in
44 the property. A revocable transfer on death deed of community property joined in
45 by both spouses is effective as to the interests of both spouses.

1 (b) A revocable transfer on death deed of community property with right of
2 survivorship made by one spouse acting alone is governed by the rules applicable
3 to property held in joint tenancy under Section 5664.

4 **Comment.** Subdivision (a) of Section 5666 is a specific application of the general rule that a
5 person has the power of disposition at death of that person's interest in community property
6 without the joinder of the person's spouse. Cf. Section 100 (one-half of community property
7 belongs to decedent). A revocable TOD deed of community property made with the joinder of the
8 transferor's spouse is subject to Chapter 2 (commencing with Section 5010) of Part 1, relating to
9 nonprobate transfers of community property. Comparable principles apply to the property of
10 registered domestic partners under Family Code Section 297.5.

11 Under subdivision (b), death of the transferor terminates the survivorship right in community
12 property with right of survivorship. See Section 5664 (joint tenancy property); cf. Civ. Code §
13 682.1(a) ("Prior to the death of either spouse, the right of survivorship may be terminated
14 pursuant to the same procedures by which a joint tenancy may be severed.") In the case of
15 simultaneous death, Section 223 (joint tenants) controls. See Civ. Code § 682.1. The one-half
16 interest of each spouse passes under the revocable TOD deed or other dispositive instrument of
17 that spouse.

18 Article 3. Creditors

19 § 5670. Priority of secured creditor of transferor

20 5670. Notwithstanding any other statute governing priorities among creditors, a
21 creditor of the transferor whose right is evidenced at the time of the transferor's
22 death by an encumbrance or lien of record on property transferred by a revocable
23 transfer on death deed has priority over a creditor of the beneficiary, regardless of
24 whether the beneficiary's obligation was created before or after the transferor's
25 death and regardless of whether the obligation is secured or unsecured, voluntary
26 or involuntary, recorded or unrecorded.

27 **Comment.** Section 5670 makes clear that a creditor of the transferor has priority over a
28 creditor of the beneficiary, at least to the extent the transferor's creditor has a lien or
29 encumbrance of record at the time of the transferor's death. Thus the doctrine of after-acquired
30 title (Civ. Code §§ 1106, 2930) does not create a priority in the beneficiary's creditors, even if the
31 right of the transferor's creditor was created after the interest of the beneficiary's creditor.
32 Likewise, the priority given by statute to a purchase money encumbrance by the beneficiary's
33 transferee does not override the general priority of an encumbrance of record by a creditor of the
34 transferor. See Civ. Code § 2898 (priority of purchase money encumbrance).

35 § 5672. Liability for unsecured debts

36 5672. Each beneficiary is personally liable to the extent provided in Section
37 5674 for the unsecured debts of the transferor. Any such debt may be enforced
38 against the beneficiary in the same manner as it could have been enforced against
39 the transferor if the transferor had not died. In any action based on the debt, the
40 beneficiary may assert any defense, cross-complaint, or setoff that would have
41 been available to the transferor if the transferor had not died. Nothing in this
42 section permits enforcement of a claim that is barred under Part 4 (commencing
43 with Section 9000) of Division 7. Section 366.2 of the Code of Civil Procedure
44 applies in an action under this section.

1 **Comment.** Section 5672 is drawn from Section 13204, relating to the liability of a decedent's
2 successor who takes real property of small value under the affidavit procedure. A beneficiary who
3 wishes to avoid the liability imposed by this section may commence a probate proceeding and
4 return the property to the estate under Section 5676. See Section 5674 (limitation on liability).
5 See also Section 275 (disclaimer).

6 **§ 5674. Limitation on liability**

7 5674. (a) A beneficiary is not liable under Section 5672 if proceedings for the
8 administration of the transferor's estate are commenced and the beneficiary
9 satisfies the requirements of Section 5676.

10 (b) The aggregate of the personal liability of a beneficiary under Section 5672
11 shall not exceed the sum of the following:

12 (1) The fair market value at the time of the transferor's death of the property
13 received by the beneficiary pursuant to the revocable transfer on death deed, less
14 the amount of any liens and encumbrances on the property at that time.

15 (2) The net income the beneficiary received from the property.

