

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Revocable Transfer on Death (TOD) Deed

October 2006

California Law Revision Commission
4000 Middlefield Road, Room D-1
Palo Alto, CA 94303-4739

NOTE

This report includes an explanatory Comment to each section of the recommended legislation. The Comments are written as if the legislation were already operative, since their primary purpose is to explain the law as it will exist to those who will have occasion to use it after it is operative. The Comments are legislative history and are entitled to substantial weight in construing the statutory provisions. For a discussion of cases addressing the use of Law Revision Commission materials in ascertaining legislative intent, see the Commission's most recent *Annual Report*.

Cite this report as *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103 (2006). This is publication #226.

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CALIFORNIA LAW REVISION COMMISSION

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October 27, 2006

To: The Honorable Arnold Schwarzenegger
Governor of California, and
The Legislature of California

In this recommendation, the California 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 Law Revision 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 appreciates the assistance of many individuals and organizations that provided input on this study. In particular, the Commission would like to thank Charlotte Ito of the State Bar Trusts and Estates Section, David Mandel of the Senior Legal Hotline, Craig Page of the California Land Title Association, and emeritus attorney Mary Pat Toups, all of whom provided comments and attended Commission meetings. The Commission's conclusions do not necessarily represent the views of the participants.

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

Respectfully submitted,

David Huebner
Chairperson

REVOCABLE TRANSFER ON DEATH (TOD) DEED

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BACKGROUND

Charge from Legislature

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

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

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

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

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

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

(4) Whether it would be more difficult for a person who has transferred a potential interest in the property by beneficiary deed to change his or her mind than if the

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).

property were devised by will to the transferee or transferred through a trust or other instrument.

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

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

The Legislature's charge includes the direction that the Commission review the statutes of other states that establish a beneficiary deed as a means of conveying real property through a nonprobate transfer.³ Nine jurisdictions now authorize a beneficiary deed.⁴ This study draws upon those statutes and experience under them.

Terminology

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

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

3. 2005 Cal. Stat. ch. 422, § 1(a).

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

5. Ariz. Rev. Stat. Ann. § 33-405; Ark. Code. Ann. § 18-12-608; Colo. Rev. Stat. § 15-15-401; Nev. Rev. Stat. Ann. § 111.109.

6. Kan. Stat. Ann. § 59-3501; Nev. Rev. Stat. Ann. § 111.109; N.M. Stat. Ann. § 45-6-401; Ohio Rev. Code Ann. §§ 5302.22-5302.23; Wis. Stat. Ann. § 705.15.

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

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

EXISTING DEVICES

Overview

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

- Will or Intestate Succession
- Intervivos Trust
- Joint Tenancy

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.

- Community Property
- Conveyance Pursuant to General Nonprobate Transfer Statute
- Intervivos Transfer
- Intervivos Transfer with Reserved Life Estate
- Revocable Intervivos Transfer (“Revocable Deed”)

There may also be other rarely used or hypothetical ways in which a transferor might attempt to transfer real property on death.⁸ This study only considers the major devices.

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

For the purpose of this study:

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

“*Revocability*” of the device refers to the owner’s ability to make a change to the beneficiary designation, or to revoke the property disposition, so long as the owner

8. “If we were concerned to complete a taxonomy of will substitutes, we could lengthen our list to include devices that are scorned by both lawyers and financial intermediaries but that still attract laymen. A substantial case law chronicles laymen’s quixotic attempts to achieve will-like results by manipulating the contingent estates and delivery rules of the law of deeds. The gift *causa mortis* is a transparent will substitute, but it can be messy to prove, and it is difficult to keep in force because of the rule that it self-destructs on the donor’s return to health. These and other stray dogs of the American law of gratuitous transfers populate the law school casebooks but have not been quantitatively important in the nonprobate revolution.” Langbein, *The Nonprobate Revolution and the Future of the Law of Succession*, 97 Harv. L. Rev. 1108, 1115 (1984) (citations omitted).

retains legal capacity. Some transfer devices are revocable, others are irrevocable.

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

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

A transferor may not wish to alert a potential beneficiary to the transferor’s estate plan. Whether it is sound estate planning not to notify a beneficiary or publicize the transfer is another matter. A beneficiary that is aware of the transferor’s intentions and actions can take steps to implement the transfer in a timely manner. There may also be some benefit from the publicity attendant on a transfer. For example, fraud, duress, or undue influence may be exposed.

“*Creditor Rights*” refers to the extent to which a transfer device subjects the property to the transferor’s creditors. Creditor rights are not recognized against many nonprobate transfer techniques, or the law governing them may be unclear. While that may be advantageous to a nonprobate transfer beneficiary, it is questionable whether it represents sound public policy.

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

“*Taxes*” are the estate tax and gift tax,⁹ generation-skipping transfer tax,¹⁰ income tax, property tax, and documentary transfer tax. Depending on the particular transfer device, the property may or may not remain part of the transferor’s taxable estate for estate tax and generation-skipping transfer tax purposes.¹¹ Property that passes from a transferor at death may receive a new basis (often stepped up) for income tax purposes.¹²

With respect to property tax, real property passing from a transferor is reassessed when a “change in ownership” occurs.¹³ Special rules apply if the property passes to a spouse or domestic partner or is a personal residence passing to a child.¹⁴ The timing and form of a real property transfer may affect whether the property is reassessed.

“*Medi-Cal Eligibility and Reimbursement*” refers to the fact that a transferor’s objective in making a transfer of real property may be to reduce assets in order to achieve Medi-Cal eligibility, as well as to remove the property from the transferor’s estate so that it will be immune from the state’s

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. See Rev. & Tax. Code § 13302.

10. See 26 U.S.C. §§ 2601-2663.

11. 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.

12. See 26 U.S.C. § 1014.

13. See Rev. & Tax. Code §§ 50-51, 60-62, 110.1.

14. See Cal. Const. art. 13A, § 2(g)-(h); Rev. & Tax. Code §§ 62(m)-(n), (p), 63.

claim for reimbursement of benefits provided to the transferor.¹⁵

Will or Intestate Succession

The classic way to transfer property at death is by will or intestate succession. A will passes no interest in property until the transferor's death, and is revocable and may be changed up to the moment of death.¹⁶

The property passes by operation of law at the transferor's death.¹⁷ It is, however, subject to probate administration.¹⁸ The personal representative deeds the property to distributees pursuant to court order.¹⁹

Probate Administration

Probate administration involves determination of heirs or devisees and settlement of debts and taxes. Court supervision is involved, and the procedure provides a forum in case of a dispute. Probate administration includes family protections to ensure that the transferor's family is not left destitute, such as the family allowance²⁰ and the probate homestead.²¹ Because

15. Such a transfer may cause the transferor to lose Medi-Cal eligibility for a period of time. Welf. & Inst. Code § 14009.5; 22 Cal. Code Regs. § 50411. The decedent's principal residence is an exempt asset for Medi-Cal eligibility purposes (Welf. & Inst. Code § 14006(c)), 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." Welf. & Inst. Code § 14009.5. 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 U.S.C. § 1396p(b)(4).

16. See Prob. Code § 6120.

17. Prob. Code § 7000.

18. Prob. Code § 7001.

19. See Prob. Code § 11750.

20. Prob. Code § 6540.

21. Prob. Code § 6520.

probate administration is a judicial proceeding, all acts and records are public. Probate fees include filing fees, personal representative and legal fees, and probate referee fees.

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

The cost of probate administration is based on the value of the estate.²² The personal representative is entitled to compensation on a sliding scale, starting at 4% on the first \$100,000, going down to 1% of amounts between \$1 million and \$10 million, and allowing smaller percentages for larger estates.²³ The estate attorney's compensation for ordinary services is on a similar scale as the personal representative's.²⁴ There are also filing fees and other costs. A reasonable estimate is that combined fees for a routine \$400,000 estate are about \$23,000.²⁵

Costs can be reduced, and administration expedited, in a routine estate by use of "independent administration" procedures.²⁶ These procedures involve limited court supervision. However, there is an irreducible minimum time required for notice to creditors and processing of claims in probate administration.²⁷

Probate administration is similar in effect to a bankruptcy proceeding. It discharges the transferor's debts and allows

22. See Prob. Code §§ 8900-8980 (appraisal of estate).

23. Prob. Code § 10800.

24. Prob. Code § 10810.

25. D. Travers, *Wills, in California Estate Planning* § 5.30, at 169-70 (Cal. Cont. Ed. Bar 2006).

26. Prob. Code § 10400 *et seq.*

27. Prob. Code §§ 9051, 9100.

property to pass to beneficiaries free of creditor claims.²⁸ The same cannot be said of small estate procedures.

Small Estate Procedures

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

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

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

The consequences of transferring property on death by will or intestate succession can be summarized as follows:

28. See Prob. Code § 9002 (untimely claims barred).

29. Prob. Code § 13100.

30. *Id.*

31. Prob. Code § 13109.

32. Prob. Code §§ 13200-13210.

- *Ownership Rights.* The transferor retains full ownership rights during life.
- *Revocability.* The transferor may change or revoke disposition.
- *Cost and Ease of Transmission.* The probate process can be costly and time consuming, except for a small estate.
- *Privacy.* A will is private before death, but is public after death.
- *Creditor Rights.* Creditors of the transferor may reach property in probate but are precluded after probate (unless the small estate procedure is used). Creditors of a beneficiary have no access to the property until distribution.
- *Taxes.* The property is part of the taxable estate. It receives a new tax basis.
- *Medi-Cal Eligibility and Reimbursement.* Property remains in transferor's estate for eligibility determination, and is subject to reimbursement.

Intervivos Trust

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

The concept of the living trust was popularized in the 1960's with the publication of Dacey, *How to Avoid Probate* (1965). Under a Dacey Trust, a settlor would put all of the settlor's property into a revocable trust with the settlor as trustee.³³ The settlor would have full use of the property during the settlor's life. On the settlor's death, the successor trustee would simply convey the property to the beneficiary designated in the trust.

33. See Prob. Code § 15200(a) (settlor as trustee).

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

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

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

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

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

34. See Prob. Code § 19001.

that real property may pass under a trust instrument even though the settlor has not executed a deed in favor of the trustee.³⁵ Whether a title company would insure title in such a case without a court determination of rights is questionable.

Trust property is included in the decedent's taxable estate for estate tax purposes.³⁶ The beneficiary gets an adjusted basis because the property is considered as having been acquired from a decedent.³⁷ Though technically the transferor is not the owner of property transferred in trust, the transferor is considered the owner for estate tax purposes because the transferor retains revocation rights.³⁸ Similarly, transfer of real property into trust does not trigger a property tax reassessment; that occurs only on distribution from the trust.³⁹

The consequences of using an intervivos trust to transfer real property on death are as follows:

- *Ownership Rights.* The transferor retains possession of the property although technically the ownership rights are now in the trustee. The transferor ordinarily acts as trustee.
- *Revocability.* The transferor may change or revoke the disposition.
- *Cost and Ease of Transmission.* Low cost both to create and implement a trust.
- *Privacy.* Can be kept private before death, but better practice and economy requires recordation of transfer during life (though not the distribution scheme of trust instrument), and failure to record

35. See Estate of Heggstad, 16 Cal. App. 4th 943, 20 Cal. Rptr. 2d 433 (1993).

36. 26 U.S.C. § 2033.

37. 26 U.S.C. § 1022(e).

38. 26 U.S.C. § 1022(e)(2)(B).

39. Rev. & Tax. Code § 62(d).

transfer of real property in trust necessitates court order to implement.

- *Creditor Rights.* Creditors of transferor may reach property during transferor's life;⁴⁰ after death they may reach property to the extent the estate is inadequate. Procedure is available to flush out creditor claims after death.⁴¹ Creditors of beneficiary have no access to property until distribution.
- *Taxes.* Property is part of taxable estate. Beneficiary receives new tax basis. Creation of trust does not trigger reassessment.
- *Medi-Cal Eligibility and Reimbursement.* Property is considered part of transferor's estate for eligibility determination, and is subject to reimbursement claim of state.

Joint Tenancy

A long-established way to pass real property to a beneficiary on death outside of probate is through joint tenancy. That is a form of joint ownership of property, consisting of equal and undivided interests of the joint tenants during life.⁴² After death, the surviving joint tenant acquires ownership of the whole by right of survivorship.⁴³ The surviving joint tenant records an affidavit of death in order to establish ownership.⁴⁴

Joint tenancy is problematic in a number of respects. Because it requires a present interest in the beneficiary, the beneficiary must be given an immediate ownership interest. That gift is irrevocable. The beneficiary then has rights

40. Prob. Code § 18200.

41. Prob. Code § 19004.

42. Civ. Code § 683.

43. King v. King, 107 Cal. App. 2d 257, 259, 236 P.2d 912 (1951).

44. Prob. Code § 210.

regarding the present use of the property, and may seek partition.⁴⁵ The beneficiary can encumber or sell the beneficiary's interest, and that interest is subject to claims of creditors.⁴⁶

Because the creation of a joint tenancy requires a gift of a present interest, it may trigger a gift tax.⁴⁷ At the transferor's death, the transferor's proportionate interest is included in the transferor's estate; the beneficiary receives an adjusted basis for the transferor's share.

- *Ownership Rights.* Immediate transfer of coownership interest.
- *Revocability.* The transfer of a present ownership interest is irrevocable.
- *Cost and Ease of Transmission.* Simple and economical.
- *Privacy.* Recordation of the deed is not necessary to create joint tenancy, but failure to record creates risk of intervening interests.
- *Creditor Rights.* Beneficiary's creditors may reach beneficiary's share during life. On death of transferor, transferor's creditors lose rights against the property.⁴⁸
- *Taxes.* Taxable as gift on creation; includable in the transferor's estate; new income tax basis on transferor's share.
- *Medi-Cal Eligibility and Reimbursement.* The gift of a present interest may cause loss of eligibility.

45. Code Civ. Proc. § 872.210.

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

47. See 26 U.S.C. § 2512(b).

48. See *Grothe v. Cortlandt Corp.*, 11 Cal. App. 4th 1313, 1318, 15 Cal. Rptr. 2d 38 (1992).

The interest that passes by survivorship remains subject to state reimbursement.⁴⁹

Community Property

Each spouse has testamentary control over one half of the community property.⁵⁰ Absent a will or other testamentary instrument, a deceased spouse's share of community property passes to the surviving spouse.⁵¹ Community property that passes to a surviving spouse by intestacy or will may pass without probate, under an expedited process.⁵²

Community property receives favorable tax treatment. Not only is the decedent's half of the property given a step up in basis to current market value, but the surviving spouse's half is also given a step up. This "double step up" in basis means that the surviving spouse can sell the entire asset at current market value without facing capital gain taxation.⁵³ A transfer of real property at death to a surviving spouse is not considered a change of ownership requiring reappraisal of the property for property tax purposes.⁵⁴

A new title form is authorized by statute — "community property with right of survivorship."⁵⁵ It is intended that the new title form will combine the best attributes of community property and joint tenancy for passing property to a surviving spouse.⁵⁶ Community property with right of survivorship is not subject to testamentary disposition, unless the right of

49. 42 U.S.C. § 1396p(b)(4), 22 Cal. Code Regs. § 50960.12.

50. See Prob. Code § 6101(b).

51. Prob. Code § 6401.

52. Prob. Code § 13500.

53. 26 U.S.C. § 1014(b)(6).

54. Rev. & Tax. Code § 63.

55. Civ. Code § 682.1.

56. See M. Dell'Osso, *California Estate Planning* § 12.9, at 440 (Cal. Cont. Ed. Bar 2006).

survivorship is first severed (converting the property to simple community property).⁵⁷ Passage of the property by right of survivorship may be confirmed using the existing affidavit procedure.⁵⁸ It is intended that the property will receive the double step up in tax basis that is a characteristic of community property, although federal treatment of the new form is not yet clear.

Community property offers many benefits and will often be the most advantageous way to transfer property to a surviving spouse. However, it is only available within marriage or domestic partnership.⁵⁹

The consequences of community property ownership are as follows:

- *Ownership Rights.* Joint control.⁶⁰ Limited to spouses and domestic partners.
- *Revocability.* Each spouse has testamentary control over disposition of one half of the community property. A right of survivorship may be severed.⁶¹
- *Cost and Ease of Transmission.* Inexpensive and efficient.
- *Privacy.* Community property with right of survivorship must be recorded before death; confirmation by recorded affidavit after death.
- *Creditor Rights.* Creditors of either spouse may reach entire property before or after death.
- *Taxes.* Favorable tax treatment for both transferor and beneficiary.

57. See Civ. Code § 683.2 (severance of joint tenancy).

58. Prob. Code § 210.

59. Fam. Code §§ 297.5, 750.

60. Fam. Code § 1102.

61. Civ. Code § 682.1.

- *Medi-Cal Eligibility and Reimbursement.* There is no reimbursement claim against a surviving spouse during the surviving spouse's life.⁶²

Conveyance Pursuant to General Nonprobate Transfer Statute

It is possible that California law already authorizes a direct conveyance of real property effective on death. The general nonprobate transfer law states:⁶³

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.

The statute appears to address primarily an instrument in which the property being transferred is under the control of a third person (insurance proceeds, account, pension plan, trust, and the like), instances where a beneficiary designation has classically been recognized and effectuated by the person holding the asset. However, Probate Code Section 5000 as drafted is broader than that, and it specifically refers to a conveyance and deed of gift.⁶⁴

62. Welf. & Inst. Code § 14009.5.

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

64. The statute also includes a catch-all clause, referring to any "other written instrument of a similar nature." Professor Grayson M.P. McCouch observes that "[t]he 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." McCouch, *Will*

The general nonprobate transfer statute is drawn from the Uniform Probate Code. The Law Revision Commission's Comment to it impliedly recognizes application of the provision to a real property transfer.⁶⁵

Michigan 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

Substitutes Under the Revised Uniform Probate Code, 58 Brooklyn L. Rev. 1123, 1135-36 (1993) (citations omitted).

65. The Comment to Probate Code Section 5000 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. The donor did not deliver the deeds to the beneficiary; the donor's intent was that the property would pass to the beneficiary at her death. The 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.

