

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION

Revocable Transfer on Death Deed: Follow-Up Study

November 2019

California Law Revision Commission
c/o UC Davis School of Law
Davis, CA 95616
www.clrc.ca.gov

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*.

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November 21, 2019

To: The Honorable Gavin Newsom
Governor of California, and
The Legislature of California

In 2015, legislation was enacted to authorize the use of a revocable transfer on death deed to transfer real property on death, without probate (Probate Code Sections 5600-5696). That statute will be repealed by its own terms on January 1, 2021, unless that date is extended or repealed.

The same legislation directed the Law Revision Commission to study the effect of the revocable transfer on death deed and make recommendations for the reform of the law based on its findings.

Earlier in this study, the Commission identified an urgent problem with the operation of the statute and recommended a narrow legislative fix. Implementing legislation was enacted in 2018 (Chapter 65 of the Statutes of 2018).

This recommendation proposes a number of further improvements to existing law.

The recommendation also recommends that the existing “sunset” provision (which would repeal the revocable transfer on death deed statute by operation of law on January 1, 2021) be revised to extend the repeal date to January 1, 2031. In addition, the Commission recommends that it be required to complete a second

follow-up study, with the same scope as the current study, to be completed by January 1, 2030.

This recommendation was prepared pursuant to Chapter 179 of the Statutes of 2016 and Section 21 of Chapter 293 of the Statutes of 2015.

Respectfully submitted,

Victor King
Chairperson

REVOCABLE TRANSFER ON DEATH DEED: FOLLOW-UP STUDY

In 2015, legislation was enacted to authorize the use of a revocable transfer on death deed (“RTODD”) to transfer real property on death, without probate.¹ By its terms, that statute will be repealed on January 1, 2021, unless that “sunset” date is extended or repealed before the sunset provision operates.

The legislation also directed the Law Revision Commission to study the RTODD statute and address all of the following matters:

- (1) Whether the revocable transfer on death deed is working effectively.
- (2) Whether the revocable transfer on death deed should be continued.
- (3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.
- (4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.
- (5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.
- (6) Whether it is feasible and appropriate to expand the revocable transfer on death deed to include the following:
 - (A) The transfer of stock cooperatives or other common interest developments.
 - (B) Transfers to a trust or other legal entity.²

This recommendation presents the Commission’s preliminary findings on those issues, along with proposed legislation to improve the effectiveness of the RTODD statute.³

1. Prob. Code §§ 5600-5690; 2015 Cal. Stat. ch. 293.

2. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

The Commission also recommends that the sunset date be extended to January 1, 2031, and that the Commission be required to conduct a second follow-up study by January 1, 2030.

OVERVIEW OF FINDINGS AND RECOMMENDATIONS

The legislation that directed the Commission to conduct this study posed a series of questions.⁴ Those questions, and the Commission's answers to them, are summarized briefly below and explained in greater detail in the later sections of this report.

Is the RTODD working effectively?

Early in this study, the Commission learned of a problem involving the execution of the RTODD. There was uncertainty about whether the law required recordation of the "Common Questions" part of the statutory form. The Commission recommended legislation to make clear that recordation of that document is not required.⁵ That legislation was enacted in 2018.⁶

The Commission later learned that some title insurers view Probate Code Section 5676 as creating a cloud on title. Under that section, an RTODD beneficiary might be required to return RTODD property to the deceased transferor's estate to pay the transferor's unsecured debts. Reportedly, some title insurers have decided that they will not issue policies during the three-year period in which such restitution may be required. To address that problem, the Commission recommends that Section 5676 be repealed and replaced with other mechanisms for enforcing a beneficiary's liability for a deceased transferor's debts. The

3. For a list of the most significant of the proposed reforms, see pages 3-4 *infra*.

4. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

5. See *Revocable Transfer on Death Deed: Recordation*, 45 Cal. L. Revision Comm'n Reports 1 (2018).

6. 2018 Cal. Stat. ch. 65.

proposed mechanisms would impose personal liability on a beneficiary, without affecting title to the transferred real property.

The Commission found no other problems with the operation of the RTODD statute.

Should the RTODD be continued?

The RTODD statute took effect on January 1, 2016.⁷ At the time that this study was concluded, the use of an RTODD had only been authorized for approximately four years. That is not a sufficient period of time to fully evaluate the practical effects of an instrument that operates on death. While there has been some experience with the *execution* of RTODDs, there has not been enough time for issues regarding their *operation* to have surfaced. The Commission found no California appellate decisions addressing the RTODD statute.

While the Commission did not find evidence of unresolved problems with the RTODD statute, it is possible that such problems exist but have not yet been discovered.

For that reason, the Commission recommends that the date for repeal of the statute be extended by another ten years, with the Commission directed to conduct a second-follow up study before the end of that period. A 10-year extension is likely to provide enough time for undiscovered problems to become known.

Is the RTODD subject to misuse or misunderstanding?

The Commission does not believe that an RTODD is any more prone to misuse or misunderstanding than any other instrument that can be used to transfer title to property. To the contrary, the RTODD is probably less prone to misunderstanding than other common property transfer instruments (e.g., a grant deed) because the statutory form is accompanied by an extensive “Common Questions” guidance document. In addition, the RTODD is limited by the mandatory statutory form to one simple application: the transfer of an owner’s entire interest in specified property, to

7. See 2015 Cal. Stat. ch. 293.

named beneficiaries, in equal shares. The form does not permit contingencies, alternative beneficiaries, or unequal beneficiary shares. This enforced simplicity should help to avoid ambiguities and mistakes that could arise if laypeople were able to draft more complicated instruments.

What changes should be made to the RTODD or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding?

The proposed law includes a number of recommended reforms to improve the effectiveness of the RTODD and avoid misuse and misunderstanding:

- Require that an RTODD be witnessed, under rules similar to those that govern wills.
- Require that an RTODD beneficiary give notice to the transferor's heirs when the transferor dies.
- Make clear that a beneficiary's personal liability for a deceased transferor's unsecured debts includes liability for the transferor's funeral expenses, expenses of last illness, and wage claims.
- Replace existing Section 5676, which authorizes the return of transferred property to a deceased transferor's estate for use in paying unsecured debts, with a provision that instead makes the beneficiary personally liable to the estate for a calculated share of those debts (based on the existing rules of abatement).
- Extend the time to record and thereby preserve the effect of third party interests in property transferred by an RTODD.
- Make clear that an error or ambiguity in an RTODD does not invalidate the RTODD, if a court can determine the transferor's intent by applying the general law on judicial construction of deeds.
- Expressly allow a court to apply *cy pres* principles to reform a charitable RTODD that would otherwise fail

because the named beneficiary disclaims the gift or does not exist at the time that the RTODD operates.

- Make clear that an enforceable restriction on the use of property transferred by RTODD does not impair the transfer of title; the beneficiary takes title subject to the restriction.
- Make clear that the beneficiary of a revoked RTODD has standing to contest the validity of the revocation, but only after the transferor's death.
- Add guidance to the "Common Questions" document to address the effect of an RTODD on a mobilehome.
- Make a variety of technical and minor substantive changes to improve the clarity and operation of the law.

Has the RTODD been used to perpetrate financial abuse on property owners and, if so, how should the law associated with the deed be changed to minimize this abuse?

While any financial instrument can be misused, the Commission did not find evidence that an RTODD is any more prone to financial abuse than any other kind of instrument that can be used to transfer title to real property.

Nonetheless, the Commission recommends three changes that would help to protect against financial abuse:

Witnessing. The Commission recommends requiring that an RTODD be witnessed, as part of the mandatory execution formalities. The proposed witnessing requirement would parallel the law that governs the execution of wills. Specifically:

- (1) The deed would need to be signed by two witnesses who were both present when the RTODD was signed or acknowledged by the transferor.⁸

8. See Prob. Code § 6110.

- (2) If a beneficiary of an RTODD also signs as a witness, the RTODD would be presumed to be the product of fraud or undue influence.⁹
- (3) The witness of an RTODD could provide evidence in an action to contest the validity of the RTODD.¹⁰

Notice to transferor's heirs. Borrowing a procedure from trust law, the Commission recommends that a beneficiary of an RTODD be required to give notice to the transferor's heirs when the transferor has died. In addition, before acquiring title to property transferred by RTODD, the beneficiary would need to record an affidavit affirming that the required notice had been given. The notice would alert those who have an interest in the decedent's estate that the RTODD exists and is operating. If there is reason to believe that the RTODD was the product of fraud or undue influence, those interested persons would have a timely opportunity to bring a contest.

Clarify standing of beneficiary to contest revocation of RTODD. If an RTODD is revoked under existing law, the beneficiary could be the only person interested in contesting the revocation, but might not have standing to do so. As a result, there might be no effective way to prove that the revocation was procured through fraud or undue influence. To eliminate this problem, the statute should be revised to make clear that the beneficiary of a revoked RTODD can contest the validity of the revocation.

Is it feasible and appropriate to expand the RTODD to include the transfer of stock cooperatives or other common interest developments?

The Commission recommends that stock cooperatives be excluded from the effect of an RTODD. Ownership of an interest in a stock cooperative is evidenced by a share of corporate stock, not a deed. For that reason, the RTODD would not be an

9. See Prob. Code § 6112.

10. See Evid. Code § 870.

appropriate instrument to convey ownership of an interest in a stock cooperative.

Other types of common interest developments (community apartment projects, condominium projects, planned developments) do not have the same problem. Ownership of interests in those developments are evidenced by and can be conveyed by deed.

The Commission recommends that those other types of common interest developments be subject to transfer by RTODD.

Is it feasible and appropriate to expand the RTODD to include transfers to a trust or other legal entity?

The Commission found good reasons to allow the use of an RTODD to transfer property to a trust. The only significant disadvantage is the possibility that the transferor will not name the trust with sufficient clarity and certainty, especially if the transferor is a layperson. The Commission recommends that the following changes be made to existing law:

- (1) The law should permit a transferor to name a trust as a beneficiary of an RTODD.
- (2) The statutory form and “Common Questions” document should be revised to provide guidance on how to identify a trust when naming a beneficiary.
- (3) The law should make clear that an error or ambiguity in naming a beneficiary does not invalidate an RTODD if the transferor’s intentions can be determined by a court.

The Commission also recommends that the law be revised to expressly permit the RTODD to name other legal entities as beneficiaries. This would facilitate charitable giving to public entities and nonprofits. To further facilitate charitable giving, the proposed law would make the following changes to existing law:

- (1) Authorize a court to apply the doctrine of *cy pres* if an RTODD that would transfer property for a charitable purpose fails because the gift was disclaimed or the beneficiary no longer exists.