16 (3) If the property has been disposed of, interest on the fair market value of the
17 property from the date of disposition at the rate payable on a money judgment. For
18 the purposes of this paragraph, "fair market value of the property" has the same
19 meaning as defined in paragraph (2) of subdivision (a) of Section 5676.

20 **Comment.** Section 5674 is drawn from Section 13207, relating to limitation of liability of a
21 decedent's successor who takes real property of small value under the affidavit procedure.

22 **§ 5676. Return of property to estate for benefit of creditors**

23 5676. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the
24 administration of the transferor's estate are commenced each beneficiary is liable
25 for:

26 (1) The restitution to the transferor's estate of the property the beneficiary
27 received pursuant to the revocable transfer on death deed if the beneficiary still
28 has the property, together with (A) the net income the beneficiary received from
29 the property and (B) if the beneficiary encumbered the property after the
30 transferor's death, the amount necessary to satisfy the balance of the encumbrance
31 as of the date the property is restored to the estate.

32 (2) The restitution to the transferor's estate of the fair market value of the
33 property if the beneficiary no longer has the property, together with (A) the net
34 income the beneficiary received from the property prior to disposing of it and (B)
35 interest from the date of disposition at the rate payable on a money judgment on
36 the fair market value of the property. For the purposes of this paragraph, the "fair
37 market value of the property" is the fair market value, determined as of the time of
38 the disposition of the property, of the property the beneficiary received pursuant to
39 the revocable transfer on death deed, less the amount of any liens and
40 encumbrances on the property at the time of the transferor's death.

41 (b) Subject to subdivision (c), if proceedings for the administration of the
42 transferor's estate are commenced and a beneficiary made a significant

1 improvement to the property received by the beneficiary pursuant to the revocable
2 transfer on death deed, the beneficiary is liable for whichever of the following the
3 transferor's estate elects:

4 (1) The restitution of the property, as improved, to the estate of the transferor
5 upon the condition that the estate reimburse the beneficiary for (A) the amount by
6 which the improvement increases the fair market value of the property restored,
7 determined as of the time of restitution, and (B) the amount paid by the
8 beneficiary for principal and interest on any liens or encumbrances that were on
9 the property at the time of the transferor's death.

10 (2) The restoration to the transferor's estate of the fair market value of the
11 property, determined as of the time of the transferor's death, less the amount of
12 any liens and encumbrances on the property at that time, together with interest on
13 the net amount at the rate payable on a money judgment running from the time of
14 the transferor's death.

15 (c) The property and amount required to be restored to the estate under this
16 section shall be reduced by any property or amount paid by the beneficiary to
17 satisfy a liability under Section 5672.

18 (d) An action to enforce the liability under this section may be brought only by
19 the personal representative of the estate of the transferor. In an action to enforce
20 the liability under this section, the court's judgment may enforce the liability only
21 to the extent necessary to protect the interests of creditors of the transferor.

22 (e) An action to enforce the liability under this section is forever barred three
23 years after the transferor's death. The three-year period specified in this
24 subdivision is not tolled for any reason.

25 **Comment.** Section 5676 is drawn from Section 13206, relating to restoration of property to the
26 estate by a decedent's successor who takes real property of small value under the affidavit
27 procedure.

28 CHAPTER 4. EFFECTUATION OF TRANSFER

29 § 5680. Beneficiary rights and duties

30 5680. (a) The beneficiary may establish the fact of the transferor's death under
31 the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of
32 Division 2.

33 (b) For the purpose of filing the change in ownership statement required by
34 Section 480 of the Revenue and Taxation Code, the beneficiary is a transferee of
35 real property by reason of death.

36 (c) For the purpose of giving the notice to the Director of Health Services
37 provided for in Section 215, the beneficiary is a beneficiary of the transferor.

38 (d) The beneficiary is liable to the transferor's estate for prorated estate and
39 generation skipping transfer taxes to the extent provided in Division 10
40 (commencing with Section 20100).

1 2040. (a) In addition to the contents required by Section 412.20 of the Code of
2 Civil Procedure, the summons shall contain a temporary restraining order:

3 (1) Restraining both parties from removing the minor child or children of the
4 parties, if any, from the state without the prior written consent of the other party or
5 an order of the court.