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 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." 264 N.W.2d at 212 (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.

to the general nonprobate transfer statute,⁶⁶ but advises caution in the use of the device.⁶⁷

Professor Grayson M.P. McCouch suggests that the general nonprobate transfer law could be improved by specifying formalities in the case of a nonprobate transfer of real property:⁶⁸

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

66. See Calhoun County Courts, *EPIC Questions and Answers*, <<http://courts.co.calhoun.mi.us/epic0220.htm>>.

67. "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." *Id.*

68. McCouch, *supra* note 64, 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.

The attributes and merits of such a device are the subject of this study.

Intervivos Transfer

A transferor may simply deed real property to a beneficiary, with the intention that the transferor will maintain possession and control of the property during life.

That option has significant limitations. An outright transfer of property during life is irrevocable and puts the transferor's control and use of the property at risk — the beneficiary may assert a right to possession or may transfer the property to a third party. The transferred property becomes subject to enforcement for the beneficiary's unrelated debts.

Once the property is transferred, the transferor may not make beneficial use of the equity in the property (through a reverse mortgage, for instance).

A transfer during life can also have negative tax consequences. The change of ownership can trigger reassessment for property tax purposes⁶⁹ and the beneficiary may be subject to gift and income taxes.

A transferor may attempt to avoid those adverse consequences by executing a deed but holding it undelivered, or by delivering the deed to the beneficiary with instructions to keep it secret until after the transferor's death. Such misguided actions can cause significant problems.⁷⁰

The consequences of a lifetime transfer can be summarized as follows:

- *Ownership Rights.* The transferor retains no ownership rights, and remains in possession at the sufferance of the beneficiary.

69. Rev. & Tax. Code § 60.

70. For example, a deed that is not delivered during the transferor's lifetime is ineffective (though it may function as a will, if properly executed). See generally 26 Cal. Jur. 3d *Deeds* § 106 (2006).

- *Revocability.* The transfer is irrevocable.
- *Cost and Ease of Transmission.* The transaction is relatively simple and efficient.
- *Privacy.* There is a public record of the transfer.
- *Creditor Rights.* Creditors of the transferor may not reach the transferred property. Creditors of the beneficiary may reach the property after it is transferred.
- *Taxes.* Change of ownership may cause reassessment for property tax purposes. The property is not part of the taxable estate but may be subject to a gift tax.
- *Medi-Cal Eligibility and Reimbursement.* A transfer without adequate consideration could result in a period of Medi-Cal ineligibility.⁷¹ Transferred property would not be in the transferor's estate and would therefore not be subject to reimbursement.⁷²

Intervivos Transfer with Reserved Life Estate

Some of the problems that result from an intervivos transfer can be minimized by the reservation of a life estate. The transferor retains possession and control of the property during life and therefore does not run the same risk of dispossession by the beneficiary. On the transferor's death, the life tenancy interest is cleared by recordation of an affidavit of death.⁷³

Splitting title in this way may be problematic. Experience shows that conflicts may arise between the life tenancy and the remainder interest. A creditor of the remainder beneficiary may be able to reach the remainder interest, and perhaps force

71. 42 U.S.C. § 1396p(c); Welf. & Inst. Code § 14015.

72. 42 U.S.C. § 1396p(b)(4); 22 Cal. Code Regs. § 50960.12.

73. Prob. Code § 210.

partition.⁷⁴ A creditor of the transferor who records a lien against the property before the transfer of the remainder interest could reach both the life estate and remainder.⁷⁵ For tax purposes, the property is included in the transferor's estate.⁷⁶

A retained life estate is the transferor's property for the purpose of determining Medi-Cal eligibility.⁷⁷ The value of the life estate is subject to Medi-Cal reimbursement; an irrevocable transfer of a remainder interest is not.⁷⁸

The consequences of an irrevocable transfer of a remainder interest, with retention of a life estate, are as follows:

- *Ownership Rights.* Transferor retains possession during life, but there may be difficult issues concerning waste and the like.⁷⁹
- *Revocability.* Irrevocable.
- *Cost and Ease of Transmission.* Simple and cost effective.
- *Privacy.* The transfer must be recorded to be fully effective.
- *Creditor Rights.* The remainder interest is subject to the beneficiary's creditors. With the exception of liens recorded before transfer of the remainder, the death of the transferor terminates the rights of creditors of the transferor.
- *Taxes.* The property is part of the transferor's taxable estate.

74. Code Civ. Proc. § 709.020.

75. See Code Civ. Proc. § 697.390.

76. 26 U.S.C. § 2036.

77. 22 Cal. Code Regs. §§ 50410, 50442.

78. 22 Cal. Code Regs. § 50961(i).

79. See Civ. Code §§ 818 (rights of life tenant), 840 (duty to maintain).

- *Medi-Cal Eligibility and Reimbursement.* The life estate is the transferor's property for purposes of determining eligibility. The life estate is subject to reimbursement liability; the remainder is not.

Revocable Intervivos Transfer (“Revocable Deed”)

Another possible way to transfer real property during life while retaining possession and control until death is the revocable deed.

California Law

The revocable deed was validated by the California Supreme Court in the 1914 case of *Tennant v. John Tennant Memorial Home*.⁸⁰ In that case the grantor gave a revocable deed and did not exercise the power of revocation during her life; the beneficiary took the property on the grantor's death. Both the grantor's estate and her heirs sued to recover the property; the beneficiary resisted on the ground that the deed made an effective nonprobate transfer of the property. The court held in favor of the beneficiary:⁸¹

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

The revocable deed has remained in use in California. In the 2002 case of *Bonta v. Burke*,⁸² for example, a Medi-Cal recipient executed a fee simple grant deed of her house to her

80. 167 Cal. 570, 140 P. 242 (1914).

81. 167 Cal. at 579, 140 P. at 247.

82. 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).

daughters, but retained a life estate in the property and the right to revoke the remainder interest. The apparent intent was to reduce the grantor's assets for qualification purposes but at the same time retain a beneficial interest in the property and dispositional flexibility until death. On the death of the Medi-Cal recipient, the state Director of Health Care Services filed a reimbursement claim against the beneficiaries of the real property conveyed to them. The *Bonta* court held that the revocable deed used in that case falls within the ambit of property that passes at the transferor's death for Medi-Cal purposes:⁸³

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

This is a complex type of transfer that is rarely used. The legal consequences are not fully understood.

Other Jurisdictions

Some other jurisdictions recognize the revocable deed as an "enhanced life estate" or as a "Lady Bird Deed."⁸⁴

83. 98 Cal. App. 4th at 794, 120 Cal. Rptr. 2d at 77.

84. It is reported that President Lyndon B. Johnson once used it to convey property to his wife Lady Bird. See Opinion of Michigan Probate Court for the

The deed takes the form of a quitclaim to a named beneficiary, reserving to the owner an “enhanced” life estate that includes the power to dispose of the property. If the owner transfers the property during life to another person, the transfer prevails over the claim of the quitclaim beneficiary. If there is no lifetime transfer, the property passes at death to the quitclaim beneficiary free of probate.

This type of nonprobate transfer of real property has been validated in Michigan.⁸⁵ Under the Estate and Protected Individuals Code of Michigan, the transfer enables the grantor to retain control over transfer of the property during life but avoids probate on the death of the grantor.⁸⁶

It has been said that in Florida the enhanced life estate is used, rather than other forms of nonprobate transfer, because the transfer does not affect the transferor’s Medicaid eligibility and the property is exempt from Medicaid recoupment and other claims against the transferor.⁸⁷ That would be different from the result in California.⁸⁸

The consequences of a revocable deed appear to be as follows:

- *Ownership Rights.* The transferor retains possession and control during life.⁸⁹

County of Wayne, In the Matter of the Estate of Dolores Ann Davis, Case No. 2004-684984 (March 29, 2005), *noted in* 18 Quinipiac Prob. L. J. 247 (2005).

85. *Id.*

86. 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.”).

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

88. See *supra* text accompanying notes 82-83.

89. Civ. Code § 818.

- *Revocability.* The transferor may revoke the transfer during life.⁹⁰
- *Cost and Ease of Transmission.* The transaction is relatively simple and cost effective.⁹¹
- *Privacy.* Recordation before death is apparently not necessary.⁹²
- *Creditor Rights.* The property is probably subject to the transferor's creditors during life.⁹³ The rights of a creditor of the recipient of the revocable remainder are uncertain.⁹⁴
- *Taxes.* Reservation of life estate does not trigger property tax reassessment;⁹⁵ vesting of the remainder on the death of the life tenant does trigger reassessment.⁹⁶ Estate and gift tax implications are unclear.
- *Medi-Cal Eligibility and Reimbursement.* The transfer probably does not affect eligibility.⁹⁷ The property is subject to reimbursement.⁹⁸

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

91. 30 Cal. Jur. 3d *Estates* § 16 (2006) (creation of life estate).

92. *Id.*

93. Code Civ. Proc. §§ 697.340, 697.390.

94. A judgment lien would attach to a revocable remainder interest. Code Civ. Proc. § 697.340(a). However, it is not clear what effect the lien would have if the transferor were to revoke the remainder.

95. Rev. & Tax. Code § 62(e).

96. *Id.*

97. 22 Cal. Code Regs. § 50442.

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

REVOCABLE TRANSFER ON DEATH DEED IN OTHER JURISDICTIONS

Jurisdictions that Recognize Revocable TOD Deed

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

Missouri (1989)⁹⁹

Kansas (1997)¹⁰⁰

Ohio (2000)¹⁰¹

Arizona (2001)¹⁰²

New Mexico (2001)¹⁰³

Nevada (2003)¹⁰⁴

Colorado (2004)¹⁰⁵

Arkansas (2005)¹⁰⁶

Wisconsin (2005)¹⁰⁷

Operation of Revocable TOD Deed

The revocable TOD deed is a deed of real property that designates a beneficiary to which the property will pass on the transferor's death. The general operation of this device is

99. Mo. Rev. Stat. § 461.025.

100. Kan. Stat. Ann. § 59-3501.

101. Ohio Rev. Code Ann. § 5302.22.

102. Ariz. Rev. Stat. § 33-405.

103. N.M. Stat. Ann. § 45-6-401.

104. Nev. Rev. Stat. § 111.109.

105. Colo. Rev. Stat. § 15-15-401.

106. Ark. Code Ann. § 18-12-608.

107. Wisc. Stat. § 705.15.

subject to some variation among the jurisdictions that have enacted it. Generally speaking:

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

Experience in Other Jurisdictions

Experience with the revocable TOD deed in other jurisdictions is compiled here.¹⁰⁸

Missouri (1989)

The Missouri statute has been in effect since 1989 and is the only statute under which there is substantial experience.

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

The beneficiary deed is widely used and has become routine in Missouri. The most recent reliable estimate is that there are some 350,000 beneficiary deeds currently of record in Missouri.

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

The Missouri statute provides the formalities and rules necessary to make an effective transfer outside of probate, and addresses many topics concerning the effect of the transfer.¹⁰⁹ When the beneficiary deed legislation was first enacted, title insurers were apprehensive about it. However, the concerns never materialized and now a title company will insure a beneficiary deed title as a matter of course.

There has been relatively little litigation over the device.¹¹⁰ There are no reports of abuses of the device. The consensus of practitioners is that experience with it is positive.

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

110. There have been a few cases under the Missouri statute. *Estate of Dugger*, 110 S.W.3d 423 (Mo. Ct. App. 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 (Mo. Ct. App. 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

Kansas (1997)

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

The Kansas bar appears to find the revocable transfer on death deed preferable to joint tenancy as a means of transferring property at death without probate:¹¹¹

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

The Kansas bar also has catalogued perceived advantages and disadvantages of the revocable transfer on death deed:¹¹²

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

- The owner does not need to have the signature of the beneficiary.

could fail under the *Pippin* test, and to execute new deeds that included the required words.

111. 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.").

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

- The property is not subject to the grantee beneficiary's debts.
- The property is not subject to the rights of the grantee beneficiary's spouse.
- The property is not affected by the incapacity of the grantee beneficiary or the grantee beneficiary's spouse.
- The grantee beneficiary does not need to know about the beneficiary designation.
- The designation does not disqualify the owner for Medicaid.
- The designation can be revoked without the signature of the grantee beneficiary.
- A new designation can be executed without having to revoke the old one.
- The owner can pass property to a trust under the beneficiary designation.
- The designation is a will substitute and avoids probate.

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

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

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

Ohio (2000)

The revocable transfer on death deed appears to be used and useful in Ohio. It has been said that it “adds to the arsenal” of methods to avoid probate. The “most important advantage of a transfer-on-death (TOD) deed is that the beneficiary or beneficiaries have no interest in the property during the lifetime of the owner of the interest.”¹¹³ The formalities must be complied with, however, and the transfer fails if the transferor fails to record the deed before death.¹¹⁴ It has been suggested that one of the advantages of the device in Ohio is that it ensures continuing title insurance coverage, unlike some other lifetime estate planning transfers such as a spousal transfer or a transfer in trust.¹¹⁵

Arizona (2001)

The estate planning bar in Arizona appears to find that the device fills a need:¹¹⁶

113. 1 Baldwin’s Oh. Prac. Merrick-Rippner Prob. L. § 14:20 (2005).

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

115. 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.”).

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

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

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

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

- Beneficiaries unaware that they need to record a death certificate.
- The consequences if the beneficiary predeceases the transferor.
- The effect of a conveyance or encumbrance by the transferor after recordation of a beneficiary deed.
- Whether notice of the beneficiary deed must be given to the beneficiary.
- The effect of a beneficiary deed on property held in joint tenancy.
- How to designate successor beneficiaries.

it appears the Beneficiary Deed can be an effective, inexpensive estate planning tool when used correctly.

- The effect of a deed to a class, such as heirs, rather than to a named beneficiary.
- Whether a transfer to a beneficiary who is married requires any special community property waiver.
- Can the beneficiary be an entity?
- How do multiple grantees hold title if the transferor fails to specify?

These issues were largely cured by 2002 legislation.¹¹⁷

New Mexico (2001)

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

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

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

117. See 2002 Ariz. Sess. Laws ch. 9 (H.B. 2334). 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."

Experts caution that a revocable transfer on death deed must be drafted and recorded properly under the New Mexico statute. Adverse experience has been reported where the deed was unrecorded at the transferor's death. Having an attorney draft the deed is wise, and coordinating with an estate plan is also important.¹¹⁸ Nonetheless, many people execute revocable TOD deeds without advice of counsel, using the statutory form which is available from forms publishers through stationery stores.

Nevada (2003)

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

Colorado (2004)

The Colorado statute replaces an older transfer on death deed statute that had left many questions unanswered. The Colorado Bankers Association worked with the Colorado Bar Association to address concerns of financial institutions in formulating the new 2004 beneficiary deed legislation. The issues were worked out satisfactorily, and the statute now appears to be operating smoothly.

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

118. See Rudd, *Ask the Probate Judge — Transfer on Death Deeds*, Albuquerque Journal (Feb. 27, 2003). See also Senior Citizens' Law Office of Albuquerque, New Mexico, online advice at <<http://www.sclo.net>> (last visited Dec. 26, 2006).

Arkansas (2005)

Practitioners appear to be unfamiliar with the new device.¹¹⁹ The deed is untested.

Wisconsin (2005)

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

LEGAL INCIDENTS OF REVOCABLE TOD DEED

If revocable TOD deed legislation were enacted in California, what would it look like? How would it operate in practice? What would be its effect on the rights of the owner, beneficiaries, family members, creditors, and third party transferees? How would it affect taxes and Medi-Cal? Would there be a statutory form? These questions are addressed in detail below to enable an informed determination of the merits of the revocable TOD deed and whether it provides a useful alternative to other means of donative transfer of real property.¹²⁰

119. The Arkansas Law Review has not yet published anything concerning it. But see Barrier, *The Uncertain Gift: Arkansas' New Beneficiary Deed*, 41 Ark. Bar 20 (2006) (discussing potential practice concerns).

120. The analysis provided here does not separately address the interrelation of the issues with the domestic partnership laws. Application of TOD legislation 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 provide the same protection to the interests of a registered domestic partner. To the extent a revocable TOD deed statute deals with the rights of a former spouse

Operational Issues

Capacity

The revocable TOD deed is a will substitute. The legal capacity to make a will is a lower standard than the legal capacity to make a real property transfer.¹²¹

To make a will, the decedent must understand the nature of the act, the nature of the property, and the decedent's relationship to family members and others.¹²² To make a real property sale, the transferor must have the capacity to contract; that requires that the transferor understand the rights, duties, and responsibilities created by the act being performed, the probable consequences of the act for the transferor and other persons affected by it, and the significant risks, benefits, and reasonable alternatives to the act.¹²³ There is some indication in the case law that to make a gift deed, the transferor need only have testamentary capacity, not contractual capacity.¹²⁴

None of the nine revocable TOD deed jurisdictions has directly addressed the capacity issue by statute. However, courts in Missouri have applied the testamentary capacity standard to a revocable TOD deed.¹²⁵

If a decedent's will is challenged for lack of testamentary capacity, that issue is resolved in a probate proceeding, before property is transferred to the beneficiary.¹²⁶ In the case of a

(for example, an ex-spouse named as a beneficiary), the statute would deal the same way with the rights of a former registered domestic partner.

121. Compare Prob. Code §§ 812 and 6100.5.

122. Prob. Code § 6100.5.

123. Prob. Code § 812.

124. *Goldman v. Goldman*, 116 Cal. App. 2d 227, 233, 253 P.2d 474 (1953).

125. See *Allee v. Ruby Scott Sigeas Estate*, 182 S.W.3d 772, 780 (Mo. Ct. App. 2006).

126. See Prob. Code §§ 8250-8254.

revocable TOD deed, the property passes directly to the beneficiary; any challenge to the transfer is retroactive.¹²⁷ A post-transfer challenge is sufficient in the case of a real property transfer, since real property is immobile.

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

Execution of Deed

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

Most statutes state explicitly that the deed need not be supported by consideration. Such a provision is probably unnecessary in California, where that is already the general rule.¹²⁸

Although the revocable TOD deed is a will substitute, no state requires that it be witnessed. In California a witness is not required for any of the authorized types of nonprobate transfer — e.g., creation of a trust or designation of a pay on death beneficiary for an insurance policy, pension plan, securities account, or account in a financial institution.¹²⁹ Many of the authorized nonprobate transfer instruments involve a third party intermediary that oversees the execution of the transfer. To some extent, acknowledgment before a

127. See proposed Prob. Code § 5692.

128. See, e.g., Civ. Code § 1040.

129. Prob. Code § 5000.

notary serves a similar function with respect to a real property deed.¹³⁰

Delivery

Ordinarily an executed deed of real property is not effective unless delivered to the transferee,¹³¹ but it is unclear whether this requirement would apply to a revocable TOD deed.¹³² The only states that address the delivery question directly are Missouri and Ohio. Their statutes provide explicitly that delivery is not required.¹³³

The Missouri analysis appears sound. Delivery helps ensure that the transfer is intentional. A person who executes a deed but never delivers it may have decided against the transfer. But assuming a revocable TOD deed must be recorded before the transferor's death to be effective, then delivery to the beneficiary should not be necessary.¹³⁴ Recordation would provide sufficient indicia of the transferor's intention.¹³⁵

130. 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.

