

Memorandum 98-17

Uniform TOD Security Registration Act: Reactivation of Study

Attached is a staff draft of a Tentative Recommendation proposing enactment of the Uniform TOD Security Registration Act, and a letter of October 14, 1997, from the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar supporting the uniform act in principle.

BACKGROUND

In November 1989, the Commission approved a Tentative Recommendation proposing enactment of the Uniform TOD Security Registration Act, then quite new. Comments were overwhelmingly favorable, with 24 letters in support, five neutral, and two opposed. But the Executive Committee of the State Bar Probate Section strongly opposed it. The Executive Committee wanted to wait until the uniform act was more widely adopted and there was experience under it in other states. The Commission decided to defer the matter until some major commercial states enact the uniform act.

Since 1989, the uniform act has been adopted in 37 states, including Pennsylvania, New Jersey, Ohio, Illinois, and Texas, but not Massachusetts or New York. Thirty-six states are shown as having enacted legislation "substantially similar" to the uniform act. Missouri is the exception, having enacted a general nonprobate transfers law covering all forms of property, rather than separate provisions for bank accounts, securities, and other forms of property. See Mo. Ann. Stat. §§ 461.001-461.300 (Vernon 1992). Substantive deviations from the uniform act in the State of Washington are set out in an Exhibit to this memorandum. The uniform act has been targeted by the National Conference of Commissioners on Uniform State Laws for special efforts to obtain its enactment in as many states as possible.

In September 1997, the Commission decided to renew study of this topic if the State Bar is interested. In view of the attached letter from the State Bar Probate Section expressing its interest in the uniform act, and its support of it in principle, it appears timely to circulate this TR for comment.

The uniform act allows an owner of securities to register title in transfer-on-death (TOD) form and to designate a death beneficiary in the instrument. TOD registration gives an owner of securities who wants to make a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. It is consistent with existing California law, which authorizes provisions for nonprobate transfer on death in a variety of written instruments, including a certificated or uncertificated security. Prob. Code § 5000.

The uniform act is an issuer protection measure. It authorizes, but does not require, issuers to offer the TOD title form, but it is “sufficiently protective to attract their attention.” The primary purpose of the uniform act is “to induce a dominant segment of the world of financial intermediation to lead investors away from joint and survivor title forms.” Wellman, *Transfer-on Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 835, 838 (1987). The act was developed with the cooperation of the mutual fund and stock transfer industries.

LEGISLATIVE INTEREST

We recently had inquiries on this project from Senator Ross Johnson, Assembly Members Ted Lempert and Debra Bowen, and the Office of Policy of the Assembly Republican Caucus. This interest resulted from inquiries from constituents, suggesting there is considerable public interest in obtaining enactment of the uniform act.

A bill to enact the uniform act has been introduced this session as AB 1683 by Assembly Member Steven Kuykendall. Mr. Lempert’s office and the State Bar Probate Section believe the Commission should pursue this study, notwithstanding Mr. Kuykendall’s bill. If the bill is enacted, the law can be revised later, if necessary, to deal with the concerns addressed in this memorandum.

OPPOSITION TO UNIFORM ACT

Attorney Matthew Rae expressed opposition to the uniform act in a memorandum of September 10, 1997. He said it is do-it-yourself estate planning with pitfalls for the unwary or unsophisticated layman, and that sales personnel are unlikely to explain to the customer the legal effect of TOD registration. He said the “State Bar Section would be doing an enormous disservice to the consumer if it were to support this proposal.”

He gives an example of a problem he says exists with Totten trust accounts, where a depositor creates a series of accounts with each of his or her children as POD payee under one account. Eventually the depositor ages and needs the funds for medical care. Each account is liquidated one by one as needed by the depositor or his or her conservator, defeating the planned equal division among children.

This assumes, of course, that the registration was in such form that the creator, or Conservator, is able to deal with it without the consent of the beneficiary or that such consent can be secured. The enormous complexity of Section 6-310 requires legal advice before deciding on an appropriate form of registration, something the . . . salesman is highly unlikely to mention.