- (2) Make technical adjustments to an existing provision that governs recordation of a deed that transfers property to a public entity.

EXPERIENCE IN OTHER STATES

The Commission reviewed the appellate case law in the nine states that had authorized the use of an RTODD¹¹ for at least 10 years.¹² Those states are listed below (with the dates of authorization noted in parentheses):

Missouri (1989)¹³
Kansas (1997)¹⁴
Ohio (2000)¹⁵
Arizona (2001)¹⁶
New Mexico (2001)¹⁷
Nevada (2003)¹⁸
Colorado (2004)¹⁹
Arkansas (2005)²⁰
Wisconsin (2005)²¹

The Commission reviewed every case that mentioned a “transfer on death deed” or “beneficiary deed,” or that included a citation to

11. Those states use their own terminology to describe a revocable transfer on death deed. This tentative recommendation uses “RTODD” as a convenient aggregate shorthand for referring to the similar instruments in the other states.

12. See generally CLRC Staff Memoranda 2016-36 and 2019-18.

13. Mo. Rev. Stat. § 461.025.

14. Kan. Stat. Ann. § 59-3501.

15. Ohio Rev. Code Ann. § 5302.22.

16. Ariz. Rev. Stat. § 33-405.

17. N.M. Stat. Ann. § 45-6-401.

18. Nev. Rev. Stat. § 111.109.

19. Colo. Rev. Stat. § 15-15-401.

20. Ark. Code Ann. § 18-12-608.

21. Wisc. Stat. § 705.15.

one of the statutes that authorize and govern such deeds. There were well over a hundred such cases.

The results of the Commission's research are summarized below, by subject matter.

Financial Abuse

The Commission found seventeen cases in which an RTODD was contested on grounds of fraud, undue influence, or transferor incapacity. The allegations were proven in only six of the cases.

The Commission did not find anything in those cases to suggest that an RTODD has any greater or special vulnerability to abuse, as compared to other instruments that can be used to transfer property on death.

The Commission did note one trend in the cases that it reviewed. Non-family caregivers were the perpetrators in half of the cases of confirmed financial abuse. This supports the notion that elderly people are particularly vulnerable to financial abuse by their caregivers.

Existing California law already provides protection against such abuse. In addition to criminal penalties,²² there is a statutory presumption that a gift to a non-family "care custodian" was the product of fraud or undue influence.²³ Unless the care custodian can rebut that presumption by clear and convincing evidence, the gift to the care custodian will fail. The California RTODD statute expressly provides that an RTODD can be contested under the existing statutory presumption of fraud or undue influence.²⁴

In summary, while there are a handful of cases in other states in which the RTODD was used to perpetrate financial abuse, the Commission did not find any evidence to suggest that the instrument has any special vulnerability to such abuse.

22. See Penal Code § 368(e).

23. Prob. Code § 21380(a)(3).

24. Prob. Code § 5690(a)(1).

Mistake

A number of the cases the Commission found involved a mistake by the transferor that affected the validity of an RTODD or its effect. The nature of those errors and the features of existing California law designed to minimize them are discussed below.

Complicated Instruments

Some of the mistakes that occurred in other states were the result of errors in the drafting of complicated instruments. For example, in one case the transferor tried to make the operation of the RTODD contingent on the beneficiary paying all property taxes during the transferor's life. Such a condition was not permissible under the authorizing statute.²⁵

Such errors should not be possible in California, because California's statute does not permit user-drafted instruments. An RTODD must be executed using a fixed statutory form.²⁶

Furthermore, California's RTODD form only provides for a single, simple type of transfer — the RTODD conveys a single owner's entire interest in described property on the owner's death, to be divided equally between named beneficiaries.

There is no option for execution by joint owners,²⁷ no option for any limitation on the interest conveyed (e.g., the reservation of a life estate),²⁸ no option for unequal beneficiary shares,²⁹ and no option for *per stirpes* distribution of a deceased beneficiary's share.

That enforced simplicity should prevent errors that could arise if laypeople were permitted to draft their own instruments.

25. Bolz v. Hatfield, 42 S.W.3d 566 (Missouri 2001).

26. Prob. Code § 5642.

27. Prob. Code § 5652.

28. *Id.*

29. Prob. Code § 5652(a)(3).

Misunderstanding

The case law also included errors that arose from simple misunderstanding of the process used to execute an RTODD or the legal effect of an RTODD. These cases involved execution errors, misdescribed property, and use of the wrong type of form.³⁰ Those kinds of errors can arise in any context and cannot be entirely avoided.

However, the California RTODD statute is designed to minimize the problem. As noted above, California law requires the use of a statutory form, which permits only a single, simple type of property transfer on death. Furthermore, the form itself provides instructions and there is an extensive “Common Questions” document that provides guidance on the legal effect of an RTODD and the procedure for executing or revoking one.³¹

Creditor Liability

Some of the cases from other states involved uncertainty about the liability of an RTODD beneficiary for the debts of the transferor.³²

That kind of problem should not arise in California. This state’s RTODD statute provides detailed and comprehensive rules on a beneficiary’s liability for the decedent’s debts.³³

Conclusion

The case law from other RTODD states confirms that an RTODD, like any other kind of instrument that transfers real property, can be used to perpetrate financial abuse. However, the Commission did not find any evidence to suggest that an RTODD is more susceptible to such abuse than any other instrument that transfers real property.

30. See generally, CLRC Staff Memoranda 2016-36, pp. 5-8.

31. Prob. Code § 5642(b).

32. See generally, CLRC Staff Memoranda 2016-36, pp. 8-9.

33. See Prob. Code §§ 5670-5676.

The case law also confirmed that those who execute RTODDs sometimes make mistakes. Again, the Commission did not find any evidence that an RTODD is any more likely to produce mistakes than any other kind of legal instrument. To the contrary, the California statute includes features that should significantly minimize the risk of error (i.e., the mandatory use of a statutory form with instructions; restriction to a single, simple type of transfer; and the inclusion of an extensive “Common Questions” guidance document).

In short, the Commission’s review of the appellate cases of other RTODD states did not reveal any problem with the use of RTODDs that is unique to the RTODD or that is more likely to arise when an RTODD is used.

PREVENTION OF FRAUD AND UNDUE INFLUENCE

The Commission recommends three reforms that should help to reduce the risk of fraud or undue influence when an RTODD is used.

Witnessing

Although an RTODD operates as a will substitute, existing law does not require that an RTODD be witnessed. Instead, an RTODD is authenticated in the same way as other deeds, by acknowledgment before a notary.³⁴

While acknowledgment before a notary is helpful, it is not as protective as witnessing. The role of the notary is merely to confirm the identity of the person who executes an RTODD.

Requiring that an RTODD be witnessed in the same way as a will would provide the following additional protections against fraud and undue influence:

- Two different witnesses would be required to be present when a transferor signs an RTODD.³⁵ These

34. Prob. Code § 5624.

35. See Prob. Code § 6110; proposed revision of Prob. Code § 5624 *infra*.

witnesses could object and refuse to sign if the transferor appears to lack capacity or be under undue pressure. This should help to uncover and deter abuse of the RTODD.

- If one of the witnesses is a beneficiary, the RTODD would be presumed to be the product of fraud or undue influence.³⁶
- The witnesses would be competent to provide opinion testimony in any subsequent contest of the RTODD.³⁷ This is important because a contest cannot be brought until after the transferor's death.³⁸ At that time, the transferor would not be available to testify as to his or her own intentions, capacity, or freedom from undue influence. The witnesses could testify on those matters, having observed the transferor's condition when the RTODD was signed.

The protections afforded by witnessing are not perfect. A bad actor could use accomplices as witnesses in order to avoid genuine scrutiny. Nonetheless, witnessing would provide significant additional protection against fraud and undue influence. The Commission therefore recommends that, going forward, the law require that an RTODD be witnessed, in addition to being notarized.

Notice to Heirs

Under the Trust Law, when a trust becomes irrevocable because of the death of the trustor, the trustee must, among other things, provide written notice to the trustor's heirs.³⁹ This alerts the heirs that the trust exists and will operate to dispose of the deceased trustor's property. If it appears that the trust is the product of fraud

36. See Prob. Code § 6112; proposed Prob. Code § 5625 *infra*.

37. See Evid. Code § 870.

38. Prob. Code § 5692(a).

39. Prob. Code § 16061.7(a)(1).

or undue influence, the heirs will have a timely opportunity to bring a contest.

The Commission recommends that the same general approach be applied to RTODDs. In order to take title to property transferred by RTODD, the beneficiary should be required to give notice to the deceased transferor's heirs.⁴⁰ In addition, the beneficiary should also be required to record an affidavit affirming that the required notice has been given.⁴¹ Until the affidavit is recorded, the law would not protect the interest of a bona fide purchaser or encumbrancer of the property⁴² and the time limit for filing a fully effective contest would not commence.⁴³ A beneficiary who fails to comply with the notice requirement, either intentionally or as a result of gross negligence, would be liable to heirs for any damages that result from the failure.⁴⁴

Those requirements would alert those who have an interest in the deceased transferor's estate that the RTODD exists and is about to operate. This would give those persons a meaningful and timely opportunity to assess the validity of the RTODD and, if necessary, bring an action to contest it. If a contest is promptly filed, the contestant could also record a *lis pendens* to protect against a quick transfer of the property to a bona fide purchaser.⁴⁵

Standing to Contest Revocation

Under the existing RTODD statute, it is not clear that the beneficiary of an RTODD has standing to contest a revocation of the RTODD.⁴⁶

40. See proposed Prob. Code § 5681(a)(1) *infra*.

41. See proposed Prob. Code § 5682(c) *infra*.

42. *Id.*

43. See proposed Prob. Code § 5694 *infra*.

44. See proposed Prob. Code § 5681(g) *infra*.

45. Sections 5690(c), 5694.

46. See generally First Supplement to CLRC Staff Memorandum 2019-17.

During the transferor's life, a beneficiary should not have standing to bring such a contest, because the beneficiary's interest in the RTODD is a mere expectancy. Appropriately, the existing statute provides that an RTODD can only be contested after the transferor's death.⁴⁷

On the transferor's death, however, the RTODD will operate and any revocation of that RTODD will take effect. If the revocation was invalid (perhaps because it was the product of fraud or undue influence, or the transferor lacked the requisite capacity), the beneficiary could allege an actual and concrete injury of sufficient magnitude to justify bringing a contest.⁴⁸ If the beneficiary does not have standing to contest the revocation, it is not clear who would. If such contests cannot be brought, there will be no accountability for misconduct that results in an improper revocation.