131. 26 Cal. Jur. 3d *Deeds* § 295 (2006).

132. 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.

133. Mo. Ann. Stat § 461.025; Ohio Rev. Code Ann. § 4302.22(B).

134. See *Estate of Dugger*, 110 S.W.3d 423, 428 (Mo. Ct. App. 2003) ("The requirement that the [beneficiary] deed be recorded before death is the formality that takes the place of the delivery requirement.") (citations omitted).

135. See discussion of "Recordation" *infra*.

The Law Revision Commission's Comment to the general nonprobate transfer statute (Probate Code Section 5000) might be interpreted to mean that the delivery requirement of the law of deeds is applicable.¹³⁶ Revocable TOD deed legislation should expressly provide otherwise.

Acceptance

Most states that have enacted revocable TOD deed legislation provide that the signature, consent, or agreement of, or notice to, the beneficiary is not required for any purpose during the life of the owner.¹³⁷ Such a provision is perhaps necessary due to the common law of deeds requirement of acceptance, although in California acceptance is presumed if the deed is beneficial to the transferee.¹³⁸ Acceptance during the transferor's life cannot be required in any event, since delivery is not required.

The beneficiary may disclaim, if appropriate, after the transferor's death.¹³⁹

Recordation

A transferor may execute a revocable TOD deed but hold it unrecorded for any number of reasons, including reluctance to publicize it, uncertainty, a change of mind, or simple disorganization or forgetfulness. Every state that has revocable TOD deed legislation requires that the deed be recorded in the county where the real property is located before the death of the owner.¹⁴⁰

136. See discussion of "Conveyance Pursuant to Nonprobate Transfer" *supra*.

137. See, e.g., Ariz. Rev. Stat. § 33-405(I).

138. Civ. Code § 1059.

139. See discussion of "Disclaimer" *infra*.

140. The original Nevada statute did not require recordation, but it has since been amended to require it. See 2005 Nev. Stat. ch. 270 (S.B. 64).

The recording requirement may frustrate the transferor's intent where the transferor fails to act diligently. Experience in other jurisdictions suggests that the transferor's neglect is a problem.¹⁴¹ Practitioners in Arizona have cautioned that the attorney drafting the deed should assume the obligation of recording it.¹⁴²

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

The Law Revision Commission believes that a revocable TOD deed should be ineffective unless recorded before the transferor's death. If the deed is not recorded during the transferor's life, there may be no assurance that the transferor intended to go through with the transfer. It is said that recordation prevents surprise through a "pocket deed." It has also been argued that the requirement that recordation be accomplished before death limits the possibility of undue influence or a "deathbed transfer."¹⁴³

Recordation cannot eliminate the possibility of fraud, duress, or undue influence. But it can minimize it by allowing fewer opportunities for manipulation. Particularly if delivery is not required for an effective transfer, the formality of recordation during the transferor's life will help ensure that the transferor's intent is effectuated.

The transferor may well not want to publicize the donative transfer. There may be issues among potential heirs about

141. The *Dugger* case in Missouri and the *Scott* case in Ohio illustrate the point. See "Experience in Other Jurisdictions" *supra*.

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

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

who should get the property. There may be a concern that a beneficiary who learns of the deed will become idle. But these concerns are overridden by the certainty of intention conferred by the act of recordation.

Battle of Recorded Deeds

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

Most jurisdictions seem to provide that the last executed deed, not the last recorded, controls.¹⁴⁴ There is some ambiguity in the drafting of the statutes.

Arizona provides the opposite rule — “If an owner executes and records more than one beneficiary deed concerning the same real property, the last beneficiary deed that is recorded before the owner’s death is the effective beneficiary deed.”¹⁴⁵ This provision assumes the owner, rather than the beneficiary, records the deed.¹⁴⁶ Wisconsin also provides that the last recorded deed prevails.¹⁴⁷

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

Although recordation of a later deed revokes an earlier deed, is the earlier deed revived by revocation of the later deed? In some instances the transferor might have wanted to revive an earlier deed; in other instances, not. The safer rule is

144. See, e.g., Ark. Code Ann. § 18-12-608(e).

145. Ariz. Rev. Stat. § 33-405(G).

146. 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.

147. Wisc. Stat. § 705.15(3).

that the earlier deed is revoked (not revocable) by the subsequent deed.

Effect of Other Instruments

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

Instrument Making Transfer on Death

In case of a conflict between a revocable TOD deed and a trust (or other instrument that purports to transfer the same property on the transferor's death), the primacy of the recorded instrument should be the determining factor.¹⁴⁸

As between a recorded revocable TOD deed and an unrecorded instrument, the revocable TOD deed should prevail. As between a recorded revocable TOD deed and a recorded instrument, the later executed instrument should prevail. But, if the other instrument is irrevocable, a later executed revocable TOD deed should have no effect on it.

Joint Tenancy

If property is held in joint tenancy form, a revocable TOD deed of the property raises the question whether the property passes by right of survivorship to the surviving joint tenant or by revocable TOD deed to the named beneficiary.

The revocable TOD deed can be viewed as an effort to achieve the advantageous dispositional aspects of joint tenancy (simple and inexpensive passage of property to the

148. See proposed Prob. Code § 5660.

survivor outside of probate) without its adverse lifetime consequences (creation of present interest in joint tenant).

Under joint tenancy law, a joint tenant may sever the joint tenancy right of survivorship and make a disposition of that joint tenant's interest to a person other than the surviving joint tenant.¹⁴⁹ There is no reason why a joint tenant, acting alone, should not be able to sever a joint tenancy and pass that joint tenant's interest in the property on death by a revocable TOD deed. The death of a joint tenant who executes and records a revocable TOD deed should sever the interest of that joint tenant and pass it to the TOD beneficiary.¹⁵⁰

This result appears to be unique among jurisdictions that have enacted revocable TOD deed legislation. Arizona, Arkansas, and Colorado, for example, make clear that a joint tenant may execute a revocable TOD deed without approval of other joint tenants, but the revocable TOD deed is effective only if the transferor survives all other joint tenants.¹⁵¹ In no case do these jurisdictions provide that a TOD beneficiary takes an interest over a surviving joint tenant.

Suppose a revocable TOD deed is joined in by all joint tenants. In some circumstances they may intend that on the death of each joint tenant the interest of that joint tenant passes to the survivors and on the death of the last surviving joint tenant, to the TOD beneficiary, unless the TOD deed is revoked by a survivor. In other circumstances the joint tenants may intend that the interest of each joint tenant passes

149. 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.

150. 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).

151. Ariz. Rev. Stat. Ann. § 33-405(D); Ark. Code Ann. § 18-12-608(b); Colo. Rev. Stat. § 15-15-408.

immediately to the TOD beneficiary on the death of that joint tenant, protecting the deposition against later revocation by a surviving joint tenant.

The Law Revision Commission believes that a joint tenant should be able to specify the intended result in the revocable TOD deed. Absent that, the default rule should be that the interest of each joint tenant passes to the TOD beneficiary on the death of that joint tenant.¹⁵² That concept is straightforward and avoids the unfairness that could result from a subsequent revocation by the surviving joint tenant.

Community Property

Spouses have an equal and undivided interest in community property, and equal rights of management and control. However, neither spouse may make a gift of community property without the consent of the other spouse, nor may either make a conveyance of community real property without the joinder of the other. That does not preclude a spouse from disposing of that spouse's one-half interest in community property at death, either by will or nonprobate transfer.¹⁵³ A spouse may make a nonprobate transfer of the entire community interest in a piece of property with the joinder or written consent of the other spouse.¹⁵⁴ Absent a disposition by will or nonprobate transfer, community property passes to the surviving spouse by intestacy.¹⁵⁵

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

152. See proposed Prob. Code § 5664.

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

154. Prob. Code §§ 5010-5032.

155. Prob. Code § 6401.

passage of community property. Under general principles of California law applicable to a nonprobate transfer of community property made with the joinder or written consent of both spouses:

- During the lifetimes of both spouses, either spouse acting alone may modify or revoke the transfer. The change is effective as to the interest of the spouse who makes the change, and has the effect of revoking the other spouse's joinder or consent to the nonprobate transfer.¹⁵⁶ However, a change by one spouse acting alone is not effective unless written notice is served on the other spouse during the other spouse's lifetime.¹⁵⁷
- After the death of one spouse, the survivor may modify or revoke the transfer as to the survivor's interest, but that does not affect passage of the deceased spouse's interest in accordance with the terms of the transfer agreed to by the deceased spouse.¹⁵⁸
- A nonprobate transfer instrument agreed to by both spouses may expressly authorize the surviving spouse to make changes. In that case, a change by the surviving spouse is effective as to the interests of both spouses.¹⁵⁹

In order to make these general rules workable in the case of a revocable TOD deed, a spousal consent to or modification or revocation of the deed should be ineffective unless it is recorded.¹⁶⁰

156. Prob. Code §§ 5023(b)(1), 5032.

157. Prob. Code § 5031.

158. Prob. Code §§ 5023(b)(2), 5030(c).

159. Prob. Code § 5023(b)(3).

160. See proposed Prob. Code § 5666.

Community Property with Right of Survivorship

Community property with right of survivorship (“CPWROS”) is a new form of title created in 2000.¹⁶¹ Unlike ordinary community property, CPWROS may not be disposed of by will but “shall, upon the death of one of the spouses, pass to the survivor, without administration, pursuant to the terms of the instrument, subject to the same procedures, as property held in joint tenancy.”¹⁶² CPWROS is apparently effective without recordation. CPWROS title is revocable by either spouse acting alone, in which case the property reverts to ordinary community property subject to ordinary means of testamentary and nontestamentary disposition. The CPWROS statute indicates that termination of the right of survivorship may be accomplished pursuant to the same procedures by which a joint tenancy may be severed.¹⁶³

A revocable TOD deed of record should terminate the CPWROS survivorship right on the death of the spouse executing the revocable TOD deed and pass that spouse’s interest to the TOD beneficiary, just as in the case of joint tenancy property.¹⁶⁴ As with joint tenancy, the spouses should be able to specify a different result in the revocable TOD deed.¹⁶⁵

Effectuation of Transfer

Unlike other nonprobate transfer mechanisms, the revocable TOD deed employs no third party intermediary such as a financial institution, broker, or insurance company

161. 2000 Cal. Stat. ch. 645.

162. Civ. Code § 682.1.

163. Civ. Code § 682.1(a).

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

165. See discussion of “Joint Tenancy” *supra*.

to transfer the property to the beneficiary after the transferor's death. The conveyance of title to the beneficiary is self-executing on the transferor's death.

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

Passage of property by revocable TOD deed is analogous to passage of property by right of survivorship pursuant to joint tenancy or community property. In those circumstances, the beneficiary records an affidavit of death together with a certified copy of the death certificate. The procedure is authorized by statute, and it is standard practice for a title insurer to act in reliance on it.¹⁶⁶

Under legislation enacted in 2001, dissolution or annulment of a marriage operates as a severance of joint tenancy or CPWROS of the spouses.¹⁶⁷ The law provides for an affidavit of facts on which a third person may rely, and protects the rights of a bona fide purchaser or encumbrancer that acts in reliance on the affidavit.¹⁶⁸

The same procedures applicable to joint tenancy or CPWROS should be made applicable to effectuate a transfer

166. *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).

167. Prob. Code § 5601; 2001 Cal. Stat. ch. 417, § 9.

168. Prob. Code §§ 5601(c), 5602.

of property that passes under a revocable TOD deed. That also appears to be the process used in other jurisdictions that have enacted revocable TOD deed legislation.¹⁶⁹

Recently enacted legislation limits the persons authorized to obtain a death certificate on request.¹⁷⁰ Authorized persons include a child, parent, guardian, grandparent, grandchild, sibling, spouse, or domestic partner of the decedent.¹⁷¹ If the TOD beneficiary is someone else, a court order will be necessary to obtain the certificate. The revocable TOD deed statute should empower a beneficiary named in the revocable TOD deed to obtain a death certificate.¹⁷²

Contest

Because the revocable TOD deed operates automatically outside probate, there is no opportunity for a claimant of the property to contest the transfer before the property passes to the beneficiary by operation of law. Standard nonprobate transfer practice is to make the transfer of property quick, simple, and efficient. If there is a contrary claim, the conflict is resolved later but the resolution does not ordinarily interfere with the effort to effectuate the transaction.¹⁷³ A

169. See Murphy, *Drafting the New Beneficiary Deed*, 38 *Ariz. 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.

170. 2006 Cal. Stat. ch 74, § 31.

171. See Health & Safety Code § 103526(c).

172. See Health & Safety Code § 103526(c)(5) (authorizing procurement of a death certificate by “any person or agency empowered by statute” to act on behalf of the decedent or the decedent’s estate).

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

disappointed claimant's remedy is against the beneficiary, not against the property.

Proceedings

The jurisdictions that have enacted revocable TOD deed legislation generally do not address a challenge to the transfer. They apparently leave the logistics to general law. The Colorado statute specifies a statute of limitations — the right of an heir, devisee, or personal representative to recover property or its value from the beneficiary is barred three years after the owner's death, or one year after recordation of a certificate of death, except in the case of fraud.¹⁷⁴ Missouri provides somewhat more guidance. Fraud, duress, or undue influence voids a beneficiary designation and may be judicially determined on petition of an interested person in a proceeding in which a jury trial is available and in which the relief awarded may be mitigated as the trier of fact determines that justice requires.¹⁷⁵ Property wrongfully received by the beneficiary, or its value, is subject to restitution.¹⁷⁶

The core procedural issues are the grounds for a contest, nature of the proceeding, venue, pleadings, statute of limitations, and remedies. The Commission recommends use of the existing Probate Code Section 850 procedure providing for court resolution of a disputed conveyance or transfer of property involving a decedent.¹⁷⁷ An interested person may petition the court for relief, serving each person that claims an interest in or has title to or possession of the property. The court may grant appropriate relief, including an order that authorizes or directs the person having title to or possession of the property to execute a conveyance or transfer to the

174. Colo. Rev. Stat. § 15-15-411.

175. Mo. Rev. Stat. § 461.054.

176. Mo. Rev. Stat. § 461.067.

177. See Prob. Code §§ 850-859.

person entitled. This is an established and reasonably expeditious procedure that is readily adaptable as a means to contest passage of title pursuant to a revocable TOD deed.

Venue

Ordinarily a proceeding involving title to real property is brought in the county in which the property is located.¹⁷⁸ The Probate Code Section 850 procedure likewise appears to suggest that the superior court in which the property is located is the proper court.¹⁷⁹

In the case of a revocable TOD deed, however, the county of probate would be more appropriate, since that is where issues concerning capacity, undue influence, and the like will be determined. A probate proceeding is in the county of the decedent's domicile or, in the case of a nondomiciliary, in the county of the decedent's death or where property of the decedent is located.¹⁸⁰ That is the proper venue for a revocable TOD deed contest proceeding.

Grounds for Contest

Presumably, common law principles of fraud, mistake, duress, and undue influence would apply to the revocable TOD deed as they would to any other deed of gift or transfer under California law. Missouri law makes clear that these principles apply to a nonprobate transfer.¹⁸¹ California revocable TOD legislation should include a comparable provision.¹⁸²

178. Code Civ. Proc. § 392.

179. See Prob. Code § 853.

180. Prob. Code §§ 7051, 7052.

181. Mo. Rev. Stat. § 461.054.

182. 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.”).

Statute of Limitations

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

The remedies available in a challenge to a revocable TOD deed should be limited, depending on the timing of the challenge. If the challenge is brought and a *lis pendens* recorded within 90 days after the transferor's death, the available remedies should include revocation of the transfer. This is a middle ground between the 40 day limitation applicable in small estate collection¹⁸³ and the six month limitation applicable in the affidavit procedure for real property of small value.¹⁸⁴

Rights of Transferor

Ownership Interest Retained

A revocable TOD deed is not effective until the transferor's death and the transferor retains full ownership rights until death. That is the rule in every jurisdiction that has revocable TOD deed legislation, and it is central to the determination of the rights of the transferor, the beneficiary, and third persons, including creditors.¹⁸⁵

A corollary of the principle that a transferor who executes a revocable TOD deed retains full rights in the property during

183. 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).

184. Prob. Code § 13200.

185. See, e.g., Ariz. Rev. Stat. Ann. § 33-405(A).

life is that the beneficiary has no rights until the transferor's death. Arizona and New Mexico have experienced problems such that a transferor must revoke a revocable TOD deed in order to refinance or sell the property. That should not be necessary if the law makes clear that the beneficiary has no right until the transferor's death.

Revocability

A key incident of retained ownership by a transferor during life is the right to revoke the TOD deed. Every jurisdiction that has enacted TOD deed legislation has made the deed revocable.¹⁸⁶

Revocability renders the TOD deed ambulatory. The transferor may make changes, or make a different disposition of the property, at any time before death. The revocability of the deed reinforces the concept that a designated beneficiary has no interest in the property until the deed is finalized by the transferor's death.¹⁸⁷

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

The TOD deed should be revocable notwithstanding language within the deed itself purporting to make it irrevocable.¹⁸⁸ An irrevocable TOD deed would imply the

186. See, e.g., Ariz. Rev. Stat. Ann. § 33-405(F).

187. 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*.

188. See, e.g., *Bolz v. Hatfield*, 41 S.W.3d 566, 568 (Mo. Ct. App. 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.").

existence of rights in the beneficiary and would breed litigation. In the analogous situation of a joint will, a disposition inconsistent with an “irrevocable” devise is ordinarily recognized, but a suit in equity is required to enforce the contractual commitment.