6 (2) Restraining both parties from transferring, encumbering, hypothecating,
7 concealing, or in any way disposing of any property, real or personal, whether
8 community, quasi-community, or separate, without the written consent of the other
9 party or an order of the court, except in the usual course of business or for the
10 necessities of life, and requiring each party to notify the other party of any
11 proposed extraordinary expenditures at least five business days before incurring
12 those expenditures and to account to the court for all extraordinary expenditures
13 made after service of the summons on that party.

14 Notwithstanding the foregoing, nothing in the restraining order shall preclude a
15 party from using community property, quasi-community property, or the party's
16 own separate property to pay reasonable attorney's fees and costs in order to retain
17 legal counsel in the proceeding. A party who uses community property or quasi-
18 community property to pay his or her attorney's retainer for fees and costs under
19 this provision shall account to the community for the use of the property. A party
20 who uses other property that is subsequently determined to be the separate
21 property of the other party to pay his or her attorney's retainer for fees and costs
22 under this provision shall account to the other party for the use of the property.

23 (3) Restraining both parties from cashing, borrowing against, canceling,
24 transferring, disposing of, or changing the beneficiaries of any insurance or other
25 coverage, including life, health, automobile, and disability, held for the benefit of
26 the parties and their child or children for whom support may be ordered.

27 (4) Restraining both parties from creating a nonprobate transfer or modifying a
28 nonprobate transfer in a manner that affects the disposition of property subject to
29 the transfer, without the written consent of the other party or an order of the court.

30 (b) Nothing in this section restrains any of the following:

31 (1) Creation, modification, or revocation of a will.

32 (2) Revocation of a nonprobate transfer, including a revocable trust, pursuant to
33 the instrument, provided that notice of the change is filed and served on the other
34 party before the change takes effect.

35 (3) Elimination of a right of survivorship to property, provided that notice of the
36 change is filed and served on the other party before the change takes effect.

37 (4) Creation of an unfunded revocable or irrevocable trust.

38 (5) Execution and filing of a disclaimer pursuant to Part 8 (commencing with
39 Section 260) of Division 2 of the Probate Code.

40 (c) In all actions filed on and after January 1, 1995, the summons shall contain
41 the following notice:

42 "WARNING: California law provides that, for purposes of division of property
43 upon dissolution of marriage or legal separation, property acquired by the parties

1 during marriage in joint form is presumed to be community property. If either
2 party to this action should die before the jointly held community property is
3 divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in
4 common, or community property) will be controlling and not the community
5 property presumption. You should consult your attorney if you want the
6 community property presumption to be written into the recorded title to the
7 property.”

8 (d) For the purposes of this section:

9 (1) “Nonprobate transfer” means an instrument, other than a will, that makes a
10 transfer of property on death, including a revocable trust, pay on death account in
11 a financial institution, Totten trust, transfer on death registration of personal
12 property, revocable transfer on death deed, or other instrument of a type described
13 in Section 5000 of the Probate Code.

14 (2) “Nonprobate transfer” does not include a provision for the transfer of
15 property on death in an insurance policy or other coverage held for the benefit of
16 the parties and their child or children for whom support may be ordered, to the
17 extent that the provision is subject to paragraph (3) of subdivision (a).

18 (e) The restraining order included in the summons shall include descriptions of
19 the notices required by paragraphs (2) and (3) of subdivision (b).

20 **Comment.** Section 2040 is amended to make explicit its application to a revocable TOD deed.
21 See Part 4 (commencing with Section 5600) of Division 5 of the Probate Code (revocable transfer
22 on death deed).

23 **Prob. Code § 250 (amended). Effect of homicide**

24 SEC. _____. Section 250 of the Probate Code is amended to read:

25 250. (a) A person who feloniously and intentionally kills the decedent is not
26 entitled to any of the following:

27 (1) Any property, interest, or benefit under a will of the decedent, or a trust
28 created by or for the benefit of the decedent or in which the decedent has an
29 interest, including any general or special power of appointment conferred by the
30 will or trust on the killer and any nomination of the killer as executor, trustee,
31 guardian, or conservator or custodian made by the will or trust.

32 (2) Any property of the decedent by intestate succession.

33 (3) Any of the decedent’s quasi-community property the killer would otherwise
34 acquire under Section 101 or 102 upon the death of the decedent.