For those reasons, the Commission believes that a beneficiary should have standing to contest a revocation of an RTODD, after the death of the transferor. The proposed law would add language to expressly establish such standing.⁴⁹

It is not clear that a successful contest of a revocation should always result in revival of the revoked RTODD. Where an RTODD is revoked by execution of a new RTODD, the transferor's intentions may be better effected by a more nuanced

47. Prob. Code § 5692(a).

48. See 1A Cal. Jur. 3d *Actions* § 40 ("To have standing, a party must be beneficially interested in the controversy, and must have some special interest to be served or some particular right to be preserved or protected, and this interest must be concrete and actual, not conjectural or hypothetical. The issue of whether a party has standing focuses on the plaintiff, not the issues he or she seeks to have determined. As a general principle, standing to invoke the judicial process requires an actual justiciable controversy as to which the complainant has a real interest in the ultimate adjudication because he or she has either suffered or is about to suffer an injury of sufficient magnitude reasonably to assure that all of the relevant facts and issues will be adequately presented to the adjudicator.") (footnotes omitted).

49. See proposed Prob. Code § 5690(a)(3) *infra*.

result. For that reason, the proposed law would grant a court discretion to fashion an appropriate remedy, consistent with the best understanding of the transferor's intentions, when the revocation of an RTODD is successfully contested.⁵⁰

PROPERTY THAT CAN BE TRANSFERRED BY RTODD

In assigning this study, the Legislature specifically directed the Commission to consider

Whether it is feasible and appropriate to expand the revocable transfer on death deed to include the following:

(A) The transfer of stock cooperatives or other common interest developments.⁵¹

That question arises because the existing RTODD statute limits the kinds of real property that can be transferred by RTODD. It does so by providing a special limited definition of the term "real property."

"Real property" means any of the following:

(a) Real property improved with not less than one nor more than four residential dwelling units.

(b) A condominium unit, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.

(c) A single tract of agricultural real estate consisting of 40 acres or less that is improved with a single-family residence.⁵²

The limitations imposed by that definition and the Commission's recommended adjustments to them are discussed below.

50. *Id.*

51. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

52. Prob. Code § 5610.

Residential Property Limitation Generally

The general purpose of the definition of “real property” appears to be to preclude the use of an RTODD to transfer commercial property.

The Commission did not recommend that limitation. Nor did the Commission find any legislative history that explains the policy served by the limitation. The limitation may have been based on an assumption that the transfer of commercial real property would typically be more complicated, and therefore more likely to result in errors, than a transfer of residential real property.

The Commission does not recommend any change to the existing rule that an RTODD cannot be used to transfer commercial real property. Such a rule may be beneficial in reducing the complexity and risk of error involved in executing an RTODD. Furthermore, the Commission generally defers to clear legislative policy choices, especially when they are recent.

However, the Commission found two technical problems with the expression of the residential property limitation. Those problems are discussed below.

Commercial Condominiums

Existing law includes a condominium unit in the definition of real property, but does not expressly preclude the use of an RTODD to transfer a commercial or industrial condominium unit. This appears to have been a drafting oversight, rather than a policy choice. For that reason, the Commission recommends that existing law be revised to provide that an RTODD can only be used to transfer a residential condominium unit.⁵³

Timing

Under existing law, it is not clear when the limitation established by the special definition of real property is to be evaluated: When the RTODD is executed or when it operates on the transferor’s

53. See proposed Prob. Code § 5610(a)(2) *infra*.

death? The use of property can change over time, so the timing could make a difference.

As noted above, the residential property limitation was likely intended to reduce the risk of execution errors, on the assumption that a transfer of business property is typically more complicated than a transfer of residential property. If that is correct, then the residential property limitation should be evaluated at the time of execution of the RTODD. That is when any execution errors would occur and the simplification created by the residential property limitation would have a beneficial effect.

The Commission did not find any policy rationale for imposing the residential property limitation at the time of the transferor's death.

For those reasons, the Commission recommends that the law be revised to make clear that the residential property limitation should be evaluated as of the time of execution of the RTODD.⁵⁴

Common Interest Developments

A common interest development is a real property development where ownership of a separate interest (a lot, unit, or apartment) is coupled with a shared interest in common area property.⁵⁵ There are four kinds of common interest developments, each with different distinguishing features: a community apartment project, a condominium project, a planned development, and a stock cooperative.⁵⁶

The existing definition of "real property" includes only a condominium unit.⁵⁷ The Commission was directed to consider whether the other types of common interest development should also be included.

54. See proposed Prob. Code § 5610(c) *infra*.

55. See Civ. Code §§ 4095 ("common area"), 4100 ("common interest development"), 4185 ("separate interest").

56. See Civ. Code §§ 4105 (community apartment project), 4125 (condominium project), 4175 (planned development), 4190 (stock cooperative).

57. Prob. Code § 5610(b).

Stock Cooperatives

A stock cooperative is a kind of common interest development where the entirety of the development is owned by a corporation formed for that purpose.⁵⁸ The owners of separate interests hold shares in the corporation, which entitle them to the exclusive right to occupy a specified apartment. Owners do not hold title to any part of the development.⁵⁹

As a result, ownership of a separate interest in a stock cooperative is not evidenced or conveyed by deed. Instead, it is conveyed by the sale of a share of stock. For that reason, a deed would not be an appropriate instrument to use to transfer ownership of a separate interest in a stock cooperative. A deed conveys title to real property, not the ownership of a share of stock.

To avoid any confusion or legal problems that would result from the mismatch between the use of a deed and the form of ownership in a stock cooperative, the Commission recommends that stock cooperatives continue to be excluded from the definition of “real property” that is used in the RTODD statute.

That approach would deny owners in stock cooperatives the benefits of using an RTODD. However, it is possible that a share of ownership in a stock cooperative could be transferred on death, outside of probate, under the existing Uniform TOD Security Registration Act.⁶⁰ The Commission plans to conduct a separate study of that possibility, under its general authority to study the Probate Code.⁶¹

Community Apartment Projects and Planned Developments

The Commission did not find any good policy reason to exclude community apartment projects or planned developments from the definition of “real property.” They are similar to condominiums in

58. Civ. Code § 4190.

59. *Id.*

60. Prob. Code §§ 5500-5512.

61. 2018 Cal. Stat. res. ch. 158.

that all of those types of property are made up of separate interests (with appurtenant interests in common area) that can be transferred by deed. There do not appear to be any distinctions between those types of property that would present an obstacle to transfer by RTODD. The proposed legislation would revise the definition of “real property” to include community apartment projects and planned developments.⁶²

Irregular Language

The language used in the existing RTODD statute to refer to a condominium unit is not consistent with the language used in common interest development law. This irregularity could cause confusion. The proposed law would revise the law to use established terminology to refer to common interest developments.⁶³

Occupancy Restrictions

In some common interest developments, the owners of separate interests are not entirely free to choose who will occupy the property. For example, the governing documents of the development may require that the board approve new occupants or impose an enforceable age restriction.

The Commission considered whether that possibility should preclude the use of an RTODD to transfer title in such a common interest development. The Commission concluded that it should not, for three reasons:

- (1) The issue is not limited to common interest developments. Any subdivision can have enforceable covenants that restrict occupation (e.g., an age restriction).

62. See proposed Prob. Code § 5610(a)(2) *infra*.

63. See proposed Prob. Code § 5610(a)(2), (b)(1) *infra*.

- (2) The issue is not limited to property transferred by RTODD. It would also apply to property transferred by will, trust, or an inter vivos conveyance.
- (3) A use restriction that is of record at the time of the transferor's death would continue to be enforceable against the property after it is transferred by RTODD. Importantly, however, the use restriction would not be a bar to the operation of the RTODD. A beneficiary who receives use-restricted property would be subject to the restriction but would hold title (which could then be sold, leased, or encumbered). The proposed law would add language to expressly state that principle.⁶⁴

Agricultural Land

Existing law only permits the use of an RTODD to transfer agricultural land if that land consists of “a single tract of agricultural real estate consisting of 40 acres or less that is improved with a single-family residence”⁶⁵ The term “agricultural real estate” is not defined. Nor is there any other use of that term in the codes. This reliance on an undefined term could cause confusion.

Definition by Reference to Use Restrictions

The proposed law would define the term as “land that is limited to agricultural use by law or by any recorded agreement or title restriction.”⁶⁶ Importantly, that language would depend on use restrictions that are part of the public record. No off-record information would bear on whether a tract is “agricultural.”

64. See proposed Prob. Code § 5652(b) *infra*.

65. Prob. Code § 5610(c).

66. See proposed Prob. Code § 5610(b)(2) *infra*.

Number of Dwelling Units

The meaning of the reference to property that is “improved by a single-family residence” is not entirely clear. It could mean property that is improved with only one single-family residence. Or it could mean property that is improved with at least one single-family residence.

The latter interpretation seems more likely. Under existing Probate Code Section 5610(a), the definition of “real property” includes real property that is “improved with not less than one nor more than four residential dwelling units.”⁶⁷ The Legislature thus chose to allow use of the RTODD to transfer as many as four dwelling units on a single parcel of land. There is no clear reason why the same rule should not also apply to agricultural land.

The proposed law would revise existing law to provide that “real property” includes agricultural land that is improved with one to four dwelling units.⁶⁸

Coordination of Provisions

As currently drafted, Probate Code Section 5610(a) defines real property as “[r]eal property improved with not less than one nor more than four residential dwelling units.” That broadly stated rule could be read as swallowing the narrower rules in subdivisions (b) and (c).

The proposed legislation would revise the structure of Section 5610 to eliminate any conflict between its different provisions.⁶⁹

PERMISSIBLE BENEFICIARIES

The Commission was also specifically directed to consider

Whether it is feasible and appropriate to expand the revocable transfer on death deed to include the following:

...

67. Prob. Code § 5610(a).

68. See proposed Prob. Code § 5610(a)(1), (b)(2) *infra*.

69. See proposed Prob. Code § 5610 *infra*.

(B) Transfers to a trust or other legal entity.⁷⁰

That question arises because language used in the existing RTODD form, including the “Common Questions” guidance document, could be read as limiting beneficiaries to natural persons.

Existing Law

The RTODD statute’s definition of “beneficiary” simply refers to a “person.”⁷¹ The Probate Code’s general definition of “person” includes legal entities.⁷² Read together, those provisions would seem to affirm that a legal entity can be the beneficiary of an RTODD.