The staff does not believe this is a serious problem. UPC Section 6-310 (Section 5510 in the attached draft) may be complex, providing for representation per stirpes and giving examples of various forms of possible TOD registration. But the effect of registration in beneficiary form is governed by UPC Section 6-306 (Section 5506 in the attached draft). The latter section is quite clear:

The designation of a TOD beneficiary on a registration in beneficiary form has no effect on ownership until the owner's death. A registration of a security in beneficiary form may be canceled or changed at any time by the sole owner or all then surviving owners without the consent of the beneficiary.

In his memorandum, Mr. Rae expressed the same concerns with the California Multiple-Party Accounts Law, which has been well-received by financial institutions and depositors.

In a memorandum of October 9, 1997, the Trust and Administration Committee of the State Bar Probate Section said the uniform act should be enacted in California

in light of the large number of other adopting states and the fairness of placing securities on the same footing as other investment assets which Californians can purchase. We did not perceive this as earth shaking legislation. We see this as a modest step in the direction of consistency without any greater attendant harm than is already upon us as a result of the myriad ways in which people hold title and designate beneficiaries in order to achieve non-probate transfers.

Concerns of State Bar Probate Section

The Executive Committee of the State Bar Probate Section is concerned about community property rights, creditor protection, and family protection, and suggested we consider issues raised in New York. New York did not adopt the uniform act because the New York State Bar Association would not support it without the issues discussed below being addressed.

Ability to Dispose of Community Property By Will Preserved

Proposed Section 5502 in the TR lists permissible forms of multiple ownership of securities in beneficiary form to include “community property held in survivorship form.” Several commentators on the 1989 TR questioned the meaning of this language. Does it mean the share of the first-to-die spouse is not subject to testamentary disposition by that spouse? According to Professor Richard Wellman who was intimately involved with drafting the Uniform Act, the reference to “community property held in survivorship form” is to take account of the fact that a few states recognize this title form. For this reason, Professor Wellman thought the reference to “community property held in survivorship form” should be kept in the California version of the Uniform Act.

Community property with right of survivorship is recognized in Nevada and Arizona. See Nevada Rev. Stat. Ann. ch. 111.064 (Michie 1993); Ariz. Rev. Stat. Ann. § 33-431 (Supp. 1997). In Texas, spouses may agree in writing that their community property passes to the survivor by right of survivorship. Tex. Prob. Code § 451-462 (Vernon Supp. 1998). The 1997 Conference of Delegates of the California State Bar approved a resolution sponsored by the Beverly Hills Bar Association to adopt community property with a right of survivorship in California. The Beverly Hills Bar is looking for an appropriate vehicle for introduction of legislation while it circulates its proposal for comment. The proposal has drawn some opposition from banks and title companies.

The general rule in California is that joint tenancy and community property may not exist at the same time in the same property. Thus, in a true joint tenancy between spouses, each spouse owns his or her interest as separate property. The form of title does not conclusively reflect the actual status of ownership of the property. For example, community property held in joint tenancy form may remain true community property. 1 Estate Planning Practice § 5.7, at 205 (Cal. Cont. Ed. Bar, rev. 10/96).

If community property is held in joint tenancy form between the spouses, there is some authority for the position that some property may pass to the surviving spouse by right of survivorship and possibly still be treated as community property for federal estate tax purposes if joint tenancy ownership has been adopted solely as a matter of convenience to facilitate the transfer of ownership on death. If successful, this position will permit the surviving spouse's interest in the property to receive a step up in basis. However, the position may be challenged by the Internal Revenue Service. *Id.* § 5.23 (rev. 12/94).

The purpose of the uniform act concept of community property held in survivorship form is to permit transfer agents to transfer the entire interest in the security to the surviving spouse on death of the first-to-die spouse. Presumably, transfer is made on receipt of a request for transfer and a certified copy of the death certificate, the same as for a security held in joint tenancy. This purpose can be accomplished without depriving the first-to-die spouse of the right to dispose by will of his or her half of a community property security.

Moreover, Commission-recommended legislation enacted in 1992 makes clear a provision for nonprobate transfer of community property on death without written consent of the other spouse is not effective as to the nonconsenting spouse's interest, does not affect the nonconsenting spouse's ability to dispose of the property by will, and may be set aside by the court. Prob. Code §§ 5020, 5021. See generally 2 Estate Planning Practice, *supra*, § 9.27, at 488; Wellman, *supra*, at 791 n.9. These provisions also apply to a multiple-party account in a financial institution if expressly described in the account agreement as a community property account. Prob. Code § 5307; see also *id.* §§ 5302(e), 5305(c); Estate of Allen, 12 Cal. App. 4th 1762, 1768-69, 16 Cal. Rptr. 2d 352, 355 (1993).