35 (4) Any property of the decedent under ~~Part 5 (commencing with Section 5700)~~
36 of Division 5 (commencing with Section 5000).

37 (5) Any property of the decedent under Part 3 (commencing with Section 6500)
38 of Division 6.

39 (b) In the cases covered by subdivision (a):

40 (1) The property interest or benefit referred to in paragraph (1) of subdivision (a)
41 passes as if the killer had predeceased the decedent and Section 21110 does not
42 apply.

1 (2) Any property interest or benefit referred to in paragraph (1) of subdivision
2 (a) which passes under a power of appointment and by reason of the death of the
3 decedent passes as if the killer had predeceased the decedent, and Section 673 not
4 apply.

5 (3) Any nomination in a will or trust of the killer as executor, trustee, guardian,
6 conservator, or custodian which becomes effective as a result of the death of the
7 decedent shall be interpreted as if the killer had predeceased the decedent.

8 **Comment.** Section 250 is amended to expand its express application to all forms of nonprobate
9 transfer under Division 5, including a provision for transfer on death in a written instrument
10 (Section 5000), a multiple party account (Section 5100), a TOD security registration (Section
11 5500), and a revocable TOD deed (Section 5600). This is consistent with Section 253 (no
12 acquisition of property by killer).

13 **Prob. Code § 267 (amended). Disclaimable interest**

14 SEC. _____. Section 267 of the Probate Code is amended to read:

15 267. (a) “Interest” includes the whole of any property, real or personal, legal or
16 equitable, or any fractional part, share, or particular portion or specific assets
17 thereof, or any estate in any such property, or any power to appoint, consume,
18 apply, or expend property, or any other right, power, privilege, or immunity
19 relating to property.

20 (b) “Interest” includes, but is not limited to, an interest created in any of the
21 following manners:

22 (1) By intestate succession.

23 (2) Under a will.

24 (3) Under a trust.

25 (4) By succession to a disclaimed interest.

26 (5) By virtue of an election to take against a will.

27 (6) By creation of a power of appointment.

28 (7) By exercise or nonexercise of a power of appointment.

29 (8) By an inter vivos gift, whether outright or in trust.

30 (9) By surviving the death of a depositor of a Totten trust account or P.O.D.
31 account.

32 (10) Under an insurance or annuity contract.

33 (11) By surviving the death of another joint tenant.

34 (12) Under an employee benefit plan.

35 (13) Under an individual retirement account, annuity, or bond.

36 (14) Under a transfer on death beneficiary designation in a deed or other
37 instrument.

38 (15) Any other interest created by any testamentary or inter vivos instrument or
39 by operation of law.

40 **Comment.** New paragraph (14) of Section 267(b) is an explicit application of the general rule
41 of paragraph (15). See Section 5614 (revocable transfer on death deed).

1 **Prob. Code § 279 (amended). Time for exercise of disclaimer**

2 SEC. _____. Section 279 of the Probate Code is amended to read:

3 279. (a) A disclaimer to be effective shall be filed within a reasonable time after
4 the person able to disclaim acquires knowledge of the interest.

5 (b) In the case of any of the following interests, a disclaimer is conclusively
6 presumed to have been filed within a reasonable time if it is filed within nine
7 months after the death of the creator of the interest or within nine months after the
8 interest becomes indefeasibly vested, whichever occurs later:

9 (1) An interest created under a will.

10 (2) An interest created by intestate succession.

11 (3) An interest created pursuant to the exercise or nonexercise of a testamentary
12 power of appointment.

13 (4) An interest created by surviving the death of a depositor of a Totten trust
14 account or P.O.D. account.

15 (5) An interest created under a life insurance or annuity contract.

16 (6) An interest created by surviving the death of another joint tenant.

17 (7) An interest created under an employee benefit plan.

18 (8) An interest created under an individual retirement account, annuity, or bond.

19 (9) An interest created under a transfer on death beneficiary designation in a
20 deed or other instrument.