However, that reading was cast into doubt when the Legislature made the statutory form mandatory and added the “Common Questions” page to the form. The statutory form instructs that a beneficiary is to be named in the following manner:

Print the FULL NAME(S) of the person(s) who will receive the property on your death (DO NOT use general terms like “my children”) and state the RELATIONSHIP that each named person has to you (spouse, son, daughter, friend, etc.)...⁷³

That instruction is reaffirmed in the “Common Questions” page:

HOW DO I NAME BENEFICIARIES? You MUST name your beneficiaries individually, using each beneficiary’s FULL name. You MAY NOT use general terms to describe beneficiaries, such as “my children.” For each beneficiary that you name, you should briefly state

70. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

71. Prob. Code § 5608.

72. Prob. Code § 56.

73. Prob. Code § 5642(a).

that person's relationship to you (for example, my spouse, my son, my daughter, my friend, etc.).⁷⁴

The reference to the beneficiary's "full name" and the examples of the types of relationships that must be stated ("spouse, son, daughter, friend, etc.") suggest that the beneficiary must be a natural person. There was enough uncertainty on this point that the Legislature added the issue to the Commission's study.⁷⁵

Trust as Beneficiary

The Commission received input from estate planning attorneys who have encountered situations where it would be helpful to use an RTODD to transfer property to a trust. For example:

- A person may wish to transfer property to an irrevocable special needs trust on their death, while maintaining ownership and control of the property during life.⁷⁶
- Some lenders require that property be transferred out of an inter vivos revocable trust when the property is refinanced. If the owner forgets to convey the property back into the trust after the refinance is completed, there could be problems with the operation of the trust on death. The use of an RTODD to transfer property into the trust on death provides a backstop to avoid such problems. Even if the owner forgets to reconvey the property to the trust, the RTODD would effect the transfer on the owner's death.⁷⁷

74. Prob. Code § 5642(b).

75. 2016 Cal. Stat. ch. 179.

76. See Letter from Angela Petrusa (July 20, 2019) (attached to CLRC Staff Memorandum 2019-4, Exhibit p. 11).

77. See Email from Nina Whitehurst to Commissioners (Dec. 4, 2018) (attached to CLRC Staff Memorandum 2019-4, Exhibit p. 24); Email from Nina Whitehurst to Commissioners (Dec. 17, 2018) (attached to CLRC Staff Memorandum 2019-4, Exhibit p. 26).

The only apparent reason to prevent the use of an RTODD to transfer property to a trust is that it would complicate the execution of an RTODD in a way that could make mistakes more likely.

The most likely error would be imprecision in naming the trust. For example, the transferor might name the trust without any other identifying information. That could result in ambiguity where the trust has a very common name (e.g., “Jones Family Trust”). Or the transferor might name the trustee of the trust without making clear that the person is being named in that person’s capacity as trustee.

Those kinds of problems could be minimized by adding instructions to the RTODD form and “Common Questions” to require that the transferor state the name of the trustee, the name of the trust, and the date of execution of the trust. That should provide sufficient specificity to avoid any ambiguity about the identity of the trust that is being named as beneficiary.

The Commission recommends that the law be revised to expressly allow a trust to be named as the beneficiary of an RTODD and to add advisory language along the lines described above.⁷⁸

The Commission also recommends that the law expressly state that an error or ambiguity in describing property or naming the beneficiary does not invalidate the RTODD, if a court can determine the transferor’s intent.⁷⁹ The law should also expressly affirm that general law governing the judicial construction of deeds applies to an RTODD.⁸⁰ This would make clear that a court should attempt to save an erroneous or ambiguous RTODD if possible and may use extrinsic evidence to do so.⁸¹

Reliance on the courts to construe and effectuate a problematic RTODD would not be ideal. The beneficiary would incur the cost, delay, and inconvenience associated with civil litigation. Those are

78. See proposed revision of Prob. Code § 5642 *infra*.

79. See proposed Prob. Code § 5659 *infra*.

80. *Id.*

81. Miller & Starr, California Real Estate, *Deeds and Descriptions* § 8.26, at 66-67 (2015) (footnotes omitted).

burdens that the transferor had tried to avoid by using a nonprobate transfer. However, in most cases it would be better for the beneficiary to bear those burdens than to have the RTODD invalidated. If the RTODD fails, the property at issue would be governed by the transferor's will or the rules of intestate succession and could wind up being transferred to someone other than the intended beneficiary.

Charitable Gifts to Legal Entities

The Commission recommends that the RTODD statute be revised to permit and facilitate the use of an RTODD to transfer real property to a public entity or private nonprofit entity. Some people will wish to make a charitable donation of their home to such entities. This seems especially likely for those who have no surviving family or close friends.

The only apparent reasons against allowing such use of an RTODD are technical. Those technical issues and the Commission's recommended solutions to them are discussed below.

Gift to Government

Under existing Government Code Section 27281, “[d]eeds or grants conveying any interest in or easement upon real estate to a political corporation or governmental agency for public purposes shall not be accepted for recordation without the consent of the grantee....” The consent of the grantee must be evidenced by the grantee's “certificate or resolution of acceptance attached to or printed on the deed or grant.”⁸²

In general, that rule makes sense as a way of ensuring that government entities are not saddled with undesirable properties, without their knowledge or consent.

However, that rule is not needed when recording an RTODD, because recordation alone does not effect a transfer of title.⁸³ The

82. Gov't Code § 27281.

83. See Prob. Code § 5650(c).

RTODD does not operate until the transferor's death. Even then, the public entity named as beneficiary can disclaim the gift if it is not wanted.⁸⁴

The proposed legislation would make existing Section 27281 inapplicable to an RTODD.⁸⁵ This would allow an RTODD that names a government entity as beneficiary to be recorded without the prior assent of that entity. To preserve the beneficial effect of Section 27281, the proposed law would add language providing that an RTODD that names a government entity as beneficiary does not operate unless and until that entity records a certificate or resolution of acceptance.⁸⁶

Cy Pres

There are certain risks associated with naming a nonprofit entity as beneficiary of an RTODD. The entity's articles, bylaws, or other governing policy might preclude acceptance of the gift; the entity might choose to disclaim the gift; or the entity might not exist when the RTODD operates (because it dissolved or was merged into another entity prior to the transferor's death). In those situations, the gift will fail.

If such a problem were to arise under a will or trust, a court could apply the equitable doctrine of *cy pres* in an attempt to effect the transferor's intentions to the greatest extent possible.⁸⁷

The Commission recommends that the same remedy be available if a charitable gift made by RTODD fails.⁸⁸

84. Prob. Code § 5652(a)(1).

85. See proposed revision of Gov't Code § 27281 *infra*.

86. *Id.*

87. See Prob. Code § 11603(c). See also 13 B. Witkin, Summary of California Law *Trusts* § 339, at 916 (11th ed. 2017) ("Where the settlor with a general charitable intent gives property in trust for a specific purpose, and for some reason that purpose cannot be carried out, a court of equity will, under the rule of *cy pres*, direct the disposition of the property to some related charitable purpose, in order to carry out the settlor's intention as nearly as possible.").

88. See proposed Prob. Code § 5658 *infra*.

EXECUTION

While the execution of an RTODD should be relatively straightforward, there will always be some risk of error. A failure to properly execute an RTODD could be an obstacle to obtaining title insurance if the property is later sold or encumbered by the beneficiary. In the best case, this would require legal action to confirm the beneficiary's ownership. In the worst case, a court might hold that the error was so severe as to invalidate the RTODD.

In addition to requiring witnessing, the Commission recommends three minor changes to the RTODD statute to reduce the risk of execution error.

- The law should make clear that there are no requirements as to the manner in which an RTODD is dated, or by whom.⁸⁹
- Sometimes a beneficiary with a disability is unable to sign an estate planning document and needs to have another person sign instead. Under existing law, that practice is generally permitted.⁹⁰ However, if the person who signs a document on behalf of another has a beneficial interest in the document, there is a possibility that the document will be deemed invalid.⁹¹ In the RTODD context, the risk of invalidation could be reduced by adding cautionary language to the "Common Questions" guidance document. The new language would encourage a transferor to consult an attorney if there is a need to have another person sign for the transferor."⁹²
- The existing requirement that a transferor state the relationship between the transferor and each

89. See proposed revision of Prob. Code § 5624 *infra*.

90. See Estate of Stephens, 28 Cal. 4th 665 (2002).

91. *Id.*

92. See proposed revision of Prob. Code § 5642 *infra*.

beneficiary who is a natural person would be made permissive.⁹³ It would still be encouraged, to provide greater certainty, but would not be required. This would eliminate a purely technical requirement that might be overlooked.

REVOCATION

Under existing law, there are two ways in which a transferor can revoke an RTODD: (1) execute and record a new RTODD,⁹⁴ and (2) execute and record a statutory form revocation.

The timing rules for recordation of those two types of revoking instruments are not consistent. A new RTODD must be recorded within 60 days of execution, which can include recordation after the transferor's death.⁹⁵ However, the law also provides that "[a]n instrument revoking a revocable transfer on death deed shall be executed and recorded before the transferor's death...."⁹⁶ It is not clear which rule would apply if a transferor records a new RTODD that would revoke an earlier one.

The Commission sees no good policy reason for different timing rules for the execution and revocation of an RTODD. It recommends that the inconsistency be resolved by deleting the requirement that a revoking instrument be recorded before the transferor's death.⁹⁷ This would be consistent with the Legislature's policy when it enacted the RTODD statute.⁹⁸

93. See proposed revision of Prob. Code § 5644 *infra*.

94. Prob. Code § 5628(a).

95. Prob. Code § 5626(a).

96. Prob. Code § 5632(a).

97. See proposed revision of Prob. Code § 5632 *infra*.

98. The Commission's original recommendation was that the law require all instruments to be recorded before a transferor's death. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 149, 163 (2006). The Legislature chose instead to allow the recordation of an RTODD after the transferor's death.

EFFECT OF RTODD ON UNRECORDED
INTERESTS

Under existing law, an RTODD transfers property “subject to any limitation on the transferor’s interest that is of record at the transferor’s death....”⁹⁹

Conversely, property transferred by RTODD is not subject to limitations on the transferor’s interest that are unrecorded at the time of the transferor’s death. For example, property transferred by RTODD would not be subject to a mechanics lien claim or lease if those interests were not recorded when the transferor died.

That rule could have unfortunate results, because it effectively cuts off the enforceability of unrecorded interests on the transferor’s death. However, the rule was thought to be necessary in order to ensure that an RTODD transfers marketable title. The rule guarantees that every enforceable claim against transferred property will be evidenced in the title records at the time of the transferor’s death. If unrecorded interests could be enforced against property transferred by RTODD, an RTODD beneficiary would have difficulty obtaining title insurance. Legal action to establish title might be required before the beneficiary could sell or encumber the property.

Colorado strikes a slightly different balance in addressing that issue. It provides that property transferred by an RTODD is subject to any limitation that is recorded at the time of the transferor’s death or in the four months after the transferor’s death.¹⁰⁰ Under that approach, a person who has an unrecorded interest in property transferred by RTODD has four months in which to record it, thereby preserving the ability to enforce the interest against the property.