Revocation Procedure

The enabling legislation for this study asks:¹⁸⁹

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

A number of the states with revocable TOD deed legislation address the revocation procedure expressly. Arizona, Arkansas, Colorado, and Kansas all provide that a revocation must be executed by the transferor, must identify the property and otherwise comply with the general requirements for a recorded instrument, and must be recorded in the county in which the real property is situated before the transferor’s death.¹⁹⁰ Several states add the probably unnecessary but perhaps helpful remark that “The joinder, signature, consent, agreement of, or notice to, the grantee-beneficiary is not required for the revocation to be effective.”¹⁹¹ Presumably, the transferor may act through an agent.¹⁹²

Three states prescribe a statutory form that may be used for revocation of a TOD deed.¹⁹³

189. 2005 Cal. Stat. ch. 422, § 1(b)(4).

190. Ariz. Rev. Stat. Ann. § 33-405(F); Ark. Code Ann. § 18-12-608(d)(2); Colo. Rev. Stat. § 15-15-405(1); Kan. Stat. Ann. § 59-3503(b).

191. See, e.g., Ariz. Rev. Stat. Ann. § 33-405(I).

192. Revocation by the transferor’s agent under a power of attorney must be properly authorized under Probate Code Section 4264.

193. See discussion of “Statutory Forms” *infra*.

California revocable TOD deed legislation should provide that revocation may be achieved by recordation of an instrument that cancels or revokes the TOD deed. A purported revocation should be ineffective unless executed by a transferor having legal capacity and recorded before the transferor's death.¹⁹⁴

Acts that Cause Revocation

The law should recognize other acts that cause or have the effect of revocation of a TOD deed. These include changing a beneficiary designation or making a subsequent conveyance of the property.¹⁹⁵

Change of Beneficiary. The mechanism by which the transferor makes a change of beneficiary varies among the jurisdictions. A number of jurisdictions provide that the transferor may change the beneficiary designation by recordation of a subsequent instrument that has the effect of a revocation of the previous instrument.¹⁹⁶ In Kansas, the statutory revocable TOD deed form makes clear that a new deed revokes a previous beneficiary designation.¹⁹⁷

New Mexico provides that recordation of a subsequent revocable TOD beneficiary designation revokes a previous

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

195. 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*.

196. Colorado, Kansas, New Mexico, Ohio, and Wisconsin among them. See, e.g., Colo. Rev. Stat. § 15-15-405(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.").

197. 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.").

beneficiary designation “to the extent there is a conflict between the two designations.”¹⁹⁸ The Commission believes such a qualification is inadvisable. It would generate interpretive questions about whether the subsequent beneficiary designation conflicts with the earlier one or is simply an effort to create a coownership interest. California should follow the lead of jurisdictions that provide a subsequent revocable TOD deed revokes an earlier one for the same property.

Subsequent Conveyance. The revocable TOD deed statutes generally make clear that a subsequent conveyance of the property acts as a revocation of a TOD deed.¹⁹⁹ The basic principle of these statutes is correct, but revocation should not be accomplished by an off-record instrument.²⁰⁰ A subsequent conveyance must be recorded before the transferor’s death if it is to override a revocable TOD deed.

Multiple Owners

Multiple ownership of property creates special challenges for the revocable TOD deed. Issues concerning execution of a deed by one coowner without the joinder of others are complex.²⁰¹

198. N.M. Stat. Ann. § 45-6-401(E).

199. 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).

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

201. 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.

Revocable TOD deed legislation should be clear that all coowners may join in a revocable TOD deed of their property. However, a joint revocable TOD deed raises issues with respect to revocability and other exercise of ownership rights during the lives of the coowners as well as during the period between the deaths of the coowners.

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

A number of jurisdictions have tried to deal with these issues. Under the law of Arizona, Arkansas, and Nevada, any coowner may revoke a revocable TOD deed joined in by all, unless the coowners hold the property as joint tenants or community property with right of survivorship (or tenancy by the entirety in Arkansas), in which case the revocation is effective only if joined in by all coowners or by the last to die of the coowners.²⁰² Missouri offers a compromise — a revocation or change of a beneficiary designation involving property of joint owners may only be made with the agreement of all owners then living.²⁰³

The Uniform TOD Security Registration Act, which is enacted in California,²⁰⁴ provides that a security registration

202. Ariz. Rev. Stat. Ann. § 33-405(F); Ark. Code Ann. § 18-12-698(d); Nev. Rev. Stat. § 111.109(7)

203. Mo. Rev. Stat. § 461.033.

204. Prob. Code §§ 5500-5512.

in beneficiary form may only be changed by all then surviving owners.²⁰⁵

Those approaches complicate ownership rights until the death of the last of the surviving owners, and create possible unfairness to beneficiaries of the first to die of the coowners. The law should pass an interest to the revocable TOD beneficiary immediately on death of a coowner, and allow revocation of the revocable TOD deed as to the surviving coowner's interest.²⁰⁶ The transfer may be made subject to a life estate in the surviving coowner, if desired.²⁰⁷

General principles of California law govern a nonprobate transfer of community property with the joinder or written consent of spouses.²⁰⁸ These principles are appropriately applied to a revocable TOD deed.²⁰⁹

Subsequent Incapacity of Owner

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

A revocable TOD deed would not create any special problems that do not already exist with respect to any other estate planning instrument of a conservatee, including a nonprobate transfer instrument. Under general principles of substituted judgment, the conservatee's estate plan must be

205. Prob. Code § 5506.

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

207. See discussion of "Multiple Beneficiaries" *infra*.

208. Prob. Code §§ 5010-5032.

209. See discussion of "Effect of Other Instruments" *supra*.

taken into account, and notice must be given to a beneficiary.²¹⁰

California law precludes an agent under a durable power of attorney from making, amending, or revoking the principal's will.²¹¹ The law allows an agent to create, modify, or revoke the principal's trust, make or revoke a gift of the principal's property, create or change survivorship interests in the principal's property, and designate or change a beneficiary to receive property on the principal's death, provided that the principal expressly authorizes the act in the power of attorney.²¹² That would appear to cover revocation of a revocable TOD deed as well, but the power of attorney law should be revised to make the coverage explicit.

The jurisdictions that have enacted revocable TOD legislation do not deal with these issues, except for Missouri. The Missouri statute appears to be generally consistent with California law on this matter.²¹³

Ownership Interest Conveyed

Generally, a revocable TOD deed transfers the owner's entire interest in the property, although some jurisdictions appear to allow an owner to transfer less than all of the ownership interest.²¹⁴ The Law Revision Commission believes such flexibility would be inadvisable. It creates constructional, as well as procedural, problems.²¹⁵

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

211. Prob. Code § 4265.

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

213. Mo. Rev. Stat. § 461.035.

214. See, e.g., Colo. Rev. Stat § 15-15-405(2).

215. 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.

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

Property passes under a revocable TOD deed subject to any limitations on the transferor's interest of record at the time of the transferor's death. Every jurisdiction that has revocable TOD deed legislation makes that rule clear.²¹⁶

Common Interest Development

The revocable TOD deed transfers "real property" on the death of the transferor. That should include a unit in a common interest development.²¹⁷

An ownership interest in a common interest development consists of an exclusive right of occupancy of a portion of a real property development, coupled with an undivided interest in the common area or membership in an association that owns the common area. A common interest development can take various forms, including a community apartment, condominium, planned development, or stock cooperative.²¹⁸ All of these interests, including membership in an association

216. 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.

217. 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).

218. Civ. Code § 1351.

or ownership of a share in a stock cooperative, are defined as real property under common interest development law.²¹⁹

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

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

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

Rights of Beneficiary

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

Execution and recordation of a revocable TOD deed creates no rights in the beneficiary; the deed remains subject to modification or revocation by the transferor at any time

219. 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).

before death. Lack of clarity on this point may have caused confusion in some jurisdictions.²²⁰ Revocable TOD deed legislation should make clear that the revocable TOD deed creates no rights in the beneficiary during the transferor's life.

Who May Be a Beneficiary

Drafter of Revocable TOD Deed

Probate Code Section 21350 provides that an instrument is not valid to make a donative transfer to the drafter of the instrument or another related person.²²¹ This provision is self-executing and would apply to the drafter of a revocable TOD deed as well as to any other donative transfer.

Ex-Spouse

The statutes of other jurisdictions generally do not deal with the effect of dissolution of marriage on a revocable TOD deed. Arkansas provides that in the event of a divorce, the revocable TOD deed is treated as a revocable trust. In Missouri, divorce revokes a nonprobate transfer generally.²²²

California law, like that of Missouri, deals with the effect of dissolution of marriage on a nonprobate transfer generally.²²³ Under the California scheme a nonprobate transfer fails if, at the time of the transferor's death, the beneficiary is not the

220. 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 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).

221. The law makes a number of exceptions to this rule, including exceptions 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 § 21351.

222. See Mo. Rev. Stat. § 461.051.

223. See Prob. Code §§ 5600-5604.

transferor's surviving spouse. This rule may be overridden by clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse. Property that fails to pass to the nonprobate transfer beneficiary because of dissolution of the marriage passes in the same manner as if the named beneficiary had predeceased the transferor.²²⁴

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

Whether that scheme would by its terms apply to a revocable TOD deed is slightly ambiguous.²²⁵ Revocable TOD deed legislation should make clear that the general statute covers a revocable TOD deed.

Automatic Temporary Restraining Order

A marital dissolution summons includes an automatic temporary restraining order (“ATRO”) that precludes either party from creating a nonprobate transfer or modifying a nonprobate transfer in a manner that affects the disposition of property subject to the transfer, without the written consent of the other party or an order of court.²²⁶ That restraint does not preclude revocation of a nonprobate transfer, provided that notice of the change is filed and served on the other party

224. See discussion of “Failure to Survive and Lapse” *infra*.

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

226. Fam. Code § 2040(a)(4).

before the change takes effect.²²⁷ This provision should state clearly that it applies to a revocable TOD deed that names a spouse as beneficiary.

The ATRO has the potential to disrupt the operation of a revocable TOD deed due to the fact that the ATRO is an off-record restraint on transfer of the property. The statute accommodates this by protecting a bona fide purchaser or encumbrancer for value.²²⁸

Trust

A few states' statutes provide that a transfer on death deed may be used to transfer an interest in real property to the trustee of a trust even if the trust is revocable.²²⁹ Such a provision would not technically be necessary in California.²³⁰ However, due to possible confusion of a revocable TOD deed beneficiary with a trust beneficiary,²³¹ such a provision would be useful.²³²

Homicide

A beneficiary is not entitled to receive property from a decedent if the beneficiary "feloniously and intentionally" kills the decedent.²³³ This rule could impair the efficacy of a

227. Fam. Code § 2040(b)(2).

228. Fam. Code § 2041.

229. Ariz. Rev. Stat. § 33-405(E); Ark. Code Ann. § 18-12-608(c)(2); Mo. Ann. Stat. § 461.025(1).

230. See, e.g., Prob. Code § 56 ("person" includes trust).

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

232. 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).

233. Prob. Code §§ 250-253. 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").

transfer under a revocable TOD deed by making the right of a beneficiary subject to an off-record factual determination (conviction of homicide). The general statute addresses such concerns by protecting a bona fide purchaser of the property.²³⁴

If property fails to pass to a beneficiary under the homicide rule the beneficiary is treated as having predeceased the transferor.²³⁵ This provision is derived from the Uniform Probate Code, but may be problematic in some circumstances.²³⁶

Minor or Incapacitated Person

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

Failure to Survive and Lapse

Under general principles of California law, a beneficiary must survive the transferor in order to take.²³⁷ If the beneficiary fails to survive, the disposition of the property

234. 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 fails to give a title insurer the security of reliance on recorded information. The Commission would supplement it with a general provision in the revocable TOD deed statute. See "Rights of Third Party Transferee" *infra*.

235. Prob. Code § 250(b).

236. See McCouch, *supra* note 64, at 1164-68. See "Failure to Survive and Lapse" *infra*.

237. See Prob. Code § 21109.

may depend on whether the transferor has named an alternate beneficiary and on anti-lapse principles.

Alternate Beneficiary

The transferor may wish to specify an alternate beneficiary in the event the named beneficiary fails to survive the transferor. A number of states recognize this option for a revocable TOD transferor. Reports of experience with this procedure under Arizona law indicate that it is satisfactory, and title companies approve of it. That would also be the result under general California rules of construction.²³⁸

Antilapse

If the transferor does not name an alternate beneficiary, general lapse (and antilapse) principles would come into play. The California antilapse statute provides that a gift to a predeceased transferee that is kindred of the transferor or of the transferor's spouse does not lapse but passes to the transferee's issue.²³⁹ This provision would appropriately be applied to a revocable TOD deed.

Several states have specifically prohibited application of antilapse principles to a revocable TOD deed.²⁴⁰ The rationale for the departure from general antilapse principles is not

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

239. Prob. Code § 21110.

240. 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. Mo. Ann. Stat. § 461.062(9)(d); Ohio Rev. Code Ann. § 5302.23(B)(1).

clear.²⁴¹ Presumably, it is to simplify matters for a title insurer.²⁴²

The Commission believes equity demands application of anti-lapse principles. These would apply by operation of law unless the transferor specifies another consequence in the deed.²⁴³

Deed Restrictions and Conditions

Some jurisdictions allow a revocable TOD deed transferor to name a beneficiary to take on any specified condition.²⁴⁴ Here is an example of a conditional transfer construed in a reported Missouri case:²⁴⁵

This Beneficiary Deed is executed pursuant to Chapter 561 R.S.Mo. It is not effective to convey title to the above-

241. 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] drafters 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 64, at 1157 (footnotes omitted).

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

243. See Prob. Code §§ 21101, 21110.

244. 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.”).

245. See *Bolz v. Hatfield*, 41 S.W.3d 566 (Mo. Ct. App. 2001) (emphasis added).

described real estate until Grantor's death or the death of the last to die of two or more Grantors. This deed is hereby expressly made irrevocable and not subject to change *unless Grantee fails to pay the property tax due on the property within thirty days of the yearly payment date for said tax* or Grantor suffers a financial emergency which requires the sale of this property to cure the financial emergency.

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

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

Multiple Beneficiaries

Named Beneficiaries

Every jurisdiction that has enacted revocable TOD deed legislation authorizes the transferor to name multiple beneficiaries, with²⁴⁶ or without²⁴⁷ detail as to the manner of

246. 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.").

247. 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

tenure.²⁴⁸ Only a few simple rules are necessary. The main issues are the manner of tenure among the named beneficiaries and the consequences of some but not all surviving the transferor.²⁴⁹ The statute should make clear that a transferor may name more than one beneficiary of property and that, unless the instrument otherwise provides, the beneficiaries take the property as tenants in common. If a named beneficiary fails to survive, that beneficiary's interest may terminate, or may go to that beneficiary's heirs, depending on application of antilapse principles.

Class Gift

A revocable TOD transferor may wish to make a class gift, for example "to my children" rather than naming individual beneficiaries. However, a title company cannot ascertain from the record who the actual beneficiaries of a class gift are.

signed by the record owner of such interest, designating a grantee beneficiary *or* beneficiaries of the interest.”).

248. Missouri provides the most elaborate detail. See Mo. Rev. Stat. § 461.031 (“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.”).

249. 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.

Moreover, a class gift generally is subject to more complex constructional issues than a gift to a named beneficiary.²⁵⁰

The various revocable TOD deed statutes appear not to permit a class gift, but rather require that a beneficiary be “named” or “identified in the deed by name.”²⁵¹ Missouri alone among the states explicitly allows a class gift, and provides some rules of construction.²⁵²

The law should discourage a revocable TOD deed to a class. A class gift results in delay, expense, and complication — the matters of concern that ordinarily prompt a transferor to use a revocable TOD deed in the first place.²⁵³

Life Estate

While a transferor should be able to transfer the property to multiple beneficiaries, the revocable TOD deed is ill-suited to fractionation among present and future interest holders. It is intended as a simple mechanism for disposition of real property free of court intervention. A trust, or other instrument more flexible than a real property deed, would be more appropriate for a complex transfer on death.

250. 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 64, at 1151.

251. See, e.g., Ohio Rev. Code Ann. § 5302.23(B)(1).

252. 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.”).

253. 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 (class includes halfbloods, adopted persons, persons born out of wedlock, step children, foster children, and their issue).

Missouri law expressly allows the transferor to fractionate present and future interests in the property.²⁵⁴ In one reported Missouri case, the transferor executed a beneficiary deed that conveyed a life estate in real property to the transferor's spouse and a remainder in fee simple to the transferor's son. The deed was challenged because it provided for transfer of the remainder on the death of the life tenant, not on the death of the transferor as required by the Missouri Nonprobate Transfers Law. The Missouri Court of Appeals, over a dissent, held that the beneficiary deed was ineffective.²⁵⁵

It may be a common desire of a TOD transferor to pass the property to the TOD beneficiary subject to a life estate in the transferor's surviving spouse. A life estate can be problematic, however. California law indicates that the life estate is a "freehold,"²⁵⁶ entitling the life tenant to exclusive occupancy of the property as well as the rents, issues, and profits of the property.²⁵⁷ The life tenant may use the land in the same manner as the owner of a fee simple, but "must do no act to the injury of the inheritance."²⁵⁸ The life tenant must keep "buildings and fences in repair from ordinary waste, and must pay taxes and other annual charges, and a just proportion of extraordinary assessments benefiting the whole inheritance."²⁵⁹ A life tenant who commits waste is liable for treble damages.²⁶⁰ These rules may be altered by the grantor,

254. Mo. Rev. Stat. §§ 461.005(12), 461.025(1).

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

256. Civ. Code §§ 761, 765.

257. 12 B. Witkin, Summary of California Law *Real Property* § 24 (10th ed. 2005).