21 (c) In the case of an interest created by a living trust, an interest created by the
22 exercise of a presently exercisable power of appointment, an outright inter vivos
23 gift, a power of appointment, or an interest created or increased by succession to a
24 disclaimed interest, a disclaimer is conclusively presumed to have been filed
25 within a reasonable time if it is filed within nine months after whichever of the
26 following times occurs latest:

27 (1) The time of the creation of the trust, the exercise of the power of
28 appointment, the making of the gift, the creation of the power of appointment, or
29 the disclaimer of the disclaimed property.

30 (2) The time the first knowledge of the interest is acquired by the person able to
31 disclaim.

32 (3) The time the interest becomes indefeasibly vested.

33 (d) In case of an interest not described in subdivision (b) or (c), a disclaimer is
34 conclusively presumed to have been filed within a reasonable time if it is filed
35 within nine months after whichever of the following times occurs later:

36 (1) The time the first knowledge of the interest is acquired by the person able to
37 disclaim.

38 (2) The time the interest becomes indefeasibly vested.

39 (e) In the case of a future estate, a disclaimer is conclusively presumed to have
40 been filed within a reasonable time if it is filed within whichever of the following
41 times occurs later:

42 (1) Nine months after the time the interest becomes an estate in possession.

43 (2) The time specified in subdivision (b), (c), or (d), whichever is applicable.

1 (f) If the disclaimer is not filed within the time provided in subdivision (b), (c),
2 (d), or (e), the disclaimant has the burden of establishing that the disclaimer was
3 filed within a reasonable time after the disclaimant acquired knowledge of the
4 interest.

5 **Comment.** Paragraph (9) is added to Section 279(b) in recognition of the establishment of the
6 revocable TOD deed and other nonprobate transfer instruments. See Sections 5000 (nonprobate
7 transfer), 5614 (revocable transfer on death deed).

8 **Prob. Code § 4264 (amended). Authority that must be specifically granted**

9 SEC. _____. Section 4264 of the Probate Code is amended to read:

10 4264. A power of attorney may not be construed to grant authority to an
11 attorney-in-fact to perform any of the following acts unless expressly authorized in
12 the power of attorney:

13 (a) Create, modify, or revoke a trust.

14 (b) Fund with the principal's property a trust not created by the principal or a
15 person authorized to create a trust on behalf of the principal.

16 (c) Make or revoke a gift of the principal's property in trust, by revocable
17 transfer on death deed, or otherwise.

18 (d) Exercise the right to make a disclaimer on behalf of the principal. This
19 subdivision does not limit the attorney-in-fact's authority to disclaim a detrimental
20 transfer to the principal with the approval of the court.

21 (e) Create or change survivorship interests in the principal's property or in
22 property in which the principal may have an interest.

23 (f) Designate or change the designation of beneficiaries to receive any property,
24 benefit, or contract right on the principal's death.

25 (g) Make a loan to the attorney-in-fact.

26 **Comment.** Subdivision (c) of Section 4264 is revised to make explicit its application to a
27 revocable TOD deed. See Part 4 (commencing with Section 5600) of Division 5 (revocable
28 transfer on death deed). Subdivisions (d) and (f) would likewise apply to a revocable TOD deed.
29 Cf. Section 24 ("beneficiary" means person to whom donative transfer of property is made).

30 **Prob. Code § 5000 (amended). Nonprobate transfer**

31 SEC. _____. Section 5000 of the Probate Code is amended to read:

32 5000. (a) A provision for a nonprobate transfer on death in an insurance policy,
33 contract of employment, bond, mortgage, promissory note, certificated or
34 uncertificated security, account agreement, custodial agreement, deposit
35 agreement, compensation plan, pension plan, individual retirement plan, employee
36 benefit plan, trust, conveyance, deed of gift, revocable transfer on death deed,
37 marital property agreement, or other written instrument of a similar nature is not
38 invalid because the instrument does not comply with the requirements for
39 execution of a will, and this code does not invalidate the instrument.

40 (b) Included within subdivision (a) are the following:

41 (1) A written provision that money or other benefits due to, controlled by, or
42 owned by a decedent before death shall be paid after the decedent's death to a

1 person whom the decedent designates either in the instrument or in a separate
2 writing, including a will, executed either before or at the same time as the
3 instrument, or later.

4 (2) A written provision that money due or to become due under the instrument
5 shall cease to be payable in event of the death of the promisee or the promisor
6 before payment or demand.