The disadvantage of the Colorado approach is that it creates a four-month period of uncertainty. At any point during that period, an interest in the property could be recorded, establishing a new

99. Prob. Code § 5652(b).

100. Colo. Rev. Stat. § 15-15-407(2)-(3).

limitation on the beneficiary's title. Until that four-month period has ended, title insurers will not be able to rely on title records as evidence of the scope of any claims against the property. This would likely make it difficult to obtain title insurance, impairing the marketability of the property during the four-month period after the transferor's death.

That should not be a significant problem in California, because California's RTODD statute already creates a roughly four-month period of impaired marketability after the transferor's death.

That is because the existing statute provides a 120-day period during which a *lis pendens* can be filed as evidence of a pending contest. If the *lis pendens* is recorded within 120 days after the transferor's death and the contest is eventually successful, the court may void the transfer, without any protection for a bona fide purchaser or encumbrancer.¹⁰¹ This means that there is a 120-day period during which a beneficiary's title to property transferred by RTODD is vulnerable to complete invalidation. It is only after that 120-day period has run, without the recording of a *lis pendens*, that a purchaser or encumbrancer can be confident that the beneficiary has good title.

Because California RTODD beneficiaries are already subject to a 120-day period of impaired marketability, enactment of the Colorado rule in California would not create a significant new burden. This means that there is no clear justification for cutting off the enforceability of unrecorded interests on the transferor's death. The Colorado approach would give those who hold unrecorded interests 120 days to record them, thereby preserving their effect. The Commission recommends that the law be revised to adopt that approach.¹⁰²

MOBILEHOMES

The Commission sees potential for misunderstanding and mistake with regard to the effect of an RTODD on a mobilehome.

101. Prob. Code § 5694.

102. See proposed revision of Prob. Code § 5652(b) *infra*.

The effect of an RTODD on a mobilehome depends on whether the mobilehome is personal property or a fixture.

As a general matter, personal property is not appurtenant to real property, even if it is physically attached to the real property. An item of personal property “may be conveyed, encumbered, or leased separate from the real property.”¹⁰³

However, if the item attached to real property is a “fixture,” then it is treated as an appurtenance of the real property. “On a conveyance of the real property, the fixtures are transferred to the grantee even though not expressly mentioned in the contract or deed.”¹⁰⁴

Thus, a mobilehome that is personal property will not be transferred by an RTODD that conveys the real property on which the mobilehome is located. A mobilehome that is a fixture will be transferred along with the real property to which it is affixed.

There is existing statutory law that determines whether a mobilehome is personal property or a fixture.¹⁰⁵ To be considered a fixture under that law, the mobilehome must be attached to a specified type of foundation and certain procedural steps must be followed (including recordation of a specified declaration by the regulating governmental entity).

The Commission concluded that existing law regarding the effect of a transfer of real property on a mobilehome is sufficiently certain. However, that law is somewhat obscure and technical; a person executing an RTODD without advice of counsel could be unclear on the governing law and its effect.

To help mitigate that problem, the proposed law would add guidance on the matter in the “Common Questions” part of the statutory form.¹⁰⁶

103. Miller & Starr, California Real Estate, *Transferable Property Interests; Fixtures* § 9:41, at 170-71 (4th ed. 2015) (citations omitted).

104. *Id.* at 170.

105. Health & Safety Code § 18551.

106. See proposed revision of Prob. Code § 5642(b) (“Will an RTODD affect my mobilehome?”) *infra*.

CREDITORS

The existing RTODD statute provides that a beneficiary is personally liable for the unsecured debts of the transferor, up to the value of the property received at the time of the transferor's death.¹⁰⁷

In addition to that personal liability, there is a period of three years after the transferor's death during which the transferor's personal representative can require that the beneficiary return the property to the transferor's estate for use in paying creditors.¹⁰⁸

Those liability rules were modeled after long-standing law that establishes a beneficiary's liability for a decedent's debt when taking property under certain statutory procedures that permit the disposition of a decedent's estate outside of probate.¹⁰⁹

The Commission recommends several improvements to the rules that govern a beneficiary's liability for a transferor's obligations. Those improvements are described below.

Types of Obligations

Under existing law, a beneficiary is liable for a transferor's "unsecured debts."¹¹⁰ However, it is not entirely clear whether that liability extends to the transferor's funeral expenses, expenses of last illness, and wage claims. Under existing law, those specific types of obligations are treated differently than the transferor's "general debts."¹¹¹

The Commission found no good policy reason to exclude the listed obligations from the beneficiary's liability for the deceased

107. Prob. Code §§ 5672, 5674. This rule is subject to some minor adjustments. See discussion of "Scope of Personal Liability" *infra*.

108. Prob. Code § 5676.

109. See Prob. Code §§ 13109-13111 (disposition of personal property of small value without administration), 13204-13206 (disposition of real property of small value without administration), and 13561-13562 (passage of property to surviving spouse without administration).

110. See Prob. Code § 5672.

111. See, e.g., Prob. Code § 11420.

transferor's debts. The Commission recommends revising the statute to make clear that a beneficiary's liability includes funeral expenses, expenses of last illness, and wage claims.

However, the Commission does not recommend that a beneficiary be made liable for a share of the general costs of estate administration. One of the main purposes of using an RTODD is to spare the beneficiary the cost of probate.

Maximum Liability

Under existing law, an RTODD beneficiary is personally liable for the transferor's unsecured debts up to the full value of the property received. In many cases, that liability will be greater than it would have been if the property had instead passed to the beneficiary through probate.

In probate, not all gifts are treated equally with respect to their liability for payment of the decedent's debts.¹¹² Unless the decedent's will specifies otherwise, a "general gift"¹¹³ will be liable for debts (will "abate") before a "specific gift."¹¹⁴ Within those categories, a gift to a non-relative will abate before a gift to a relative.¹¹⁵ Finally, gifts that are in the same abatement class will abate pro rata.¹¹⁶

A transfer of a specified interest in real property is a specific gift. Thus, in probate, all general gifts would be used to pay creditor claims before a specific gift of real property would be reached. If the general gifts were sufficient to pay all creditor claims, the real property would have no liability at all.

By contrast, if a person takes property by RTODD, that person is personally liable up to the full value of the property, without regard

112. Prob. Code § 21402 (order of abatement).

113. Prob. Code § 21117(b) ("A general gift is a transfer from the general assets of the transferor that does not give specific property.").

114. Prob. Code § 21117(a) ("A specific gift is a transfer of specifically identifiable property.").

115. Prob. Code § 21402.

116. Prob. Code § 21403(a).

for whether there are assets in the probate estate that would abate earlier.

The proposed law includes three reforms that would help an RTODD beneficiary to avoid disproportionate personal liability for the transferor's unsecured debts. They are described below.

Personal Liability to Estate

The proposed law would provide a new rule for the liability of a beneficiary for a transferor's unsecured debts.¹¹⁷ The new rule would only apply if the transferor's estate is being administered in probate.

Under the proposed rule, the RTODD beneficiary would be personally liable to the estate for a share of liability for the transferor's unsecured debts. The beneficiary's share of liability would be determined by applying the normal rules of abatement, as if the property transferred by RTODD had instead been a specific gift in the transferor's will.¹¹⁸

If the beneficiary had already paid any of the transferor's unsecured debts, the amount paid would be credited against the beneficiary's liability under the new rule.¹¹⁹

Payment of the amount owed to the estate under the new rule would fully satisfy the beneficiary's obligations for payment of the transferor's unsecured debts; the beneficiary would have no further personal liability to the transferor's creditors.¹²⁰

The cost of implementing the new rule would be paid by the beneficiary.¹²¹

117. See proposed Prob. Code § 5677 *infra*.

118. See proposed Prob. Code § 5677(b) *infra*.

119. See proposed Prob. Code § 5677(d) *infra*.

120. See proposed revision of Prob. Code § 5674 *infra*.

121. See proposed Prob. Code § 5677(e) *infra*.

Voluntary Return of Property to the Estate

The proposed law would also create a simpler option for a beneficiary who wants to avoid disproportionate personal liability. The beneficiary could voluntarily return the RTODD property to the estate for administration.¹²² Such property would be treated as if it were a specific devise to the beneficiary in the transferor's will. General abatement rules would then be applied to the decedent's entire estate, including the RTODD property. Any funds that remain as part of the RTODD beneficiary's gift would be distributed to the beneficiary under the usual probate process.

Although this option could subject the RTODD property to a share of the costs of administration and would delay receipt of the gift, it still might be preferable to a beneficiary who lacks sufficient funds to pay a share of the decedent's debts out of pocket and does not wish to go to the trouble to sell the property in order to pay that share.

Scope of Personal Liability

As discussed above, existing law provides that an RTODD beneficiary is personally liable for the transferor's unsecured debts up to the value of the property received at the time of the transferor's death (less any liens or encumbrances on the property at that time).¹²³ However, that liability can be increased in two ways:

- (1) If the beneficiary derives income from the property, the liability includes the amount of the income.¹²⁴
- (2) If the property was sold by the beneficiary, the liability also includes interest on the proceeds of sale.¹²⁵

122. See proposed Prob. Code § 5678 *infra*.

123. Prob. Code § 5674(b)(1).

124. Prob. Code § 5674(b)(2).

125. Prob. Code § 5674(b)(3).

The Commission recommends that those increases be eliminated.¹²⁶ The beneficiary's liability should be limited to the value of the property at the time of the transferor's death, because that would be the maximum extent of the beneficiary's liability had the property been received through probate or by trust. There is no clear policy reason why a beneficiary's liability should be increased due to events that occur after disposition of the property.

Elimination of Property Return Provision

Under existing Probate Code Section 5676, a beneficiary is liable to the estate for restitution of the property transferred by RTODD, if that property is required for payment of a share of the decedent's debts. If any proceeds remain from the sale of the property after the payment of that share, they are returned to the beneficiary.¹²⁷ This "property return" liability can be enforced for up to three years after the transferor's death.

There are two problems with the operation of the property return provision:

- (1) *Cloud on title.* The possibility that a beneficiary will be required to return RTODD property to the transferor's estate, for a period of up to three years, could create a cloud on title. The Commission has heard anecdotal reports that some California title insurers will not issue policies during this three-year period.
- (2) *Undue disruption.* The existing property return provision does not expressly provide an option that would allow a beneficiary to pay the beneficiary's share of liability to the estate, in lieu of returning the real property to the estate for liquidation. If Section 5676 is read strictly, it could divest the beneficiary of ownership of real property that the beneficiary would rather retain, even in a situation where the beneficiary

126. See proposed revision of Prob. Code § 5674 *infra*.

127. Prob. Code § 5676(f).

has sufficient funds available to pay the beneficiary's share of the estate's liability. That approach is unnecessarily inflexible and burdensome.