258. Civ. Code § 818.

259. Civ. Code § 840.

260. Code Civ. Proc. § 732.

who may convey a life estate with power to consume the corpus.²⁶¹

This statutory scheme is somewhat at odds with the Legal Estates Principal and Income Law,²⁶² which by its terms also applies to apportionment of rights between life and remainder interests in real property where there is no trust.²⁶³ The law includes special rules on (1) application of rents or income from the property, (2) treatment of animals, timber, minerals, oil and gas, and other natural resources, (3) depletion, (4) replacement of the property, and (5) allocation of expenses, including taxes, utilities, insurance premiums, debt service, litigation costs, broker commissions, title charges, and the like.²⁶⁴

Under common law principles, a remainder holder has the right to enforce the duties and obligations of a life tenant with respect to the maintenance and preservation of the property. A remainder holder may bring an action for an injunction or damages against the life tenant or any other person in possession of the premises that is committing waste.²⁶⁵ The Legal Estates Principal and Income Law appears to provide an alternative, should a person granting a life estate wish to build in a mechanism to avoid this sort of judicial supervision of relations between the life tenant and remainder holder.²⁶⁶

If a transferor wishes to pass property free of probate but subject to a life estate, a trust is a preferable means to accomplish that. The transferor may spell out the proposed

261. See cases cited in 12 B. Witkin, *Summary of California Law Real Property* § 29 (10th ed. 2005).

262. Civ. Code § 731 *et seq.*

263. See Civ. Code §§ 731.02-731.04.

264. See Civ. Code §§ 731.05-731.15.

265. Miller & Starr, *California Real Estate Estates* § 9:32 (3d ed. 2007).

266. Civ. Code § 731.04.

relationship between the parties in some detail, the trustee may supervise the arrangement, and judicial review is readily available if that proves to be necessary.

Nonetheless, there should be a limited exception to the general rule against creation of a future interest by means of a revocable TOD deed in the case of a remainder conditioned on a life estate. The transferor should be aware, however, that complications may result from creation of a life estate that make the simplicity of a revocable TOD deed illusory.

Covenants and Warranties

Although a revocable TOD deed is a real property deed, it is not generally thought to carry with it the implied covenants and warranties of a grant deed.²⁶⁷ The revocable TOD deed is more akin to a quitclaim in that whatever interest the transferor has in the property is transferred to the beneficiary subject to all encumbrances. One jurisdiction makes this explicit in its statute.²⁶⁸

Experience in other jurisdictions suggests that a transferor, acting without advice of counsel, may include “warranty” language in a revocable TOD deed.²⁶⁹ The property should pass free of warranties and covenants notwithstanding a provision otherwise in the revocable TOD deed.

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

268. 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.”).

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

Proceeds of Property

Property subject to a revocable TOD deed may no longer exist at the time of the transferor's death, although there may be a fund representing the property.²⁷⁰ Should the beneficiary be entitled to the fund? General principles of construction in California address this question in some detail.²⁷¹ These principles would apply to a revocable TOD deed beneficiary.

Disclaimer of Interest

A revocable TOD deed beneficiary may not wish to receive the property.²⁷² Ordinarily, a beneficiary may avoid a donative transfer of property by executing a disclaimer.

California law includes detailed provisions governing the disclaimer, including manner of execution, time of execution, filing, and effect.²⁷³ These provisions would apply to a revocable TOD deed beneficiary.²⁷⁴

Rights of Family Members

The California probate system incorporates a number of protections for family members of a decedent, including

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

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

272. Sometimes the property may be contaminated and carry significant liability with it. On other occasions, 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.

273. 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.

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

probate homestead and family allowance, as well as protection of a spouse or child inadvertently omitted from the decedent's estate plan. The probate system's treatment of family protection developed in the context of probate administration and does not comprehend passage of property entirely outside of probate, such as by a revocable TOD deed.

Possession of Family Dwelling and Probate Homestead

The decedent's surviving spouse and minor children are entitled to remain in possession of the family dwelling for a period of time during probate administration.²⁷⁵ The probate court may also set apart a probate homestead for as long as the life of the surviving spouse or the minority of children.²⁷⁶

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

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

The probate homestead likewise does not affect title to the property, though possession of the probate homestead may endure for many years. The probate homestead statute is

275. Prob. Code § 6500.

276. Prob. Code §§ 6520, 6524.

limited by its terms to property passing by will or intestate succession.²⁷⁷

The existing statute should not be extended to property passing by a revocable TOD deed. The probate homestead statute requires further review in light of the contemporary use of a trust or other instrument that transfers property outside probate. The matter should not be addressed piecemeal in the context of the revocable TOD deed. The Law Revision Commission's proposal for the revocable TOD deed would specifically recognize the option of a life estate in the surviving spouse.²⁷⁸

Omitted Spouse or Child

A decedent who executes a will or trust before marriage or before the birth of a child may neglect to later change the instrument to reflect the change in family circumstances. The law protects an inadvertently omitted spouse or child by awarding that person the equivalent of an intestate taker's share of the decedent's probate or trust estate.²⁷⁹

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

Professor McCouch argues that a nonprobate transfer of an individual asset, such as a revocable TOD deed of real property, should not be subject to omitted spouse and child protection:²⁸⁰

The provisions protecting an omitted spouse or child apply only to probate assets and operate essentially as

277. Prob. Code § 6522(b).

278. See discussion of "Life Estate" *supra*.

279. See Prob. Code §§ 21600-21630.

280. McCouch, *supra* note 64, at 1180.

constructional rules for wills: they take will substitutes into account solely for the purpose of determining whether a testator's failure to provide for a spouse or child in the will was intentional. In interpreting a will, which normally disposes of a decedent's residual property, it makes sense to inquire into the testator's overall dispositive plan. By contrast, the same inquiry with respect to each separate will substitute makes no sense as a practical matter. The [Uniform Probate Code] properly does not attempt to extend the provisions protecting an omitted spouse or child beyond the will context.

Missouri law states explicitly that, "No law intended to protect a spouse or child from unintentional disinheritance by the will of a testator shall apply to a nonprobate transfer."²⁸¹

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

Rights of Creditors

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

281. Mo. Rev. Stat. § 461.059(1).

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

For example, a surviving joint tenant takes the property free of the decedent's debts. Presumably, the same principle would apply to the surviving spouse of community property with right of survivorship.²⁸² A trust estate is liable for debts to the extent the probate estate is inadequate.²⁸³

The law governing many types of nonprobate transfers is uncertain. The general California statute authorizing nonprobate transfers provides that "Nothing in this section limits the rights of creditors under any other law."²⁸⁴ The same rule applies to securities that pass pursuant to a TOD security registration.²⁸⁵ But there is no general state law governing rights of a creditor where a decedent's property passes outside of probate.

The State Bar Trusts and Estates Section observes with respect to the revocable TOD deed that, "An informal inquiry among attorneys around the country reveals that the treatment

282. 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. Senate Floor Analysis of AB 2913 (August 18, 2000).

283. 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. Prob. Code §§ 19003-19004. 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?

284. Prob. Code § 5000(c).

285. Prob. Code § 5509(b).

of creditors is a major issue, and a major area of differentiation among the states that have adopted some form of statute sanctioning beneficiary deeds.”²⁸⁶

Creditor Rights During Transferor’s Life

Creditors of Transferor

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

Creditors of Beneficiary

A revocable TOD deed creates no present interest in the beneficiary and the beneficiary’s creditors should acquire no access to the property during the transferor’s life.²⁸⁷ Revocable TOD deed legislation should make that principle explicit.

After-Acquired Title

A revocable TOD deed beneficiary may attempt to make an encumbrance or transfer in anticipation of acquiring title. In that circumstance, the encumbrance or transfer would affect the property by operation of law when title is acquired.²⁸⁸

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

287. 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.

288. See, e.g., Civ. Code § 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

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

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

Secured Creditors

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

Ohio addresses the matter explicitly:²⁸⁹

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

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

until distribution of property; any expectancy of lien is extinguished by sale of property in probate).

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

For the same reason, execution and recordation of a revocable TOD deed would not trigger an acceleration clause on a loan secured by the property, whether in a regular mortgage or in a reverse mortgage.²⁹⁰ Revocable TOD deed legislation should reinforce the concept that execution and recordation of the deed do not constitute a transfer or conveyance of any right, title, or interest in the property until the transferor's death.

Creditor Rights After Transferor's Death

Secured Creditors

The beneficiary takes property under a revocable TOD deed subject to the transferor's encumbrances.²⁹¹ Execution and recordation of a revocable TOD deed does not trigger an acceleration clause, but passage of the property to the beneficiary on the transferor's death does. On transfer of the property to the beneficiary, a secured creditor could take steps to enforce its security interest. The revocable TOD deed statute should include express language on the point.

Unsecured Creditors

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

290. 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.

291. 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).

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

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

New Mexico takes the approach that, if the probate estate is insufficient to satisfy claims of creditors, the estate may recapture the property to satisfy the claims.²⁹² Colorado allows the estate to assess the beneficiary for the value of the property, as does Missouri. The Colorado assessment procedure is subject to a one-year limitation period.²⁹³ The Missouri assessment process is subject to an 18 month limitation period; all nonprobate transfer beneficiaries are assessed proportionately based on the value of property received.²⁹⁴

The Uniform Probate Code deals comprehensively with creditor rights in the event of a nonprobate transfer.²⁹⁵ Under the Uniform Probate Code, if the probate estate is insufficient to cover debts of the transferor, beneficiaries of a nonprobate transfer are liable, not to exceed the value of the property

292. N.M. Stat. Ann. § 45-6-401(J).

293. Colo. Rev. Stat. § 15-15-411.

294. Mo. Rev. Stat. § 461.300.

295. See UPC § 6-102 (1998).

transferred. The estate must first seek recovery from the transferor's revocable trust before proceeding against nonprobate transfer beneficiaries, pro rata. The statute of limitations for such a proceeding is one year after the transferor's death.

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

Meanwhile, revocable TOD deed legislation should not be enacted without creditor protection. The Commission would follow the existing California model applicable to a successor who takes property of a decedent without probate under the affidavit procedure for real property of small value.²⁹⁶ Under this model, a beneficiary is personally liable for the transferor's unsecured debts, limited by the value of the property received, and subject to a one year statute of limitations.²⁹⁷ The liability is enforceable against the beneficiary in a direct action by a creditor, or indirectly by the transferor's personal representative seeking restoration of the property or its value to the estate for the benefit of creditors. The beneficiary may avoid liability by restoring the property to the transferor's estate.²⁹⁸ The beneficiary may also avoid liability by disclaiming.²⁹⁹

296. Prob. Code §§ 13200-13210.

297. See Code Civ. Proc. § 366.2.

298. The statute should make clear that any surplus after satisfaction of creditor claims should be returned to the beneficiary. A conforming revision should be made to the comparable small estate recovery statutes. See Prob. Code §§ 13111 (affidavit procedure for collection or transfer of personal property),

Rights of Third Party Transferee

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

The Missouri and Colorado statutes state this rule expressly.³⁰⁰ California law should reinforce this basic principle.³⁰¹

Taxation

Gift Tax

A revocable TOD deed has no present effect — the transferor retains full ownership rights and the beneficiary acquires no ownership rights. Gift tax liability arises only on a completed gift.³⁰² Execution and recordation of a revocable TOD deed would not be a taxable event for gift tax purposes.

Estate Tax and Generation-Skipping Transfer Tax

The future of the estate tax and the generation-skipping transfer tax is uncertain. Under existing federal law, the estate tax exclusion amount is currently \$2 million. The exclusion amount increases to \$3.5 million in 2009, and the estate tax is eliminated completely in 2010. But the estate tax is reinstated

13206 (affidavit procedure for real property of small value), 13562 (passage of property to surviving spouse without administration).

299. See Prob. Code § 275.

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

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

302. 26 C.F.R. § 25.2511-2.

in 2011 with an exclusion amount of \$1 million.³⁰³ Similarly, the generation-skipping transfer tax will be repealed in 2010 but reinstated in 2011 with a 55% rate.³⁰⁴

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

Property included in the decedent's gross estate for estate tax purposes includes property in which the decedent had a beneficial interest transferable at death.³⁰⁵ That describes the revocable TOD deed. Property that passes by revocable TOD deed would be included in the transferor's taxable estate.

Similarly, a revocable TOD deed to a grandchild would be considered a taxable distribution on the transferor's death and subject to generation-skipping transfer tax liability.³⁰⁶

Under the California law, proration of the estate tax is required "in the proportion that the value of the property received by each person interested in the estate bears to the total value of the property received by each person interested in the estate."³⁰⁷ A revocable TOD deed beneficiary is a person interested in the estate for that purpose.³⁰⁸

303. See B. Kramer & L. Nakahara, *Estate and Gift Taxes, in California Estate Planning* § 10.6, at 333 (Cal. Cont. Ed. Bar 2006).

304. See K. Marois, *Generation-Skipping Transfer Tax, in California Estate Planning* § 11.1, at 395 (Cal. Cont. Ed. Bar 2006).

305. 26 U.S.C. § 2033.

306. 26 U.S.C. §§ 2611-2613; 26 C.F.R. § 26.2612-1.

307. Prob. Code § 20111.

308. 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 Probate Code Section 20100 Comment ("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.").

A similar rule applies to equitable proration of the generation-skipping transfer tax.³⁰⁹

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

Income Tax

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

The basis of property acquired from a decedent is generally the fair market value of that property on the date of the decedent's death.³¹⁰ That results in a stepped-up basis to the decedent's beneficiary. The increased value of the real property is recognized in the decedent's gross estate and recaptured through the estate tax.

Property is deemed to pass from a decedent if it is acquired by reason of death, form of ownership, or other condition and is required for that reason to be included in the decedent's gross estate.³¹¹

Under these principles, real property that passes to a beneficiary under a revocable TOD deed is entitled to a stepped-up basis for income tax purposes, at least under the law as it exists now.³¹² But if the estate tax is permanently repealed, the beneficiary would not be entitled to an

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

310. 26 U.S.C. § 1014(a)(1).

311. 26 U.S.C. § 1014(b)(9).

312. See M. Dell'Osso, *Income Tax Basis*, in *California Estate Planning* § 12.18, at 444 (Cal. Cont. Ed. Bar 2006).

adjustment in basis. Instead, the beneficiary would receive the property with a carryover basis from the transferor.³¹³

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

Property Tax

One of the specific questions the Legislature has asked is whether property transferred by revocable TOD deed would be reassessed.³¹⁴

Under California law a reassessment is triggered when there is a change in ownership. That occurs when there is “a transfer of a present interest in real property, including the beneficial use thereof, the value of which is substantially equal to the value of the interest.”³¹⁵ The statutes identify transfers that are not a change in ownership for reassessment purposes, including a transfer to a revocable trust, a transfer reserving a life estate, and a transfer in which proportional ownership interests remain the same before and after the transfer.³¹⁶

Under these principles, execution and recordation of a revocable TOD deed would not constitute a change in ownership so as to trigger a reassessment.³¹⁷ A change in ownership would occur on the transferor’s death, when the

313. 26 U.S.C. § 1015; M. Dell’Osso, *Income Tax Basis*, in California Estate Planning § 12.6, at 438 (Cal. Cont. Ed. Bar 2006).

314. 2005 Cal. Stat. ch. 422, § 1(b)(5).

315. Rev. & Tax. Code § 60.

316. Rev. & Tax. Code § 62.

317. The property taxation laws authorize the assessor to require the filing of a “preliminary change in ownership report” concurrent with the recordation of any document effecting a change in ownership. Rev. & Tax. Code § 480.3. Execution or recordation of a revocable TOD deed is not a change in ownership. The statute should make that clear.

beneficiary acquires the property. However, there are special exemptions for transfers between spouses and between registered domestic partners, as well as transfers from a parent to a child or grandchild.³¹⁸

A transferee of real property is required to file a change in ownership statement within 150 days of the transferor's death.³¹⁹ Ordinarily the personal representative or trustee files a change in ownership statement on the decedent's death. Because a TOD transfer passes outside of probate and the beneficiary may be unaware of this obligation, revocable TOD deed legislation should highlight the duty.

Documentary Transfer Tax

A documentary transfer tax of roughly one tenth of one percent of the value of the property may be imposed by a county on a deed that transfers property "sold within the county."³²⁰ The tax does not apply to a deed that purports to transfer property to a beneficiary by reason of *intervivos* gift or death.³²¹

The recorder may not record a deed that is subject to the documentary transfer tax unless the tax is paid at the time of recording. A declaration of the amount of tax due must appear on or be attached to the deed.³²²

A revocable TOD deed, or its revocation, would be exempt from the documentary transfer tax under these rules. The statute should make that clear.

318. See Rev. & Tax. Code §§ 62-63.

319. Rev. & Tax. Code § 480(b).

320. Rev. & Tax. Code § 11911.

321. Rev. & Tax. Code § 11930.

322. Rev. & Tax. Code § 11933.

Change of Tax Burdens

The Legislature has asked the Commission whether tax burdens would shift or decrease as a result of revocable TOD deed legislation.³²³

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

Medi-Cal Eligibility and Reimbursement

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

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

A transfer or gift of real property is a technique commonly used to help a person achieve or maintain Medi-Cal eligibility. It is particularly favored by estate planners because that may put the property out of the transferor’s estate and immunize it from the state’s reimbursement claim.³²⁴ A transfer without consideration made in advance of the transferor’s application for Medi-Cal benefits may cause a loss of eligibility for a period of time.³²⁵ Generally, a transfer

323. 2005 Cal. Stat. ch. 422, § 1(b)(5).

324. See J. Milgate, *Transfers in Medi-Cal Planning*, in *California Estate Planning* § 30.3, at 1112 (Cal. Cont. Ed. Bar 2006).

325. Welf. & Inst. Code § 14015(a).

of the family home, a transfer to a spouse or registered domestic partner, or a transfer to a disabled child is exempt.³²⁶

A transfer is “a change of ownership whereby a person no longer holds title to or beneficial interest in, property.”³²⁷ Because a revocable TOD deed does not affect the transferor’s ownership of the property, it would not be considered a transfer for Medi-Cal purposes. It would neither diminish the transferor’s assets for qualification purposes, nor would it cause a loss of eligibility for Medi-Cal benefits.

On a Medi-Cal recipient’s death, the state has a claim for reimbursement against the decedent’s “estate” or against a recipient of the decedent’s property “by distribution or survival.”³²⁸ For that purpose, the decedent’s estate includes property in which the decedent had any legal title or interest at the time of death including “assets conveyed to a survivor, heir, or assign of the deceased individual through joint tenancy, tenancy in common, survivorship, life estate, living trust, or other arrangement.”³²⁹ Under this standard, real property that a transferor gave by deed to the transferor’s children while reserving a life estate and the right to revoke the transfer has been held to be part of the transferor’s estate for reimbursement purposes.³³⁰

A revocable TOD deed would not operate to divest the transferor’s “Medi-Cal estate” of the property. On the transferor’s death, the property would be subject to the state’s Medi-Cal reimbursement claim. The Arkansas, Colorado, and

326. See 42 U.S.C. § 1396p(c)(2).

327. 22 Cal. Code Regs. § 50096.