7 (3) A written provision that any property controlled by or owned by the
8 decedent before death that is the subject of the instrument shall pass to a person
9 whom the decedent designates either in the instrument or in a separate writing,
10 including a will, executed either before or at the same time as the instrument, or
11 later.

12 (c) Nothing in this section limits the rights of creditors under any other law.

13 **Comment.** Section 5000 is revised to make explicit its application to a revocable TOD deed.
14 See Section 5614 (revocable transfer on death deed). This is a specific instance of the general
15 principle stated in the section.

16 **Prob. Code §§ 5040-5048 (added). Nonprobate transfer to former spouse**

17 SEC. ____ Chapter 3 (commencing with Section 5040) is added to Part 1 of
18 Division 5 of the Probate Code, to read:

19 CHAPTER 3. NONPROBATE TRANSFER TO FORMER SPOUSE

20 **Comment.** Sections 5040-5048 continue former Sections 5600-5604 without change, other
21 than numbering. The sections are relocated to make room for new Part 4 (commencing with
22 Section 5600) of Division 5, relating to the revocable TOD deed.

23
24 5040. (a) Except as provided in subdivision (b), a nonprobate transfer to the
25 transferor's former spouse, in an instrument executed by the transferor before or
26 during the marriage, fails if, at the time of the transferor's death, the former spouse
27 is not the transferor's surviving spouse as defined in Section 78, as a result of the
28 dissolution or annulment of the marriage. A judgment of legal separation that does
29 not terminate the status of husband and wife is not a dissolution for purposes of
30 this section.

31 (b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the
32 following cases:

33 (1) The nonprobate transfer is not subject to revocation by the transferor at the
34 time of the transferor's death.

35 (2) There is clear and convincing evidence that the transferor intended to
36 preserve the nonprobate transfer to the former spouse.

37 (3) A court order that the nonprobate transfer be maintained on behalf of the
38 former spouse is in effect at the time of the transferor's death.

39 (c) Where a nonprobate transfer fails by operation of this section, the instrument
40 making the nonprobate transfer shall be treated as it would if the former spouse
41 failed to survive the transferor.

1 (d) Nothing in this section affects the rights of a subsequent purchaser or
2 encumbrancer for value in good faith who relies on the apparent failure of a
3 nonprobate transfer under this section or who lacks knowledge of the failure of a
4 nonprobate transfer under this section.

5 (e) As used in this section, “nonprobate transfer” means a provision, other than a
6 provision of a life insurance policy, of either of the following types:

7 (1) A provision of a type described in Section 5000.

8 (2) A provision in an instrument that operates on death, other than a will,
9 conferring a power of appointment or naming a trustee.

10
11 5042. (a) Except as provided in subdivision (b), a joint tenancy between the
12 decedent and the decedent’s former spouse, created before or during the marriage,
13 is severed as to the decedent’s interest if, at the time of the decedent’s death, the
14 former spouse is not the decedent’s surviving spouse as defined in Section 78, as a
15 result of the dissolution or annulment of the marriage. A judgment of legal
16 separation that does not terminate the status of husband and wife is not a
17 dissolution for purposes of this section.

18 (b) Subdivision (a) does not sever a joint tenancy in either of the following
19 cases:

20 (1) The joint tenancy is not subject to severance by the decedent at the time of
21 the decedent’s death.

22 (2) There is clear and convincing evidence that the decedent intended to
23 preserve the joint tenancy in favor of the former spouse.

24 (c) Nothing in this section affects the rights of a subsequent purchaser or
25 encumbrancer for value in good faith who relies on an apparent severance under
26 this section or who lacks knowledge of a severance under this section.

27 (d) For purposes of this section, property held in “joint tenancy” includes
28 property held as community property with right of survivorship, as described in
29 Section 682.1 of the Civil Code.

30
31 5044. (a) Nothing in this part affects the rights of a purchaser or encumbrancer
32 of real property for value who in good faith relies on an affidavit or a declaration
33 under penalty of perjury under the laws of this state that states all of the following:

34 (1) The name of the decedent.

35 (2) The date and place of the decedent’s death.

36 (3) A description of the real property transferred to the affiant or declarant by an
37 instrument making a nonprobate transfer or by operation of joint tenancy
38 survivorship.