For those reasons, the Commission recommends that Section 5676 be repealed.

That reform should not cause any problems for creditors or the decedent's estate, because the law would still provide ample alternative means for an RTODD beneficiary to pay an appropriate share of decedent's unsecured debts. As discussed above, the beneficiary is personally liable to creditors for those debts, up to the value of the property received.¹²⁸ In addition, the proposed law would add an alternative rule that would apply if a probate is open: The beneficiary would be personally liable to the estate for the beneficiary's share of the transferor's unsecured debts.¹²⁹ In addition, an RTODD beneficiary would have the option of voluntarily returning the property to the estate for use in paying creditor claims.¹³⁰

SUNSET DATE

The legislation that directed the Commission to conduct this study asked the Commission to consider a threshold question: "Whether the revocable transfer on death deed should be continued."¹³¹

The advantages of the RTODD statute seem self-evident. When properly executed, an RTODD allows a property owner to transfer real property on death outside of probate, without the need to pay for a trust. If a transferor understands the effect of the RTODD and the procedure for executing one, the process is very simple and inexpensive. On the transferor's death, the process of transferring

128. Prob. Code § 5672.

129. See "Personal Liability to Estate" *supra*. See also proposed Prob. Code § 5677 *infra*.

130. See proposed Prob. Code § 5678 *infra*.

131. 2016 Cal. Stat. ch. 179; 2015 Cal. Stat. ch. 293, § 21.

title to the beneficiary is also quick, inexpensive, and straightforward. There is generally no need for the involvement of attorneys or the courts. In addition, the Commission has learned that some attorneys use the RTODD as a component of a professionally prepared estate plan.

The main disadvantages of the RTODD are the risk of fraud, undue influence, or mistake. Those risks also exist in other estate planning contexts, but they warrant particular attention in this context because (1) an RTODD is intended to be a straightforward instrument that a layperson can execute without the advice of counsel, and (2) an RTODD is intended to operate without the involvement of the courts. Existing law already includes many protections designed to prevent such harm and the proposed law would add new protections. As yet, there does not appear to be any evidence that fraud, undue influence, and mistake are more common in the RTODD context than in other estate planning contexts.

Ultimately, the question of whether the RTODD statute should continue in effect depends on whether the disadvantages of the RTODD significantly outweigh its benefits.

The Commission has not found evidence of problems serious enough to justify repealing the RTODD statute at this time. All of the problems that were identified in this study would likely be mitigated or avoided through enactment of the proposed law.

However, as discussed earlier, the time provided for study of the effects of the RTODD statute has probably been too short for all potential problems to have surfaced. In particular, any problems with the operation of an RTODD on a transferor's death and any subsequent contest litigation are unlikely to have manifested in just four years.

For those reasons, the Commission recommends that the sunset date for the RTODD be extended by another ten years (from 2021 to 2031).¹³² In addition, the Law Revision Commission's charge to

132. See proposed revision of Prob. Code § 5600 *infra*.

evaluate the RTODD statute should also be extended, with a second follow-up report due in 2030.¹³³

The proposed extension of the sunset date is likely to provide enough time to uncover problems with the RTODD that have not yet manifested (because most RTODDs have not yet operated). It would also provide time to evaluate the effect of the reforms proposed in this recommendation. Once that information is available, the Commission should be able to make a well-grounded recommendation on whether the statute should continue in effect permanently.

133. See proposed Prob. Code § 5605 *infra*.

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PROPOSED LEGISLATION

Prob. Code § 5600 (amended). Application of part

SEC. _____. Section 5600 of the Probate Code is amended to read:

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

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

(c) This part shall remain in effect only until January 1, ~~2021~~ 2031, and as of that date is repealed, unless a later enacted statute, that is enacted before January 1, ~~2021~~, 2031, deletes or extends that date. The repeal of this part pursuant to this subdivision shall not affect the validity or effect of a revocable transfer on death deed that is executed before January 1, ~~2021~~, 2031, and shall not affect the authority of the transferor to revoke a transfer on death deed by recording a signed and notarized instrument that is substantially in the form specified in Section 5644.

(d) The revisions made by the act that added this subdivision do not apply to a revocable transfer on death deed or revocation form that was signed before January 1, 2021.

Comment. Subdivision (c) of Section 5600 is amended to extend the date for repeal of this part from January 1, 2021 to January 1, 2031. See also Section 5605 (California Law Revision Commission study).

Prob. Code § 5605 (added). Reporting requirement

SEC. _____. Section 5605 is added to the Probate Code to read:

5605. (a) The California Law Revision Commission shall study the effect of California's revocable transfer on death deed and make recommendations for improvement of this part. The commission shall report all of its findings and recommendations to the Legislature on or before January 1, 2030.

(b) In the study required by subdivision (a), the commission shall address all of the following:

(1) Whether the revocable transfer on death deed is working effectively.

(2) Whether the revocable transfer on death deed should be continued.

(3) Whether the revocable transfer on death deed is subject to misuse or misunderstanding.

(4) What changes should be made to the revocable transfer on death deed or the law associated with the deed to improve its effectiveness and to avoid misuse or misunderstanding.

(5) Whether the revocable transfer on death deed has been used to perpetuate financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.

(6) Whether there should be any change to the types of property that can be transferred by revocable transfer on death deed.

(7) Whether there should be any change to the types of persons or entities that can be named as the beneficiary of a revocable transfer on death deed.

(c) The report required by subdivision (a) shall comply with Section 9795 of the Government Code.

Comment. Section 5605 is drawn from Section 21 of Chapter 293 of the Statutes of 2015, as amended by Chapter 179 of the Statutes of 2016, except that the deadline for the new report is January 1, 2030. See also Section 5600(c) (part to be repealed by operation of law on January 1, 2031).

Prob. Code § 5608 (amended). “Beneficiary” defined

SEC. ____ . Section 5608 of the Probate Code is amended to read:

5608. “Beneficiary” means a person named in a revocable transfer on death deed as transferee of the property. A natural person, trust, or legal entity may be named as a beneficiary.

Comment. Section 5608 is amended to provide that beneficiaries are not limited to natural persons and may include a trust or legal entity such as a nonprofit corporation or public entity.

Prob. Code § 5610 (repealed). “Real property” defined

SEC. ____ . Section 5610 of the Probate Code is repealed.

~~5610. “Real property” means any of the following:~~

~~(a) Real property improved with not less than one nor more than four residential dwelling units.~~

~~(b) A condominium unit, including the limited common elements allocated to the exclusive use thereof that form an integral part of the condominium unit.~~

~~(c) A single tract of agricultural real estate consisting of 40 acres or less that is improved with a single family residence.~~

Comment. Section 5610 is repealed and has been replaced with a new Section 5610.

Prob. Code § 5610 (added). “Real property” defined

SEC. ____. Section 5610 is added to the Probate Code, to read:

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

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

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

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

(1) A separate interest in a stock cooperative.

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

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

Comment. Section 5610 replaces former Section 5610. The new provision was added to make the meaning of the law clearer, eliminate inconsistencies, and make the following substantive changes:

(1) Expand the definition of “real property” to include two more types of common interest development (planned development and community apartment project), not just a condominium. See Civ. Code §§ 4100 (“common interest development”), 4185 (“separate interest”).

(2) Make clear that the definition only includes a residential interest in a common interest development.

(3) Expressly exclude stock cooperatives from the definition of “real property.” See Civ. Code § 4190 (“stock cooperative”).

(4) Eliminate the duplicative and ambiguous requirement that agricultural land must be improved with a “single family residence” to be included in the definition of “real property.”

(5) Define the term “agricultural land,” in terms that depend on information that can be obtained from public records. Laws that designate property for agricultural use might include a zoning ordinance or general plan. Other recorded documents that designate land for agricultural use might include a deed restriction, contract, or trust.

(6) Specify the time when the definition is applied. Under subdivision (c), a parcel of land that falls within the definition at the time that a revocable transfer on death deed is executed would be considered real property for the purposes of that deed, even if it no longer falls within the scope of the definition when the transferor dies.

Prob. Code § 5615 (added). “Subscribing witness” defined

SEC. _____. Section 5615 is added to the Probate Code, to read:

5615. “Subscribing witness” means a person who signs a revocable transfer on death deed as a witness, as provided in Section 5624.

Comment. Section 5615 is new. It is added for drafting convenience.

Prob. Code § 5618 (added). “Unsecured debts” defined

SEC. _____. Section 5618 is added to the Probate Code, to read:

5618. “Unsecured debts” includes, but is not limited to, a transferor’s funeral expenses, expenses of a transferor’s last illness, and wage claims.

Comment. Section 5618 is new. It is added to make clear that a beneficiary’s liability for a deceased transferor’s “unsecured debts” includes liability for funeral expenses, expenses of last illness, and wage claims. See also Sections 5672 (beneficiary liability to creditors), 5677 (beneficiary liability to estate).

Prob. Code § 5624 (amended). Execution

SEC. _____. Section 5624 of the Probate Code is amended to read:

5624. (a) A revocable transfer on death deed is not effective unless the transferor signs and dates the deed and acknowledges

the deed is signed by the transferor, acknowledged before a notary public, public, dated, and signed by two persons who were present at the same time and who witnessed either the signing of the deed or the transferor's acknowledgment of the deed and who understand that the instrument they sign is the testator's deed.

Comment. Section 5624 is amended to require that a revocable transfer on death deed be signed by two witnesses. The witnessing requirement is drawn from Section 6110(c)(1).

See also Evid. Code § 870 (testimony of subscribing witness).

Prob. Code § 5625 (added). Interested witnesses

SEC. ____ . Section 5625 is added to the Probate Code, to read:

5625. (a) Any person generally competent to be a witness may act as a witness to a revocable transfer on death deed.

(b) A revocable transfer on death deed is not invalid because it is signed by an interested witness.

(c) If a beneficiary of a revocable transfer on death deed is also a subscribing witness, there is a presumption that the witness procured the revocable transfer on death deed by duress, menace, fraud, or undue influence. This presumption is a presumption affecting the burden of proof. This presumption does not apply where the witness is named as beneficiary solely in a fiduciary capacity.

Comment. Section 5625 is drawn from Section 6112(a)-(c).

Prob. Code § 5632 (amended). Revocation

SEC. ____ . Section 5632 of the Probate Code is amended to read:

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. Section 5632 is amended to delete language requiring that an instrument revoking a revocable transfer on death deed be recorded before the transferor's death.