328. Welf. & Inst. Code § 14009.5.

329. 42 U.S.C. § 1396p(b)(4); 22 Cal. Code Regs. § 50960(b)(1).

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

Nevada revocable TOD deed laws make this rule explicit by statute.³³¹ California law should do the same.

There is a three-year limitation period for recovery, running from the time the state is given written notice of the decedent's death under Probate Code Section 215.³³² The beneficiary or person in possession of the decedent's property must notify the Department of Health Care Services. Revocable TOD deed legislation should state that requirement clearly.

Implementation of Revocable TOD Deed

Statutory Form

Seven of the nine states that have revocable TOD deed legislation provide a statutory form for creation of the deed. Four of those states also provide a form for revocation of a revocable TOD deed.

The statutory form is typically a "safe harbor" form — a revocable TOD deed in substantially the prescribed form is sufficient.³³³ A few states appear to mandate the statutory form — the revocable TOD deed must be in substantially the prescribed form.³³⁴

A statutory form has a number of attractions. It provides a model for a type of deed new to the law. It helps standardize usage.³³⁵ It also serves an educational purpose by including

331. See, e.g. Ark. Code Ann. § 18-12-608(a), (i).

332. *Shewry v. Begil*, 128 Cal. App. 4th 639, 644, 27 Cal. Rptr. 3d 209 (2005); Code Civ. Proc. § 338.

333. See, e.g. Ariz. Rev. Stat. Ann. § 33-405(K).

334. See Kan. Stat. Ann. § 59-3502; N.M. Stat. Ann. § 45-6-401(C); Ohio Rev. Code Ann. § 5302.22(A).

335. 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.

language that describes the rights of the transferor and beneficiary under the deed.

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

Whether or not the statute prescribes a form, it is probable that forms publishers will provide both printed and electronic revocable TOD deed forms to consumers. If there is a statutory form, that is likely to serve as a basis for private forms.³³⁶ A statutory form can thus serve as a model for best practices.

The Law Revision Commission believes that revocable TOD deed legislation should include a model statutory form. That will be informative and help effectuate the transfer. The statutory form should be short and simple, and provide for only the most common circumstances.

A transferor would still be able to make a revocable TOD deed without using the statutory form. That would be important where the transferor wishes to elect an option that is not included in the simple statutory form. However, the beneficiary might have trouble getting a title company to recognize a variant form, and a court order might be required to confirm title in the beneficiary.

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

Alternative Types of Transfer

A simple revocable TOD deed statutory form, accompanied by a well articulated statute that lays out the incidents of the revocable TOD deed, is likely to become the preferred means, apart from a trust, by which a decedent might transfer real property to a beneficiary effective on death. However, the law should be clear that the revocable TOD deed is not exclusive. For example, California law would continue to recognize the validity of a revocable transfer of property with a reserved life estate³³⁷ or a variant type of nonprobate transfer under Probate Code Section 5000. Such a safety valve may be necessary to effectuate the transferor's intent in case of a defectively executed revocable TOD deed.

Retroactivity

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

If the instrument conforms to the requirements of the revocable TOD deed law, the instrument should be recognized as a revocable TOD deed under the law. That would clarify the rules applicable to the instrument.³³⁸

If the instrument does not conform to the requirements of the revocable TOD deed law, it may nonetheless still be a

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

338. 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).

valid transfer on death under Probate Code Section 5000.³³⁹ Such an instrument would be governed by the applicable law in effect at the time.³⁴⁰

EVALUATION OF REVOCABLE TOD DEED

Adequacy of Other Instruments

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

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

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

339. 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.

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

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

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

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

- Will or intestate succession — significant cost and delay of probate.
- Intervivos trust — may be unduly complex and expensive for transfer of a single piece of property.
- Joint tenancy — immediate transfer of undivided interest, subject to creditors of transferee.
- Community property — only available for transfer to surviving spouse or domestic partner, and requires shared concurrent ownership.
- Intervivos transfer — transferor immediately and irrevocably gives up ownership and control of the property.
- Intervivos transfer with reserved life estate — irrevocable and subject to conflicts between present and future interest holders.

- Conveyance pursuant to general nonprobate transfer statute — no clear legal incidents established.
- Revocable deed — little known or understood.

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

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

A revocable TOD deed cannot be processed the same way other nonprobate transfers are processed. Other forms of nonprobate transfer typically involve a third party to effectuate the transfer or to issue new title — a bank, a transfer agent, a trustee. In a probate proceeding, a court issues a decree of title, or a court-appointed personal representative transfers title. To a significant extent, the rights of a transferee under a revocable TOD deed must depend on the mechanism of title insurance. The Commission's recommendations in this study are designed to make the

transfer of real property under a revocable TOD deed insurable without the need for judicial proceedings.

Need for the Device

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

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

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

The proposal for a simple, one page state-recognized beneficiary deed that we could use at the Senior centers and elsewhere would be a real benefit to California seniors.³⁴¹

Large portions of these citizens live on small pensions that leave them no discretionary funds for which to hire an attorney to draft a revocable trust to avoid probate. However, most, if not all, of these citizens wish to avoid the possibility of their estates being subjected to the probate court system where from \$11,000 to \$20,000 of their estate is eaten up in attorney's fees for simply passing a single family house to heirs.³⁴²

Over my 20 years in practice I have often seen expensive living trusts, bought from trust mills by senior clients. Some of the trusts were useless, and all of them cost the senior too much of his/her very limited resources. These elders simply wanted to pass their homes to their children outside of probate. If revocable transfer-on-death deeds had been available, all of those clients could have used that much simpler method, and would not have been such easy prey for the trust salespeople.³⁴³

341. James A. Gibling, emeritus attorney volunteering with Contra Costa Senior Legal Services. See Commission Staff Memorandum 2006-19, Exhibit p. 16 (June 6, 2006).

342. Contra Costa County Advisory Council on Aging. See Commission Staff Memorandum 2006-19, Exhibit p. 13 (June 6, 2006).

343. 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

Many senior citizens have little in liquid assets and most of their estate is in their residence. When they find out that they have to incur the expense and administrative burdens of a revocable trust, or subject their heirs to the cost and delays of probate they sometimes try to use other devices to pass on their property. One of the most frequent is to retitle their property in joint tenancy with the heirs. That is very risky since they subject the property to liabilities incurred by the joint tenants. Often they execute an undated quitclaim deed that is not recorded with the hope that it can be used to transfer the property after their death. In other situations they deed the property to the heirs and reserve a life estate. That creates complications because the transfer is not revocable. In addition it is difficult to deal with that situation when the life tenant is no longer capable of living on the property. Such devices also trigger elder abuse concerns when the relationship between the parties becomes strained.³⁴⁴

Concern About Revocable TOD Deed Concept

Professionals who would be in the position of implementing the revocable TOD deed, including attorneys, judges, lenders, and title companies, have expressed concerns. They have noted that the revocable TOD deed may lend itself to use by a real property owner without adequate counseling. While the revocable TOD deed is a way to cheaply and quickly transfer property, it is not necessarily the safest or most reliable method of accurately ensuring the transferor's wishes are carried out as the transferor intended.

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." See Commission Staff Memorandum 2006-19, pp. 69-70 (June 6, 2006).

344. John A. Cape, pro bono legal services volunteer. See Commission Staff Memorandum 2006-19, p. 71 (June 6, 2006).

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

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

- The revocable TOD deed would create and encourage an estate planning substitute that is likely to be a self-help device for the elderly, resulting in (1) inappropriate use where another device might be more suited to the transferor’s circumstances, (2) an increase in title problems caused by lay drafting and execution of the instrument, (3) susceptibility to elder abuse, and (4) avoidance of competent estate planning advice and assistance, resulting in adverse consequences. “It would create more opportunities than presently exist for non-lawyers to give inadequate or poor advice to persons wishing to avoid probate, and more opportunities for abusers to obtain title to property from the elderly, without the court overseeing the transfer.”³⁴⁵
- The privacy inherent in the revocable TOD deed “does not allow heirs at law or creditors to know real property has passed to named designees upon the death of a family member, and as a result the property may be sold or refinanced before possible abuse claims can be raised.”³⁴⁶

345. Sacramento County Bar Association. See Commission Staff Memorandum 2006-19, p. 73 (June 6, 2006).

346. State Bar Conference of Delegates, Resolutions Committee. See Commission Staff Memorandum 2006-19, p. 73 (June 6, 2006).

- The revocable TOD deed would add an ad hoc device to the proliferation of other types of estate planning mechanisms, particularly nonprobate transfers that are not controlled by a will or trust. “This proliferation results in confusion, inconsistency, litigation, and frustration for all involved. It makes it increasingly difficult to prepare estate plans for people and have any assurance that the plan will be consistently implemented by all the beneficiary choices that people make.”³⁴⁷
- The revocable TOD deed would be a new and untested estate planning device that is unnecessary because existing devices are available to achieve the same purpose.
- In states that have adopted the revocable TOD deed there has been confusion about rights as between the transferor and beneficiary during the transferor’s life.

Balancing Need Against Concerns

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

The Law Revision Commission disagrees with the argument that the revocable TOD deed is unnecessary because California already recognizes the functional equivalent — a revocable deed with reserved life estate — which has been the law for nearly a century.³⁴⁸ That device is little known, and its legal effect and consequences are

347. State Bar Trusts & Estates Section. See Commission Staff Memorandum 2006-19, p. 73 (June 6, 2006).

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

unclear. It would be preferable for the law to provide a simple, understandable device with clear rules, such as the revocable TOD deed, than to encourage people to rely on a shadowy device such as the revocable deed with reserved life estate.

California law has allowed nonprobate transfer devices to proliferate without consistent standards or consistent consequences. At some point, this area of law must be treated comprehensively. However, consideration of the revocable TOD deed concept should not be deferred until that can be done. It is not clear when such a comprehensive overview could occur. To the extent that appropriate and clearly expressed solutions for revocable TOD deed issues are developed in the interim, that will provide a model and thereby facilitate sensible treatment of nonprobate transfer issues generally.

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

The most cautionary issues surrounding the revocable TOD deed relate to the likelihood of uninformed self-help use of the device, leading to adverse estate planning consequences for the transferor, improperly drafted instruments that defeat

the transferor's intent, failure to make the required recordation, and manipulation and financial abuse against the transferor. The revocable TOD deed enables a seductively simple transfer of what could well be the transferor's major asset without any neutral guidance or assistance.

While the potential for misuse and abuse of the revocable TOD deed is real, the existence of the device will not generate problems that do not already exist if an individual is inclined to avoid counsel and to avoid probate.³⁴⁹ An outright transfer of the property, or creation of a joint tenancy, is likely to be a greater source of problems than a revocable TOD deed. The revocable TOD deed is a relatively benign instrument. Unlike a standard deed, there is no immediate transfer of the property³⁵⁰ and the deed is revocable. Unlike a will that may remain private until the transferor's death, the required recording of the revocable TOD deed provides public exposure.

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

Conclusion

The nonprobate revolution has largely bypassed real property. Nearly all other significant assets, including life insurance, securities, bank accounts, and pension plans, pass

349. "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. See Commission Staff Memorandum 2006-19, p. 75 (June 6, 2006).

350. Civ. Code § 1054; 26 Cal. Jur. 3d *Deeds* § 295 (2006).

commonly by beneficiary designation outside the probate system. Real property is the last major holdout, although substantial amounts of real property pass by right of survivorship under joint tenancy or community property or under a trust. It has been observed that ownership of real property is the factor most likely to determine whether a death will lead to a probate proceeding.³⁵¹

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

Having surveyed existing transfer devices and reviewed the experience in other jurisdictions, and having considered the legal incidents of the revocable TOD deed, the Law Revision Commission recommends adoption of the device in California as prescribed in the “Proposed Legislation” below.

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

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PROPOSED LEGISLATION

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

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

PART 4. REVOCABLE TRANSFER ON DEATH DEED

CHAPTER 1. GENERAL PROVISIONS

Article 1. Preliminary Provisions

§ 5600. Application of part

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

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

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

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

§ 5602. Effect on other forms of transfer

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

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

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

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

§ 5604. Effect of other law

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

- (1) Division 2 (commencing with Section 100).
- (2) Part 1 (commencing with Section 5000) of this division.
- (3) Division 10 (commencing with Section 20100).
- (4) Division 11 (commencing with Section 21101).

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

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

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

Article 2. Definitions

§ 5606. Application of definitions

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

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

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

§ 5608. Beneficiary

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

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

§ 5610. Real property

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

(a) A leasehold.

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

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

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

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

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

§ 5612. Recorded

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

Comment. Section 5612 adopts the rule that an instrument is deemed to be recorded when, being duly acknowledged or proved and certified, it is deposited in the recorder’s office, with the proper officer, for record. See Civ. Code § 1170 (recorded). This definition applies to variants of the term defined, including “of record,” “recordation,” and the like.

§ 5614. Revocable transfer on death deed

5614. (a) “Revocable transfer on death deed” means an instrument created pursuant to this part that (1) makes a

donative transfer of real property to a named beneficiary, (2) operates on the transferor's death, and (3) remains revocable until the transferor's death.

(b) "Revocable transfer on death deed" does not include an instrument that purports to transfer less than all of the transferor's interest in the property or that purports to be irrevocable.

(c) A revocable transfer on death deed may also be known as a "revocable TOD deed."

Comment. Section 5614 adopts revocable TOD deed terminology, rather than "beneficiary deed" terminology used in some jurisdictions that have enacted comparable legislation.

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

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

A revocable TOD deed creates no rights in the beneficiary until the death of the transferor, and is revocable until that time. See Sections 5630 (revocability) and 5650 (effect during transferor's life).

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

§ 5616. Transferor

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

Comment. Section 5616 is a specific application of Section 81 ("transferor" defined).

CHAPTER 2. EXECUTION AND REVOCATION

Article 1. Execution

§ 5620. Capacity to make deed

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

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

§ 5622. Beneficiary

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

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

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

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

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

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

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

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

A transferor may condition the beneficiary's right to the property on an intervening life estate. See Section 5652 (effect at death).

§ 5624. Execution

5624. (a) Except as provided in subdivision (b), a revocable transfer on death deed is not effective unless the transferor signs and dates the deed and acknowledges the deed before a notary public.

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

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

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

§ 5626. Recordation, delivery, and acceptance

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

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

(c) The beneficiary is not required to accept a revocable transfer on death deed from the transferor during the transferor's life.

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

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

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

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

§ 5628. Multiple deeds

5628. (a) If a revocable transfer on death deed is recorded for the same property for which another revocable transfer on death deed is recorded, the later executed deed is the operative instrument and its recordation revokes the earlier executed deed.

(b) Revocation of a revocable transfer on death deed does not revive an instrument earlier revoked by recordation of that deed.

Comment. Subdivision (a) of Section 5628 gives effect to the last executed of revocable TOD deeds recorded before the transferor's death. A revocable TOD deed is executed by signing, dating, and acknowledging before a notary public. See Section 5624 (execution). Execution is complete when the transferor acknowledges the deed before a notary public, not when the deed is signed and dated.

Under subdivision (b), recordation of a revocable TOD deed has the effect of revoking an earlier executed revocable TOD deed, regardless of the order of recordation of the deeds. Subsequent revocation of the later executed recorded deed does not revive an earlier executed deed. Instead, the property passes under failed transfer principles. See Section 21111 (failed transfer).

Article 2. Revocation

§ 5630. Revocability

5630. A transferor who has testamentary capacity may revoke a revocable transfer on death deed at any time.

Comment. Section 5630 states the rule that a transfer on death deed is revocable. The transferor's right of revocation may be subject to a contractual or court ordered limitation.

A TOD deed may be revocable in some circumstances even though the transferor lacks testamentary capacity. The transferor's agent under a durable power of attorney may not revoke a TOD deed unless expressly authorized. See Section 4264(f) (power of attorney). If the transferor's conservator seeks to revoke a TOD deed, the transferor's estate plan must be taken into account under general principles of substituted judgment, and notice must be given to the beneficiary. See Sections 2580-2586 (guardianship and conservatorship).

§ 5632. Revocation of deed

5632. (a) An instrument revoking a revocable transfer on death deed shall be executed and recorded before the transferor's death in the same manner as execution and recordation of a revocable transfer on death deed.

(b) Joinder, consent, or agreement of, or notice to, the beneficiary is not required for revocation of a revocable transfer on death deed.

Comment. Under subdivision (a) of Section 5632 a revoking instrument must be signed, dated, acknowledged, and recorded by the transferor or a person acting at the transferor's direction. See Sections 5624 (execution), 5626 (recordation).

Subdivision (b) implements the principle that creation and recordation of a revocable TOD deed creates no rights in the beneficiary. See Section 5650 (effect during transferor's life).

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 article.

(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 article.

Comment. Section 5640 makes clear that use of the statutory forms provided in this article is permissive and is 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 form provided in this section.

(a) The face of the form shall include the following:

Revocable Transfer on Death (TOD) Deed
[California Probate Code Section 5600]

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

Assessor’s Parcel Number:

Space Above For Recorder’s Use

This deed is exempt from documentary transfer tax under Rev. & Tax. Code § 11930.

This deed is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

**IMPORTANT NOTICE: THIS DEED
MUST BE RECORDED**

This deed will transfer ownership of the property described below when you die. **YOU SHOULD CAREFULLY READ ALL OF THE INFORMATION ON THE OTHER SIDE OF THIS FORM.** You may wish to consult an attorney before using this deed. It may have results that you don’t want. Provide only the information asked for in the form. **DO NOT INSERT ANY OTHER INFORMATION OR**

INSTRUCTIONS. This form **MUST** be **RECORDED** before your death or it will not be effective.

PROPERTY DESCRIPTION

Print the address or other legal description of the property affected by this deed:

BENEFICIARY

Print the **NAME(S)** of beneficiary(ies) who will receive the property on your death (do **NOT** use general terms like “my children”):

TRANSFER ON DEATH

I transfer all of my interest in the described property to the named beneficiary(ies) on my death. I may revoke this deed. When recorded, this deed revokes any TOD deed that I made before signing this deed. **NOTE:** This deed only transfers **YOUR** ownership share of the property. The deed does **NOT** transfer the share of a co-owner of the property (if any). Any co-owner who wants to name a TOD beneficiary must complete and **RECORD** a **SEPARATE** deed.