39 (4) Either of the following, as appropriate:

40 (A) The affiant or declarant is the surviving spouse of the decedent.

41 (B) The affiant or declarant is not the surviving spouse of the decedent, but the
42 rights of the affiant or declarant to the described property are not affected by
43 Section 5040 or 5042.

1 (b) A person relying on an affidavit or declaration made pursuant to subdivision
2 (a) has no duty to inquire into the truth of the matters stated in the affidavit or
3 declaration.

4 (c) An affidavit or declaration made pursuant to subdivision (a) may be
5 recorded.

6
7 5046. Nothing in this part is intended to limit the court's authority to order a
8 party to a dissolution or annulment of marriage to maintain the former spouse as a
9 beneficiary on any nonprobate transfer described in this part, or to preserve a joint
10 tenancy in favor of the former spouse.

11
12 5048. (a) The operative date of this chapter (formerly Part 4, commencing with
13 Section 5600) is January 1, 2002.

14 (b) Except as provided in subdivision (c), this chapter applies to an instrument
15 making a nonprobate transfer or creating a joint tenancy whether executed before,
16 on, or after the operative date of this chapter.

17 (c) Sections 5040 and 5042 do not apply, and the applicable law in effect before
18 the operative date of this chapter applies, to an instrument making a nonprobate
19 transfer or creating a joint tenancy in either of the following circumstances:

20 (1) The person making the nonprobate transfer or creating the joint tenancy dies
21 before the operative date of this chapter.

22 (2) The dissolution of marriage or other event that terminates the status of the
23 nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before
24 the operative date of this chapter.

25 **Prob. Code § 5302 (amended). Multiple party account**

26 SEC. _____. Section 5302 of the Probate Code is amended to read:

27 5302. Subject to Section ~~5600~~ 5040:

28 (a) Sums remaining on deposit at the death of a party to a joint account belong to
29 the surviving party or parties as against the estate of the decedent unless there is
30 clear and convincing evidence of a different intent. If there are two or more
31 surviving parties, their respective ownerships during lifetime are in proportion to
32 their previous ownership interests under Section 5301 augmented by an equal
33 share for each survivor of any interest the decedent may have owned in the
34 account immediately before the decedent's death; and the right of survivorship
35 continues between the surviving parties.

36 (b) If the account is a P.O.D. account:

37 (1) On death of one of two or more parties, the rights to any sums remaining on
38 deposit are governed by subdivision (a).

39 (2) On death of the sole party or of the survivor of two or more parties, (A) any
40 sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to
41 the survivor of them if one or more die before the party, (B) if two or more P.O.D.
42 payees survive, any sums remaining on deposit belong to them in equal and

1 undivided shares unless the terms of the account or deposit agreement expressly
2 provide for different shares, and (C) if two or more P.O.D. payees survive, there is
3 no right of survivorship in the event of death of a P.O.D. payee thereafter unless
4 the terms of the account or deposit agreement expressly provide for survivorship
5 between them.

6 (c) If the account is a Totten trust account:

7 (1) On death of one of two or more trustees, the rights to any sums remaining on
8 deposit are governed by subdivision (a).

9 (2) On death of the sole trustee or the survivor of two or more trustees, (A) any
10 sums remaining on deposit belong to the person or persons named as beneficiaries,
11 if surviving, or to the survivor of them if one or more die before the trustee, unless
12 there is clear and convincing evidence of a different intent, (B) if two or more
13 beneficiaries survive, any sums remaining on deposit belong to them in equal and
14 undivided shares unless the terms of the account or deposit agreement expressly
15 provide for different shares, and (C) if two or more beneficiaries survive, there is
16 no right of survivorship in event of death of any beneficiary thereafter unless the
17 terms of the account or deposit agreement expressly provide for survivorship
18 between them.

19 (d) In other cases, the death of any party to a multiple-party account has no
20 effect on beneficial ownership of the account other than to transfer the rights of the
21 decedent as part of the decedent's estate.

22 (e) A right of survivorship arising from the express terms of the account or
23 under this section, a beneficiary designation in a Totten trust account, or a P.O.D.
24 payee designation, cannot be changed by will.

25 **Comment.** Section 5302 is amended to reflect the renumbering of former Section 5600 as
26 Section 5040.