Prob. Code § 5642 (amended). Statutory form deed

SEC. _____. Section 5642 of the Probate Code is amended to read:
5642. A revocable transfer on death deed shall be substantially
in the following form.

(a) The first page of the form shall be substantially the
following:

**~~SIMPLE~~ REVOCABLE TRANSFER ON DEATH (TOD)
DEED**

(California Probate Code Section 5642)

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

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

This document is exempt from documentary transfer tax under
Rev. & Tax. Code § 11930. This document is exempt from
preliminary change of ownership report under Rev. & Tax. Code
§ 480.3.

**IMPORTANT NOTICE: THIS DEED MUST BE
RECORDED ON OR BEFORE 60 DAYS AFTER THE DATE
IT IS SIGNED ~~AND NOTARIZED~~**

Use this deed to transfer the residential property described below
directly to your named beneficiaries when you die. YOU
SHOULD CAREFULLY READ ALL OF THE INFORMATION
ON THE OTHER PAGES OF THIS FORM. You may wish to
consult an attorney before using this deed. It may have results that
you do not want. Provide only the information asked for in the
form. DO NOT INSERT ANY OTHER INFORMATION OR
INSTRUCTIONS. This form MUST be RECORDED on or before
60 days after the date it is signed ~~and notarized~~ or it will not be
effective.

PROPERTY DESCRIPTION

Print the legal description of the residential property affected by this deed:

BENEFICIARY(IES)

~~Print the FULL NAME(S) of the person(s) who will receive the property on your death (DO NOT use general terms like “my children”) and state the RELATIONSHIP that each named person has to you (spouse, son, daughter, friend, etc.):~~

Name the person(s) or entity(ies) who will receive the described property on your death.

IF YOU ARE NAMING A PERSON, state the person’s FULL NAME (DO NOT use general terms like “my children”). You may also wish to state the RELATIONSHIP that the person has to you (spouse, son, daughter, friend, etc.), but this is not required.

IF YOU ARE NAMING A TRUST, state the full name of the trust, the name of the trustee(s), and the date shown on the signature page of the trust.

IF YOU ARE NAMING A PRIVATE OR PUBLIC ENTITY, state the name of the entity as precisely as you can.

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.

Sign and print your name below (your name should exactly match the name shown on your title documents):

_____ Date _____

NOTE: This deed only transfers MY ownership share of the property. The deed does NOT transfer the share of any co-owner of the property. Any co-owner who wants to name a TOD beneficiary must execute and RECORD a SEPARATE deed.

WITNESSES

To be valid, this deed must be signed by two persons, both present at the same time, who witness your signing of the deed or your acknowledgment that it is your deed.

Witness #1

Witness #2

Print and sign your name:

Print and sign your name:

ACKNOWLEDGMENT OF NOTARY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.
WITNESS my hand and official seal.

Signature _____ (Seal)

(b) Subsequent pages of a form executed under this section shall be in substantially the following form:

COMMON QUESTIONS ABOUT THE USE OF THIS FORM

WHAT DOES THE TOD DEED DO? When you die, the identified property will transfer to your named beneficiary without probate. The TOD deed has no effect until you die. You can revoke it at any time.

CAN I USE THIS DEED TO TRANSFER BUSINESS PROPERTY? ~~This deed can only be used to transfer (1) a parcel of property that contains one to four residential dwelling units, (2) a condominium unit, or (3) a parcel of agricultural land of 40 acres or less, which contains a single-family residence.~~ **NONRESIDENTIAL Property?** No. This deed can only be used to transfer residential property. Also, the deed cannot be used to transfer a unit in a stock cooperative or a parcel of agricultural land that is over 40 acres in size.

CAN I USE THIS DEED TO TRANSFER A MOBILEHOME? The deed can only be used to transfer a mobilehome if it is a “fixture” or improvement under Section 18551 of the Health and Safety Code. If you are unsure whether your mobilehome is a fixture, you may wish to consult an attorney. An error on this point could cause the transfer of your mobilehome to fail.

HOW DO I USE THE TOD DEED? Complete this form. Have it notarized. Have it signed by two persons who are both present at the same time and who witness you signing or acknowledging the form. RECORD the form in the county where the property is located. The form MUST be recorded on or before 60 days after the date you sign it or the deed has no effect.

CAN A PERSON WHO SIGNS THE DEED AS A WITNESS ALSO BE A BENEFICIARY? Yes, but this can cause serious legal problems, including the possible invalidation of the deed. You should avoid using a beneficiary as a witness.

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

IS THE “LEGAL DESCRIPTION” OF THE PROPERTY NECESSARY? Yes.

HOW DO I FIND THE “LEGAL DESCRIPTION” OF THE PROPERTY? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the county recorder for the county where the property is located. If you are not absolutely sure, consult an attorney.

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 transfers 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, have witnessed and

notarized, and RECORD a revocation form. (2) Create, have witnessed and notarized, and RECORD a new TOD deed. (3) Sell or give away the property, or transfer it to a trust, before your death and RECORD the deed. A TOD deed can only affect property that you own when you die. A TOD deed cannot be revoked by will.

CAN I REVOKE A TOD DEED BY CREATING A NEW DOCUMENT THAT DISPOSES OF THE PROPERTY (FOR EXAMPLE, BY CREATING A NEW TOD DEED OR BY ASSIGNING THE PROPERTY TO A TRUST)? Yes, but only if the new document is RECORDED. To avoid any doubt, you may wish to RECORD a TOD deed revocation form before creating the new instrument. A TOD deed cannot be revoked by will, or by purporting to leave the subject property to anyone via will.

IF I SELL OR GIVE AWAY THE PROPERTY DESCRIBED IN A TOD DEED, WHAT HAPPENS WHEN I DIE? If the deed or other document used to transfer your property is RECORDED before your death, the TOD deed will have no effect. If the transfer document is not RECORDED before your death, the TOD deed will take effect.

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 do all of the following: (1) RECORD evidence of your death (Prob. Code § ~~210~~), and file 210. (2) File a change in ownership notice (Rev. & Tax. Code § 480). (3) Provide notice to your heirs that includes a copy of this deed and your

death certificate (Prob. Code § 5681). Determining who is an “heir” can be complicated. Your beneficiary should consider seeking professional advice to make that determination. (4) RECORD an affidavit affirming that notice was sent to your heirs (Prob. Code § 5682(c)). (5) If you received Medi-Cal benefits, your beneficiary must notify the State Department of Health Care Services of your death and provide a copy of your death certificate (Prob. Code § 215). Your beneficiary may wish to consult a professional for assistance with these requirements.

WHAT IF I NAME MORE THAN ONE BENEFICIARY? Your beneficiaries will become co-owners in equal shares as tenants in common. If you want a different result, you should not use this form.

HOW DO I NAME BENEFICIARIES? ~~You~~ (1) If the beneficiary is a person, you MUST name your beneficiaries individually, using each beneficiary’s state the person’s FULL name. You MAY NOT use general terms to describe beneficiaries, such as “my children.” For each beneficiary that you name, you should You may also briefly state that person’s relationship to you (for example, my spouse, my son, my daughter, my friend, etc.). etc.), but this is not required. (2) If the beneficiary is a trust, you MUST name the trust, name the trustee(s), and state the date shown on the trust’s signature page. (3) If the beneficiary is a public or private entity, name the entity as precisely as you can.

WHAT IF A BENEFICIARY DIES BEFORE I DO? If all beneficiaries die before you, the TOD deed has no effect. If a beneficiary dies before you, but other beneficiaries survive you, the share of the deceased beneficiary will be divided equally between the surviving beneficiaries. If that is not the result you want, you should not use the TOD deed.

WHAT IS THE EFFECT OF A TOD DEED ON PROPERTY THAT I OWN AS JOINT TENANCY OR COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP? If you are the first joint tenant or spouse to die, the deed is VOID and has no

effect. The property transfers to your joint tenant or surviving spouse and not according to this deed. If you are the last joint tenant or spouse to die, the deed takes effect and controls the ownership of your property when you die. If you do not want these results, do not use this form. The deed does NOT transfer the share of a co-owner of the property. Any co-owner who wants to name a TOD beneficiary must complete and RECORD a SEPARATE deed.

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.

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 MEDICAL EXPENDITURES? Your home may be liable for reimbursement. If you have questions, you should consult an attorney.~~

Comment. Section 5642 is amended to conform to other changes made to this part and to make related improvements.

Prob. Code § 5644 (amended). Revocation form

SEC. ____. Section 5644 of the Probate Code is amended to read:
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 TO BE EFFECTIVE**

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 legal description of the property affected by this revocation:

REVOCAATION

I revoke any TOD deed to transfer the described property that I executed before executing this form.

SIGNATURE AND DATE

Sign and print your name below (your name should exactly match the name shown on your title documents):

_____ Date _____

WITNESSES

To be valid, this form must be signed by two persons, both present at the same time, who witness your signing of the form or your acknowledgment that it is your form.

Witness #1

Witness #2

Print and sign your name:

Print and sign your name:

ACKNOWLEDGMENT OF NOTARY

A notary public or other officer completing this certificate verifies only the identity of the individual who signed the document to which this certificate is attached, and not the truthfulness, accuracy, or validity of that document.

State of California)
County of _____)

On _____ before me, (here insert name and title of the officer), personally appeared _____, who proved to me on the basis of satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or the entity upon behalf of which the person(s) acted, executed the instrument.

I certify under PENALTY OF PERJURY under the laws of the State of California that the foregoing paragraph is true and correct.

WITNESS my hand and official seal.

Signature _____ (Seal)

Comment. Section 5644 is amended to conform to other changes made to this part and to make related improvements.

Prob. Code § 5652 (amended). Effect of deed

SEC. _____. Section 5652 of the Probate Code is amended to read:

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

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

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

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

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

(b) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor's interest that is of

record at the transferor's ~~death~~, death or that is recorded no later than 120 days after the affidavit required by subdivision (c) of Section 5682 is recorded, 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. An enforceable restriction on the use of the transferred property does not affect the transfer of title to the property by a revocable transfer on death deed.

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

Comment. Section 5652 is amended to achieve the following results:

(1) To provide that property transferred by revocable transfer on death deed is burdened by any limitation on the transferor's ownership that is recorded within 120 days of recordation of the affidavit required by Section 5682(c).

(2) To make clear that a use restriction does not affect the transfer of title by a revocable transfer on death deed. A beneficiary who receives use-restricted property takes title subject to the restriction, but remains free to convey or encumber the property.

Prob. Code § 5658 (added). *Cy pres*

SEC. ____ . Section 5658 is added to the Probate Code, to read:

5658. A court in which the transferor's estate is being administered may, on the petition of the personal representative or interested person, or on its own motion, apply the doctrine of *cy pres* to reform a revocable transfer on death deed that was made by the transferor for a charitable purpose, in either of the following circumstances:

(a) The beneficiary does not accept the gift.