Sign and print your name below:

_____ Date _____

OPTIONAL LIFE ESTATE IN SURVIVING SPOUSE

See the other side of this form for a description of the life estate option. **DO NOT SIGN BELOW IF YOU DO NOT WANT TO CREATE A LIFE ESTATE IN YOUR SURVIVING SPOUSE.**

By signing below, I create a life estate in my surviving spouse (or registered domestic partner). After my surviving spouse (or registered domestic partner) dies, ownership of the property will transfer to my named beneficiary(ies).

ACKNOWLEDGMENT OF NOTARY

State of California)
 County of _____)

On [date], before me, [name of notary], a notary public in and for said County and State, personally appeared [name of signer], personally known to me, or proved to me on the basis of satisfactory evidence, to be the person(s) whose name(s) is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or the entity upon behalf of which the person acted, executed the instrument. WITNESS my hand and official seal.

Signature of Notary _____

(b) The reverse of the form shall include the following:

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

WHAT DOES THE TOD DEED DO? When you die, your beneficiary will become owner of the property described in the TOD deed. Probate is not required. The TOD deed has no effect until you die. It can be revoked by you at any time.

HOW DO I USE THE TOD DEED? Complete this form. Have it notarized. RECORD the form in the county where the property is located. The form MUST be recorded before your death or it has no effect.

HOW DO I “RECORD” THE FORM? Take the completed and notarized form to the County Recorder for the county in which the property is located. Follow the instructions given by the County Recorder to make the form part of the official property records.

WHAT IF I SHARE OWNERSHIP OF THE PROPERTY? This form only affects YOUR share of the property. If a co-owner also wants to name a TOD beneficiary, that co-owner must complete and RECORD a separate form.

CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND? Yes. You may revoke the TOD deed at any time. No one, including your beneficiary, can prevent you from revoking the deed.

HOW DO I REVOKE THE TOD DEED? There are three ways to revoke a recorded TOD deed: (1) Complete, notarize, and RECORD a revocation form. (2) Create and RECORD a new TOD deed, trust, or other estate planning document that disposes of the same property. (3) Sell or give away the property before your death and RECORD the deed. A TOD deed can only affect property that you own when you die.

IF I CREATE A NEW TOD DEED, TRUST, OR OTHER ESTATE PLANNING DOCUMENT THAT DISPOSES OF THE SAME PROPERTY, DOES THAT AUTOMATICALLY REVOKE A RECORDED TOD DEED? No. If you want the new document to revoke a recorded TOD deed, the new document must be signed and dated after the deed you wish to revoke and it must be RECORDED. To avoid any doubt about whether the deed is revoked, you can also complete and RECORD a revocation form.

I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do NOT complete this form unless you freely choose to do so. If you are being pressured to dispose of your property in a way that you do not want, you may want to alert a family member, friend, the district attorney, or a senior service agency.

DO I NEED TO TELL MY BENEFICIARY ABOUT THE TOD DEED? No. But, secrecy can cause later complications and might make it easier for others to commit fraud.

WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary must RECORD evidence of your death (Prob. Code § 210), and file a change in ownership notice (Rev. & Tax. Code § 480). If you received Medi-Cal benefits, your beneficiary may also be required to notify the Department of Health Care Services (Prob. Code § 215).

WHAT IF I NAME MORE THAN ONE BENEFICIARY? Your beneficiaries will become co-owners in equal shares. If you want a different result, you should not use this form. You MUST name your beneficiaries individually. You MAY NOT use general terms to describe beneficiaries, such as “my children.”

WHAT IF A BENEFICIARY DIES BEFORE I DO? You should probably create and RECORD a new deed. Otherwise, the property will transfer according to the general rules on failed gifts, which may not meet your needs. See Prob. Code §§ 21110-21111.

HOW DOES A TOD DEED AFFECT PROPERTY THAT I OWN IN JOINT TENANCY OR COMMUNITY PROPERTY? On your death, your share of the property will pass to the named beneficiary. A joint tenant, spouse, or domestic partner will NOT receive the property (unless that person is a beneficiary). If you want a different result, you should not use this form.

WHAT IS THE “OPTIONAL LIFE ESTATE IN SURVIVING SPOUSE?” You may choose to use the TOD deed to allow your surviving spouse (or registered domestic partner) to own the property for the duration of his or her life (a “life estate”). When your surviving spouse dies, ownership would change to your named beneficiary. **THIS IS NOT A GOOD CHOICE FOR EVERYONE.** A life estate can cause disagreements between your surviving spouse and your beneficiary, over maintenance of the property and payment of mortgage and taxes. Your surviving spouse’s ability to sell or borrow against the property will be limited. To choose this option you **MUST** sign where indicated on the form. If you do not want this option, **DO NOT** sign where indicated.

CAN I ADD OTHER CONDITIONS ON THE FORM? No. If you do, your beneficiary may need to go to court to clear title.

IS PROPERTY TRANSFERRED BY THE TOD DEED SUBJECT TO MY DEBTS? Yes.

DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES? No. If you wish to avoid gift and estate tax you should consult a tax professional for advice.

HOW DOES THE TOD DEED AFFECT PROPERTY TAXES? The TOD deed has no effect on your property taxes until your death. At that time, property tax law applies as it would to any other change of ownership.

DOES THE TOD DEED AFFECT MY ELIGIBILITY FOR MEDI-CAL? No.

AFTER MY DEATH, WILL MY HOME BE LIABLE FOR REIMBURSEMENT OF THE STATE FOR MEDI-CAL EXPENDITURES? If your estate is subject to reimbursement, any property transferred by a TOD deed will also be subject to reimbursement.

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

The form provided in this section enables the transferor to condition passage of the property to the beneficiary on a life estate in the transferor's surviving spouse. Comparable principles apply to a surviving registered domestic partner under Family Code Section 297.5. The option provided in this form should not be read to preclude a transferor from making a revocable TOD deed subject to a life estate in a person other than the surviving spouse, or from imposing conditions on the life estate. See Sections 5640 (statutory forms permissive), 5652 (effect at death).

§ 5644. Statutory form revocation of revocable TOD deed

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

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

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

Assessor's Parcel Number: Space Above For Recorder's Use

This deed revocation is exempt from documentary transfer tax under Rev. & Tax. Code § 11930.

This deed revocation is exempt from preliminary change of ownership report under Rev. & Tax. Code § 480.3.

**IMPORTANT NOTICE: THIS FORM
MUST BE RECORDED**

This revocation form **MUST** be **RECORDED** before your death or it will not be effective. This revocation form only

affects a transfer on death deed that YOU made. A transfer on death deed made by a co-owner of your property is not affected by this revocation form. A co-owner who wants to revoke a transfer on death deed that he/she made must complete and RECORD a SEPARATE revocation form.

PROPERTY DESCRIPTION

Print the address or other legal description of the property affected by this revocation:

**RECORDING INFORMATION FOR DEED
REVOKED BY THIS FORM:**

County: _____
Date of Recordation: _____
Book and Page or Series Number: _____

REVOCATION

I revoke the described revocable TOD deed.

SIGNATURE AND DATE

Print and sign your name:

Date: _____

ACKNOWLEDGMENT OF NOTARY

State of California)
County of _____)

On [date], before me, [name of notary], a notary public in and for said County and State, personally appeared [name of signer], personally known to me, or proved to me on the basis of satisfactory evidence, to be the person whose name is subscribed to the within instrument and acknowledged to me that he/she executed the same in his/her authorized capacity, and that by his/her signature on the instrument the person, or

the entity upon behalf of which the person acted, executed the instrument.

Witness my hand and official seal.

Signature _____ (Seal)

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

CHAPTER 3. EFFECT

Article 1. General Provisions

§ 5650. Effect during transferor's life

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

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

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

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

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

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

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

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

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

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

§ 5652. Effect at death

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

(b) A revocable transfer on death deed may condition the beneficiary's right to the property on an intervening life estate, but may not otherwise create a future interest in a beneficiary.

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

enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed.

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

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

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

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

§ 5654. Medi-Cal eligibility and reimbursement

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

(b) For the purpose of a claim of the Department of Health Care Services under Section 14009.5 of the Welfare and Institutions Code, property transferred by a revocable transfer on death deed is a part of the estate of the decedent, and the

beneficiary is a recipient of the property by distribution or survival.

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

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

§ 5656. Property taxation

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

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

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

Comment. Section 5656 prescribes the effect of a revocable TOD deed or its revocation for purposes of property tax reassessment and documentary transfer taxation.

Under subdivision (a), mere recordation or revocation of a revocable TOD deed is not a transfer or change in ownership for taxation purposes. This is an application of existing law. See, e.g., Rev. & Tax Code §§ 480.3 (application of preliminary change of ownership requirement), 11930 (exemption from documentary transfer tax).

Under subdivision (b), a change in ownership pursuant to a revocable TOD deed does not occur until the transferor's death. The TOD beneficiary is responsible for filing the change in ownership statement required by Revenue and Taxation Code Section 480. See Section 5680 (beneficiary rights and duties). Although a transfer of property by a revocable TOD deed is a change in ownership for reassessment purposes,

the transfer may qualify for exclusion under the Revenue and Taxation Code, depending on the nature of the parties to the transfer. See, e.g., Rev. & Tax. Code §§ 62-63.1.

Article 2. Other Instruments and Forms of Tenure

§ 5660. Conflicting dispositive instruments

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

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

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

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

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

This section does not apply if the transferor revokes a recorded revocable TOD deed before death. See Section 5630 (revocability).

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

§ 5662. Joint deed

5662. Except as otherwise provided in this part, if coowners of property join in a revocable transfer on death deed of the property:

(a) The property interest of a coowner passes to the beneficiary on the death of that coowner.

(b) A coowner may revoke the transfer on death deed as to the interest of that coowner. The revocation does not affect the transfer on death deed as to the interest of another coowner.

Comment. Section 5662 provides rules governing a revocable TOD deed joined in by coowners of the property. A coowner of property may condition passage of the coowner's interest to the beneficiary on a life estate in the surviving coowner. *Cf.* Section 5652 (effect at death).

The revocation right under subdivision (b) applies before or after the death of another coowner.

For rules applicable to property held in joint tenancy, see Section 5664. For rules applicable to community property, see Section 5666. For rules applicable to community property with right of survivorship, see Section 5668.

§ 5664. Joint tenancy

5664. Unless the deed otherwise provides, if an owner of property held in joint tenancy makes a revocable transfer on death deed of the property:

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

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

Comment. Section 5664 addresses the conflict between a revocable TOD deed and an earlier joint tenancy in the property. In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660 (conflicting dispositive instruments).

Because a revocable TOD deed is revocable until the transferor's death, execution and recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when the transferor dies with the

revocable TOD deed still in effect. If another joint tenant who has not made a revocable TOD deed predeceases the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the combined interest passes pursuant to the transferor's revocable TOD deed. See Section 5652(a) (transferor's entire interest in property passes at death).

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

Section 5664 provides a default rule; joint tenants may provide a different result in the deed. For example, the deed may provide that on the death of a joint tenant, the property passes to the surviving joint tenant and, on the death of the surviving joint tenant, to the TOD beneficiary. In that circumstance, the TOD deed would remain revocable by the surviving joint tenant. See Sections 5630 (revocability), 5632 (revocation of deed).

§ 5666. Community property

5666. (a) Chapter 2 (commencing with Section 5010) of Part 1 applies to a revocable transfer on death deed of community property.

(b) For the purpose of application of Chapter 2 (commencing with Section 5010) of Part 1 to a revocable transfer on death deed of community property, written consent to the deed, revocation of written consent to the deed, or modification of the deed, is ineffective unless recorded within the time required by that chapter for execution or service of the written consent, revocation, or modification.

Comment. Subdivision (a) of Section 5666 incorporates the general statutes governing the rights of spouses in a nonprobate transfer of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer apply to a revocable TOD deed. Section 5604(a)(2) (effect of other law).

Under the rules governing a nonprobate transfer of community property, a person has the power of disposition at death of the person's interest in community property without the joinder of the person's spouse. A revocable transfer on death deed of community property joined in by both spouses is effective as to the interests of both spouses. The revocable TOD deed may be subject to subsequent modification or revocation as to the interest of each spouse. Comparable principles apply

to the property of registered domestic partners under Family Code Section 297.5.

Subdivision (b) makes clear that the general statute governing the rights of spouses in a nonprobate transfer of community property is qualified by the recording requirement in the case of a revocable TOD deed of community property. This is a specific application of the rule that general provisions of Part 1 of this division governing a nonprobate transfer are subject to a contrary rule in the revocable TOD deed law. See Section 5604(b); see also Section 5011(b) (rights of parties subject to “contrary state statute specifically applicable to instrument under which nonprobate transfer is made”).

A third party that acts in reliance on apparent spousal rights under a revocable TOD deed is protected in that reliance. Section 5682 (bona fide purchaser protection).

§ 5668. Community property with right of survivorship

5668. (a) A revocable transfer on death deed of community property with right of survivorship is subject to Section 5666, relating to a revocable transfer on death deed of community property.

(b) Unless the deed otherwise provides, if an owner of community property with right of survivorship makes a revocable transfer on death deed of the property:

(1) The death of the transferor terminates the right of survivorship in the same manner as severance of a joint tenancy under Section 5664.

(2) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the community property with right of survivorship.

Comment. Section 5668 addresses the effect of a revocable TOD deed on community property with right of survivorship. See Civ. Code § 682.1 (community property with right of survivorship).

A revocable TOD deed of the property is subject to the rules governing a nonprobate transfer of community property. Subdivision (a).

Subdivision (b) is consistent with Civil Code Section 682.1(a) (termination of survivorship right pursuant to same procedures by which joint tenancy may be terminated). In the case of simultaneous death, Section 223 (joint tenants) controls; the one-half interest of each spouse

passes under the revocable TOD deed or other dispositive instrument of that spouse.

Subdivision (b) provides a default rule; the spouses may provide a different result in the deed. For example, the deed may provide that on the death of the spouse, the property passes to the surviving spouse and, on the death of the surviving spouse, to the TOD beneficiary. In that circumstance, the TOD deed would remain revocable by the surviving spouse. See Sections 5630 (revocability), 5632 (revocation of deed).

Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.

Article 3. Creditors

§ 5670. Priority of secured creditor of transferor

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

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

§ 5672. Liability for unsecured debts

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

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

§ 5674. Limitation on liability

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

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

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

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

(3) If the property has been disposed of, interest on the fair market value of the property from the date of disposition at

the rate payable on a money judgment. For the purposes of this paragraph, “fair market value of the property” has the same meaning as defined in paragraph (2) of subdivision (a) of Section 5676.

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

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

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

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

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

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

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

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

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

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

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the transferor. Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of creditors of the transferor.

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

Comment. Section 5676 is drawn from Section 13206, relating to restoration of property to the estate by a decedent's successor who takes real property of small value under the affidavit procedure. The beneficiary of revocable TOD-deeded property that is restored to the

transferor's estate under this section is the beneficiary of a specific gift for purposes of abatement under Section 21402.

Subdivision (d) makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the beneficiary.

CHAPTER 4. EFFECTUATION OF TRANSFER

§ 5680. Beneficiary rights and duties

5680. (a) The beneficiary may establish the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2. For the purpose of this subdivision, the beneficiary is a person empowered by statute to act on behalf of the transferor or the transferor's estate within the meaning of Section 103526 of the Health and Safety Code.

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

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

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

Comment. Subdivision (a) of Section 5680 establishes that a beneficiary may record an affidavit of death of the transferor to effectuate the transfer. See Section 212 (recordation is prima facie evidence of death to extent it "identifies real property located in county, title to which is affected by death"). Subdivision (a) authorizes the named beneficiary to obtain a certified copy of the transferor's death certificate under Health and Safety Code Section 103526 for the purpose of effectuating the transfer by revocable TOD deed.

Subdivision (b) cross-references the duty imposed on the beneficiary to file a change of ownership statement with the country recorder or assessor within 150 days after the transferor's death. See Rev. & Tax. Code § 480.

Subdivision (c) cross-references the duty imposed on the beneficiary to give the Director of Health Services notice of the death of a transferor who has received Medi-Cal benefits. See Section 215.

Subdivision (d) is a specific application of Division 10 (commencing with Section 20100), relating to proration of taxes. The beneficiary of a nonprobate transfer, such as a revocable TOD deed, is liable for a pro rata share of estate and generation-skipping transfer taxes paid by the transferor's estate. See Sections 20100 *et seq.* (proration of estate tax), 20200 *et seq.* (proration of tax on generation-skipping transfer).

A beneficiary may disclaim the property under Section 275 (disclaimer).

§ 5682. Bona fide purchaser protection

5682. Except as provided in Section 5694, a person acting in good faith and for a valuable consideration with the beneficiary of a revocable transfer on death deed of real property for which an affidavit of death is recorded under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2 has the same rights and protections as the person would have if the beneficiary had been named as a distributee of the property in an order for distribution of the transferor's estate that had become final.

Comment. Section 5682 is drawn from Section 13203(a) (affidavit procedure for real property of small value).

CHAPTER 5. CONTEST

§ 5690. Contest of transfer

5690. (a) The transferor's personal representative or an interested person may, under Part 19 (commencing with Section 850) of Division 2, contest the validity of a transfer of property by a revocable transfer on death deed.

(b) The proper county for a contest proceeding is the proper county for proceedings concerning administration of the transferor's estate, whether or not proceedings concerning administration of the transferor's estate have been commenced at the time of the contest.

(c) On commencement of a contest proceeding, the contestant may record a lis pendens in the county in which the revocable transfer on death deed is recorded.

Comment. Section 5690 incorporates the procedure of Sections 850-859, relating to a conveyance or transfer of property claimed to belong to a decedent or other person. A person adversely affected by a revocable TOD deed has standing to contest the transfer. *Cf.* Section 48 ("interested person" defined).

Grounds for contest may include but are not limited to lack of capacity of the transferor (Section 5620), improper execution or recordation (Sections 5624-5626), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350). See also Section 5696 (fraud, undue influence, duress, mistake, or other invalidating cause).

The proper county for proceedings for administration of a decedent's estate is the county of the decedent's domicile or, in the case of a nondomiciliary, the county of the decedent's death or, if the decedent died outside the state, where property of the decedent is located. Prob. Code §§ 7051, 7052.

Recordation of a lis pendens within 90 days after the transferor's death preserves remedies for the contestant. See Section 5694 (remedies).

§ 5692. Time for contest

5692. (a) A contest proceeding may not be commenced before the transferor's death.