(b) The beneficiary is a legal entity that dissolved or was merged into another entity before the transferor's death.

Comment. Section 5658 is new.

Prob. Code § 5659 (added). Error or ambiguity

SEC. ____ . Section 5659 is added to the Probate Code, to read:

5659. An error or ambiguity in describing property or designating a beneficiary does not invalidate a revocable transfer on death deed if the transferor’s intention can be determined by a court. The general law that governs judicial construction or reformation of an error or ambiguity in a deed applies to a revocable transfer on death deed.

Comment. Section 5659 is new. It makes clear that ambiguity or error in a revocable transfer on death deed does not invalidate the deed if the transferor’s intention can be determined through judicial construction. See, e.g., Miller & Starr, California Real Estate, *Deeds and Descriptions* § 8.26 at 66-67 (2015) (footnotes omitted) (“An unintentional error in the name of the grantee does not prevent a transfer of the property to the intended party. ... The deed must describe the grantee with sufficient clarity and certainty that he or she can be identified, and extrinsic evidence is admissible to prove the identity of the parties mentioned in the deed, except when the identity is inherently uncertain and indeterminate by the terms of the document.”); *Id.* § 861 at 171-73 (emphasis in original) (footnotes omitted) (“A deed will be sustained if it is possible from the whole description to ascertain and identify the land conveyed with reasonable certainty. No particular form of description is required.... A conveyance is void when the description in the deed is omitted or is so vague as not to be capable of being made certain.... However, mere *ambiguity* or uncertainty will not defeat the effectiveness of the conveyance if it can be cured by extrinsic evidence.”).

Prob. Code § 5674 (amended). Scope of personal liability

SEC. ____ . Section 5674 of the Probate Code is amended to read:

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~~, 5677 or 5678.

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

~~(1) The~~

~~(b) The personal liability of a beneficiary under Section 5672 shall not exceed 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 amended to reflect the repeal of Section 5676 and the addition of Sections 5677 and 5678, and to remove net income and interest from the calculation of a beneficiary's total personal liability for a transferor's unsecured debts.

Prob. Code § 5676 (repealed). Restitution liability

SEC. ____ . Section 5676 of the Probate Code is repealed.

Comment. Section 5676 is repealed. This repeal does not affect a beneficiary's right to voluntarily return property to the transferor's estate under Section 5678.

Prob. Code § 5677 (added). Personal liability to estate

SEC. ____ . Section 5677 is added to the Probate Code, to read:

5677. (a) If proceedings for the administration of the transferor's estate are commenced, a beneficiary of a revocable transfer on death deed is personally liable to the estate for a share of the transferor's unsecured debts.

(b) In calculating the beneficiary's share of liability under subdivision (a), the abatement rules provided in Part 4 (commencing with Section 21400) of Division 11 shall be applied, using all of the following assumptions:

(1) The property that was transferred to the beneficiary by revocable transfer on death deed shall be treated as if it were a specific gift made by the decedent's will.

(2) The value of the property received by the beneficiary pursuant to the revocable transfer on death deed shall be deemed to be the fair market value of the property at the time of the

transferor's death, less the amount of any liens and encumbrances on the property at that time.

(3) Any unsecured debts of the transferor that were paid by the beneficiary pursuant to Section 5672 shall be treated as if they were claims made against the transferor's estate.

(c) The personal representative shall provide a written statement of liability to the beneficiary, which specifies the amount that must be paid to the estate.

(d) The beneficiary is personally liable to the estate for the amount specified in the statement of liability. Any amount that the beneficiary paid toward the unsecured debts of the transferor pursuant to Section 5672 shall be credited against the amount that the beneficiary owes the estate under this subdivision. If the amount that the beneficiary paid pursuant to Section 5672 exceeds the amount specified in the written statement of liability, the estate shall reimburse the difference to the beneficiary. For the purposes of Section 11420, this reimbursement shall be deemed an expense of administration.

(e) In the event that the beneficiary and the personal representative cannot agree on the reimbursement or liability due under this section, the beneficiary or personal representative may petition the court for an order determining the amount of the reimbursement or liability.

(f) The reasonable cost of proceeding under this section shall be reimbursed as an extraordinary service under Sections 10801 and 10811. The beneficiary is liable for the payment of that cost, which shall be separately identified in the statement of liability.

Comment. Section 5677 is new. It provides a process for the determination and satisfaction of a beneficiary's share of liability for the unsecured debts of the transferor. A beneficiary who pays the indicated amount to the estate has no personal liability under Section 5672. See Section 5674(a).

Prob. Code § 5678 (added). Voluntary return of property to estate

SEC. ____ . Section 5678 is added to the Probate Code, to read:

5678. (a) If proceedings for the administration of the transferor's estate are commenced, a beneficiary who receives property from

the transferor under a revocable transfer on death deed may voluntarily return that property to the transferor's estate for administration.

(b) Property returned to the transferor's estate under this section shall be treated as if it had been specifically devised to the beneficiary by the transferor.

(c) If the beneficiary's action or inaction increased the value of property returned to the estate or decreased the estate's obligations, the estate shall reimburse the beneficiary by the same amount. Actions or inaction that increase the value of returned property or decrease the estate's obligations include, but are not necessarily limited to, the following actions:

(1) A payment toward an unsecured debt of the decedent.

(2) A payment toward a debt secured against the returned property.

(3) A significant improvement of the returned property that increased the fair market value of the property.

(d) If the beneficiary's action or inaction decreased the value of property returned to the estate or increased the estate's obligations, the beneficiary is personally liable to the estate for that amount. Actions or inaction that decrease the value of the returned property or increase the estate's obligations include, but are not necessarily limited to, the following actions or inaction:

(1) An action or inaction that resulted in a lien or encumbrance being recorded against the property.

(2) The receipt of income from the property, if that income would have accrued to the estate had the property not been transferred to the beneficiary.

(e) The personal representative shall provide the beneficiary a written statement of any reimbursement or liability under this section, along with a statement of the reasons for the reimbursement or liability. For the purposes of Section 11420, any reimbursement under this section shall be deemed an expense of administration.

(f) In the event that the beneficiary and the personal representative cannot agree on the reimbursement or liability due

under this section, the beneficiary or personal representative may petition the court for an order determining the amount of the reimbursement or liability. In making a decision under this subdivision, the court should consider the surrounding circumstances, including whether the parties acted in good faith and whether a particular result would impose an unfair burden on the beneficiary or the estate.

Comment. Section 5678 is new. It provides the beneficiary of a revocable transfer on death deed the option of voluntarily returning property received under the deed to the transferor's estate for administration. A beneficiary who returns property to the estate under this section has no personal liability under Section 5672. See Section 5674(a).

Prob. Code § 5681 (added). Notice

SEC. ____ . Section 5681 is added to the Probate Code, to read:

5681. (a) After the death of the transferor, the beneficiary of a revocable transfer on death deed shall serve notice on the transferor's heirs, along with a copy of the revocable transfer on death deed and a copy of the transferor's death certificate.

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

“NOTICE OF REVOCABLE TRANSFER ON DEATH DEED

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

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

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

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

If you believe that the revocable transfer on death deed is invalid and you wish to stop it from taking effect, you have only 120 days

from the date of this notice to file a fully effective challenge. You should act promptly and may wish to consult an attorney.”

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

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

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

(2) Unknown to the beneficiary.

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

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

(g)(1) A beneficiary is liable to an heir of the transferor for any damage caused by a failure to comply with this section that is intentional or grossly negligent.

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

Comment. Section 5681 is new. It requires that a beneficiary of a revocable transfer on death deed serve notice on heirs after the transferor has died. The notice requirement is similar to Section 16061.7(b)(2). Subdivisions (c)-(e) are drawn from Section 16061.7(c)-(e).

Prob. Code § 5682 (amended). Protection of third parties

SEC. ____ . Section 5682 of the Probate Code is amended to read:

5682. If ~~both~~ all of the following conditions are satisfied, a person dealing with a beneficiary of a revocable transfer on death deed of real property shall have 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:

(a) The person acted in good faith and for a valuable consideration.

(b) An affidavit of death was recorded for the property under Chapter 2 (commencing with Section 210) of Part 4 of Division 2.

(c)(1) An affidavit was recorded for the property, which contains a statement in substantially the following form: "I, [name of beneficiary], served the notice required by Probate Code Section 5681."

(2) If a revocable transfer on death deed names more than one beneficiary, only one beneficiary is required to comply with this subdivision.

Comment. Section 5682 is amended to condition the protections afforded by the section on recordation of an affidavit affirming compliance with the notice requirement in Section 5681.

Prob. Code § 5690 (amended). Contest

SEC. ____. Section 5690 of the Probate Code is amended to read:

5690. (a)(1) An action for the disqualification of a beneficiary under Part 3.7 (commencing with Section 21360) of Division 11 may be brought to contest the validity of a transfer of property by a revocable transfer on death deed.

(2) An action to contest the validity of a transfer of property by a revocable transfer on death deed may be filed by the transferor's personal representative or an interested person under Part 19 (commencing with Section 850) of Division 2.

(3) An action to contest the validity of a revocation of a revocable transfer on death deed may be filed by the transferor's personal representative or a beneficiary of the revoked deed under Part 19 (commencing with Section 850) of Division 2. If the contest is successful, the court shall determine the appropriate remedy, which may include revival of the revoked deed. In deciding the remedy, the court shall attempt to effectuate the intentions of the transferor.

(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.

(d) In a contest proceeding, each subscribing witness of the revocable transfer on death deed shall be produced and examined. If no subscribing witness is available as a witness within the meaning of Section 240 of the Evidence Code, the court may admit the evidence of other witnesses to prove the due execution of the deed.

Comment. Paragraph (3) is added to Section 5690(a) to make clear that the beneficiary of a revoked deed has standing to contest the purported revocation. Note, however, that such a contest cannot be filed until after the transferor's death. Section 5692(a). If the contest is successful, the court has discretion to fashion a remedy that would best effectuate the transferor's intentions.

Subdivision (d) is drawn from Section 8253. See also Section 5624 (execution of deed).

Prob. Code § 5694 (amended). Available relief

SEC. ____ . Section 5694 of the Probate Code is amended to read:

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 no later than 120 days after the ~~transferor's death~~ affidavit required by subdivision (c) of Section 5682 was recorded, 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 120 days after the ~~transferor's death~~, affidavit required by subdivision (c) of Section 5682 was recorded, 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. Section 5694 is amended to change the date on which the specified 120-day period commences.