(b) A contest proceeding shall be commenced within the earlier of the following times:

(1) Three years after the transferor's death.

(2) One year after the beneficiary establishes the fact of the transferor's death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2.

Comment. Section 5692 limits the contest of a revocable TOD deed to a post-death challenge. A challenge before the transferor's death would

be premature since a revocable TOD deed may be revoked at any time before the transfer occurs by reason of the transferor's death. However, the transferor's conservator may seek to revoke a revocable TOD deed pursuant to substituted judgment principles. See Section 5630 (revocability) & Comment; see also Sections 2580-2586 (substituted judgment).

§ 5694. Remedies

5694. If the court in a contest proceeding determines that a transfer of property by a revocable transfer on death deed is invalid, the court shall order the following relief:

(a) If the proceeding was commenced and a lis pendens was recorded within 90 days after the transferor's death, the court shall void the deed and order transfer of the property to the person entitled to it.

(b) If the proceeding was not commenced and a lis pendens was not recorded within 90 days after the transferor's death, the court shall grant appropriate relief but the court order shall not affect the rights in the property of a purchaser or encumbrancer for value and in good faith acquired before commencement of the proceeding and recordation of a lis pendens.

Comment. The 90 day period under Section 5694 represents a balance between the 40 day period applicable to disposition of an estate without administration under Sections 13100 (affidavit procedure for collection or transfer of personal property) and 13151 (court order determining succession to property), and the six month period applicable to the affidavit procedure for real property of small value under Section 13200.

§ 5696. Fraud, undue influence, duress, mistake, or other invalidating cause

5696. Nothing in this chapter limits the application of principles of fraud, undue influence, duress, mistake, or other invalidating cause to a transfer of property by a revocable transfer on death deed.

Comment. Section 5696 is drawn from Section 5015 (nonprobate transfer of community property).

CONFORMING REVISIONS

Fam. Code § 2040 (amended). Automatic temporary restraining order

SEC. _____. Section 2040 of the Family Code is amended to read:

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

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

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

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

other party to pay his or her attorney's retainer for fees and costs under this provision shall account to the other party for the use of the property.

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

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

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

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

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

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

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

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

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

“WARNING: California law provides that, for purposes of division of property upon dissolution of marriage or legal separation, property acquired by the parties during marriage in joint form is presumed to be community property. If either party to this action should die before the jointly held

community property is divided, the language of how title is held in the deed (i.e., joint tenancy, tenants in common, or community property) will be controlling and not the community property presumption. You should consult your attorney if you want the community property presumption to be written into the recorded title to the property.”

(d) For the purposes of this section:

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

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

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

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

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

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

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

(1) Any property, interest, or benefit under a will of the decedent, or a trust created by or for the benefit of the decedent or in which the decedent has an interest, including

any general or special power of appointment conferred by the will or trust on the killer and any nomination of the killer as executor, trustee, guardian, or conservator or custodian made by the will or trust.

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

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

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

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

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

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

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

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

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

Prob. Code § 267 (amended). Disclaimable interest

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

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

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

- (1) By intestate succession.
- (2) Under a will.
- (3) Under a trust.
- (4) By succession to a disclaimed interest.
- (5) By virtue of an election to take against a will.
- (6) By creation of a power of appointment.
- (7) By exercise or nonexercise of a power of appointment.
- (8) By an inter vivos gift, whether outright or in trust.
- (9) By surviving the death of a depositor of a Totten trust account or P.O.D. account.
- (10) Under an insurance or annuity contract.
- (11) By surviving the death of another joint tenant.
- (12) Under an employee benefit plan.
- (13) Under an individual retirement account, annuity, or bond.
- (14) Under a transfer on death beneficiary designation in a deed or other instrument.
- (15) Any other interest created by any testamentary or inter vivos instrument or by operation of law.

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

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

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

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

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

(1) An interest created under a will.

(2) An interest created by intestate succession.

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

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

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

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

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

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

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

(c) In the case of an interest created by a living trust, an interest created by the exercise of a presently exercisable power of appointment, an outright inter vivos gift, a power of appointment, or an interest created or increased by succession to a disclaimed interest, a disclaimer is conclusively presumed to have been filed within a reasonable time if it is

filed within nine months after whichever of the following times occurs latest:

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

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

(3) The time the interest becomes indefeasibly vested.

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

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

(2) The time the interest becomes indefeasibly vested.

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

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

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

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

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

Prob. Code § 5000 (amended). Nonprobate transfer

SEC. _____. Section 5000 of the Probate Code is amended to read:

5000. (a) 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, revocable transfer on death deed, 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.

(b) Included within subdivision (a) are the following:

(1) A written provision that money or other benefits due to, controlled by, or owned by a decedent before death shall be paid after the decedent's death to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(2) A written provision that money due or to become due under the instrument shall cease to be payable in event of the death of the promisee or the promisor before payment or demand.

(3) A written provision that any property controlled by or owned by the decedent before death that is the subject of the instrument shall pass to a person whom the decedent designates either in the instrument or in a separate writing, including a will, executed either before or at the same time as the instrument, or later.

(c) Nothing in this section limits the rights of creditors under any other law.

Comment. Section 5000 is revised to make explicit its application to a revocable TOD deed. See Section 5614 (revocable transfer on death deed). This is a specific instance of the general principle stated in the section.

Prob. Code §§ 5040-5048 (added). Nonprobate transfer to former spouse

SEC. _____. Chapter 3 (commencing with Section 5040) is added to Part 1 of Division 5 of the Probate Code, to read:

CHAPTER 3. NONPROBATE TRANSFER TO FORMER SPOUSE

§ 5040. Nonprobate transfer to former spouse

5040. (a) Except as provided in subdivision (b), a nonprobate transfer to the transferor's former spouse, in an instrument executed by the transferor before or during the marriage, fails if, at the time of the transferor's death, the former spouse is not the transferor's surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(b) Subdivision (a) does not cause a nonprobate transfer to fail in any of the following cases:

(1) The nonprobate transfer is not subject to revocation by the transferor at the time of the transferor's death.

(2) There is clear and convincing evidence that the transferor intended to preserve the nonprobate transfer to the former spouse.

(3) A court order that the nonprobate transfer be maintained on behalf of the former spouse is in effect at the time of the transferor's death.

(c) Where a nonprobate transfer fails by operation of this section, the instrument making the nonprobate transfer shall be treated as it would if the former spouse failed to survive the transferor.

(d) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on the apparent failure of a nonprobate transfer under this section or who lacks knowledge of the failure of a nonprobate transfer under this section.

(e) As used in this section, “nonprobate transfer” means a provision, other than a provision of a life insurance policy, of either of the following types:

(1) A provision of a type described in Section 5000.

(2) A provision in an instrument that operates on death, other than a will, conferring a power of appointment or naming a trustee.

Comment. Sections 5040 continues former Section 5600 without change.

§ 5042. Effect of dissolution of marriage on joint tenancy

5042. (a) Except as provided in subdivision (b), a joint tenancy between the decedent and the decedent’s former spouse, created before or during the marriage, is severed as to the decedent’s interest if, at the time of the decedent’s death, the former spouse is not the decedent’s surviving spouse as defined in Section 78, as a result of the dissolution or annulment of the marriage. A judgment of legal separation that does not terminate the status of husband and wife is not a dissolution for purposes of this section.

(b) Subdivision (a) does not sever a joint tenancy in either of the following cases:

(1) The joint tenancy is not subject to severance by the decedent at the time of the decedent’s death.

(2) There is clear and convincing evidence that the decedent intended to preserve the joint tenancy in favor of the former spouse.

(c) Nothing in this section affects the rights of a subsequent purchaser or encumbrancer for value in good faith who relies on an apparent severance under this section or who lacks knowledge of a severance under this section.

(d) For purposes of this section, property held in “joint tenancy” includes property held as community property with right of survivorship, as described in Section 682.1 of the Civil Code.

Comment. Sections 5042 continues former Section 5601 without change.

§ 5044. Rights of purchaser or encumbrancer

5044. (a) Nothing in this chapter affects the rights of a purchaser or encumbrancer of real property for value who in good faith relies on an affidavit or a declaration under penalty of perjury under the laws of this state that states all of the following:

(1) The name of the decedent.

(2) The date and place of the decedent’s death.

(3) A description of the real property transferred to the affiant or declarant by an instrument making a nonprobate transfer or by operation of joint tenancy survivorship.

(4) Either of the following, as appropriate:

(A) The affiant or declarant is the surviving spouse of the decedent.

(B) The affiant or declarant is not the surviving spouse of the decedent, but the rights of the affiant or declarant to the described property are not affected by Section 5040 or 5042.

(b) A person relying on an affidavit or declaration made pursuant to subdivision (a) has no duty to inquire into the truth of the matters stated in the affidavit or declaration.

(c) An affidavit or declaration made pursuant to subdivision (a) may be recorded.

Comment. Sections 5044 continues former Section 5602 without change.

§ 5046. Court order to preserve beneficiary designation

5046. Nothing in this chapter is intended to limit the court's authority to order a party to a dissolution or annulment of marriage to maintain the former spouse as a beneficiary on any nonprobate transfer described in this chapter, or to preserve a joint tenancy in favor of the former spouse.

Comment. Sections 5046 continues former Section 5603 without change.

§ 5048. Operative date

5048. (a) The operative date of this chapter (formerly Part 4, commencing with Section 5600) is January 1, 2002.

(b) Except as provided in subdivision (c), this chapter applies to an instrument making a nonprobate transfer or creating a joint tenancy whether executed before, on, or after the operative date of this chapter.

(c) Sections 5040 and 5042 do not apply, and the applicable law in effect before the operative date of this chapter applies, to an instrument making a nonprobate transfer or creating a joint tenancy in either of the following circumstances:

(1) The person making the nonprobate transfer or creating the joint tenancy dies before the operative date of this chapter.

(2) The dissolution of marriage or other event that terminates the status of the nonprobate transfer beneficiary or joint tenant as a surviving spouse occurs before the operative date of this chapter.

Comment. Sections 5048 continues former Section 5604 without change.

Prob. Code § 5302 (amended). Multiple party account

SEC. _____. Section 5302 of the Probate Code is amended to read:

5302. Subject to Section ~~5600~~ 5040:

(a) Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent unless there is clear and convincing evidence of a different intent. If there are two or more surviving parties, their respective ownerships during lifetime are in proportion to their previous ownership interests under Section 5301 augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before the decedent's death; and the right of survivorship continues between the surviving parties.

(b) If the account is a P.O.D. account:

(1) On death of one of two or more parties, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole party or of the survivor of two or more parties, (A) any sums remaining on deposit belong to the P.O.D. payee or payees if surviving, or to the survivor of them if one or more die before the party, (B) if two or more P.O.D. payees survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more P.O.D. payees survive, there is no right of survivorship in the event of death of a P.O.D. payee thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(c) If the account is a Totten trust account:

(1) On death of one of two or more trustees, the rights to any sums remaining on deposit are governed by subdivision (a).

(2) On death of the sole trustee or the survivor of two or more trustees, (A) any sums remaining on deposit belong to

the person or persons named as beneficiaries, if surviving, or to the survivor of them if one or more die before the trustee, unless there is clear and convincing evidence of a different intent, (B) if two or more beneficiaries survive, any sums remaining on deposit belong to them in equal and undivided shares unless the terms of the account or deposit agreement expressly provide for different shares, and (C) if two or more beneficiaries survive, there is no right of survivorship in event of death of any beneficiary thereafter unless the terms of the account or deposit agreement expressly provide for survivorship between them.

(d) In other cases, the death of any party to a multiple-party account has no effect on beneficial ownership of the account other than to transfer the rights of the decedent as part of the decedent's estate.

(e) A right of survivorship arising from the express terms of the account or under this section, a beneficiary designation in a Totten trust account, or a P.O.D. payee designation, cannot be changed by will.

Comment. Section 5302 is amended to reflect the renumbering of former Section 5600 as Section 5040.

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

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

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

Prob. Code § 13111 (amended). Affidavit procedure for collection or transfer of personal property

SEC. _____. Section 13111 of the Probate Code is amended to read:

13111. (a) Subject to the provisions of this section, if proceedings for the administration of the decedent's estate are commenced in this state, or if the decedent's personal representative has consented to the payment, transfer, or delivery of the decedent's property under this chapter and the personal representative later requests that the property be restored to the estate, each person to whom payment, delivery, or transfer of the decedent's property is made under this chapter is liable for:

(1) The restitution of the property to the estate if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after it was delivered or transferred to the person, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property and (B) interest on the fair market value of the property from the date of disposition at the rate payable on a money judgment. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property paid, delivered, or transferred to the person under this chapter, less any liens and encumbrances on the property at that time.

(b) Subject to subdivision (c) and subject to any additional liability the person has under Sections 13109 to 13112, inclusive, if the person fraudulently secured the payment, delivery, or transfer of the decedent's property under this chapter, the person is liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair

market value of the property” is the fair market value, determined as of the time the person liable under this subdivision presents the affidavit or declaration under this chapter, of the property paid, delivered, or transferred to the person under this chapter, less the amount of any liens and encumbrances on the property at that time.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13109 or 13110.

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. ~~In an action to enforce the liability under this section, the court’s judgment~~ Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(e) An action to enforce the liability under this section is forever barred three years after presentation of the affidavit or declaration under this chapter to the holder of the decedent’s property, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

(f) In the case of a nondomiciliary decedent, restitution under this section shall be made to the estate in an ancillary administration proceeding.

Comment. Section 13111 is amended for parallelism with Section 5676 (revocable TOD deed). It makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the successor of the decedent.

Prob. Code § 13206 (amended). Affidavit procedure for real property of small value

SEC. _____. Section 13206 of the Probate Code is amended to read:

13206. (a) Subject to subdivisions (b), (c), (d), and (e), if proceedings for the administration of the decedent's estate are commenced, or if the decedent's personal representative has consented to use of the procedure provided by this chapter and the personal representative later requests that the property be restored to the estate, each person who is designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 is liable for:

(1) The restitution to the decedent's estate of the property the person took under the certified copy of the affidavit if the person still has the property, together with (A) the net income the person received from the property and (B) if the person encumbered the property after the certified copy of the affidavit was issued, the amount necessary to satisfy the balance of the encumbrance as of the date the property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the property if the person no longer has the property, together with (A) the net income the person received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at the time the certified copy of the affidavit was issued.

(b) Subject to subdivision (d), if the person fraudulently executed or filed the affidavit under this chapter, the person is

liable under this section for restitution to the decedent's estate of three times the fair market value of the property. For the purposes of this subdivision, the "fair market value of the property" is the fair market value, determined as of the time the certified copy of the affidavit was issued, of the property the person took under the certified copy of the affidavit, less the amount of any liens and encumbrances on the property at that time.

(c) Subject to subdivision (d), if proceedings for the administration of the decedent's estate are commenced and a person designated as a successor of the decedent in a certified copy of an affidavit issued under Section 13202 made a significant improvement to the property taken by the person under the certified copy of the affidavit in the good faith belief that the person was the successor of the decedent to that property, the person is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the property, as improved, to the estate of the decedent upon the condition that the estate reimburse the person making restitution for (A) the amount by which the improvement increases the fair market value of the property restored, determined as of the time of restitution, and (B) the amount paid by the person for principal and interest on any liens or encumbrances that were on the property at the time the certified copy of the affidavit was issued.

(2) The restoration to the decedent's estate of the fair market value of the property, determined as of the time of the issuance of the certified copy of the affidavit under Section 13202, less the amount of any liens and encumbrances on the property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the issuance of the certified copy of the affidavit.

(d) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the person to satisfy a liability under Section 13204 or 13205.

(e) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. ~~In an action to enforce the liability under this section, the court's judgment~~ Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

(f) An action to enforce the liability under this section is forever barred three years after the certified copy of the affidavit is issued under Section 13202, or three years after the discovery of the fraud, whichever is later. The three-year period specified in this subdivision is not tolled for any reason.

Comment. Section 13206 is amended for parallelism with Section 5676 (revocable TOD deed). It makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the successor of the decedent.

Prob. Code § 13562 (amended). Passage of property to surviving spouse without administration

SEC. _____. Section 13562 of the Probate Code is amended to read:

13562. (a) Subject to subdivisions (b), (c), and (d), if proceedings for the administration of the decedent's estate are commenced, the surviving spouse is liable for:

(1) The restitution to the decedent's estate of the decedent's property if the surviving spouse still has the decedent's property, together with (A) the net income the surviving

spouse received from the decedent's property and (B) if the surviving spouse encumbered the decedent's property after the date of death, the amount necessary to satisfy the balance of the encumbrance as of the date the decedent's property is restored to the estate.

(2) The restitution to the decedent's estate of the fair market value of the decedent's property if the surviving spouse no longer has the decedent's property, together with (A) the net income the surviving spouse received from the decedent's property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the decedent's property. For the purposes of this paragraph, the "fair market value of the decedent's property" is the fair market value of the decedent's property, determined as of the time of the disposition of the decedent's property, less the amount of any liens and encumbrances on the decedent's property at the time of the decedent's death.

(b) Subject to subdivision (c), if proceedings for the administration of the decedent's estate are commenced and the surviving spouse made a significant improvement to the decedent's property in the good faith belief that the surviving spouse was the successor of the decedent to the decedent's property, the surviving spouse is liable for whichever of the following the decedent's estate elects:

(1) The restitution of the decedent's property, as improved, to the estate of the decedent upon the condition that the estate reimburse the surviving spouse for (A) the amount by which the improvement increases the fair market value of the decedent's property restored, valued as of the time of restitution, and (B) the amount paid by the surviving spouse for principal and interest on any liens or encumbrances that were on the decedent's property at the time of the decedent's death.

(2) The restoration to the decedent's estate of the fair market value of the decedent's property, valued as of the time of the decedent's death, excluding the amount of any liens and encumbrances on the decedent's property at that time, together with interest on the net amount at the rate payable on a money judgment running from the date of the decedent's death.

(c) The property and amount required to be restored to the estate under this section shall be reduced by any property or amount paid by the surviving spouse to satisfy a liability under Chapter 3 (commencing with Section 13550).

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the decedent. ~~In an action to enforce the liability under this section, the court's judgment~~ Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of the heirs, devisees, and creditors of the decedent.

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

Comment. Section 13562 is amended for parallelism with Section 5676 (revocable TOD deed). It makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the surviving spouse.