These provisions are relevant only to controversies between claimants, and do not affect statutory protection given to the holder of the property under Probate Code Section 5003. Prob. Code § 5012. To be consistent, the uniform act should be made subject to these provisions. **The staff added language to Section 5507 in the TR to make clear it does not affect community property rights of a nonconsenting spouse as provided in Probate Code Sections 5010-5032.** (Statutory language is necessary because Section 5011 says community property rights in a nonprobate transfer on death are subject to a "contrary state statute specifically applicable to the instrument under which the nonprobate transfer is

made.” Without language in Section 5507, the uniform act might override the protection of community property rights in Sections 5010-5032.)

Family Protection Eroded?

The right of a decedent’s surviving spouse and children to a family allowance is limited to property in the probate estate. See Prob. Code § 6540; 2 California Decedent Estate Practice § 16.3, at 16-4 (Cal. Cont. Ed. Bar, May 1997 Update). Expanding the kinds of property passing outside probate reduces assets available for payment of a family allowance.

If both spouses are registered as co-owners of securities in beneficiary form, the surviving spouse will become sole owner on death of the other. So the family allowance question is a potential problem only if one spouse is registered as owner and the designated TOD beneficiary is someone outside the family. If the property is community, the surviving spouse is entitled to one-half of it. If it is the separate property of the deceased spouse, a TOD designation of a beneficiary outside the family will reduce the property available for a family allowance.

Should the increasingly popular TOD form be rejected for securities because it may affect a family allowance? The staff thinks not. The Legislature has been receptive to Commission recommendations for POD accounts in financial institutions, for TOD registration of various kinds of vehicles and vessels, and for nonprobate transfers in written instruments. Arguably securities are different, because most of the value of a decedent’s estate may be in this form. Perhaps a family will suffer hardship because the decedent has disposed of all his or her separate property to others. But in most cases it should not be a problem.

As noted above, Missouri has a provision permitting the personal representative to recover a pro rata share of any nonprobate transfer if needed to pay “statutory allowances to the surviving spouse and unmarried minor children.” Mo. Ann. Stat. § 461.300 (set out in the attached Exhibit). This might provide a model for a general provision in California regarding creditors’ rights in nonprobate assets, to be studied separately as discussed above. Or the Commission may prefer to include in the attached draft a provision to protect the family allowance as discussed immediately below.

Rights of Creditors

The attached letter from the State Bar Probate Section mentions creditor protection as a problem that should be addressed. Section 5509 in the attached

draft says “[t]his part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.” This is virtually identical to Probate Code Section 5000(c), the general nonprobate transfer provision which has been in California law since 1983.

Under existing law, a decedent’s debts are generally payable from the probate estate, not from property passing outside probate. Debts are not apportioned to life insurance, pension plans, Totten trusts, joint tenancy property, individual retirement accounts, or other contract proceeds. 1 California Decedent Estate Practice § 12.70, at 12-85 (Cal. Cont. Ed. Bar, rev. 6/95); see also Chillag, *Creditors’ Rights to Reach Nonprobate Assets*, 5 CEB Est. Plan. & Cal. Prob. Rep. 1-6 (1983). An exception permits these assets to be reached if the transfer was in fraud of creditors. *Id.*

Since nonprobate assets generally may not be reached to satisfy the decedent’s debts, the problem will be exacerbated if TOD registration of securities is encouraged. This has been recognized as a general problem in existing law, and is not peculiar to the Uniform TOD Security Registration Act. Last September when the Commission considered new topics and priorities, the staff reported the following:

Creditors’ rights against nonprobate assets. The staff has identified policy issues. The Uniform Probate Code is developing a statute to address the issues. The staff is monitoring experience under the new trust claims statute to see whether to proceed with this project.

The trust claims statute is in Probate Code Sections 19000-19403, enacted in 1991. It provides an optional procedure by which the trustee of a revocable trust created by the decedent may compel the decedent’s creditors to file claims against trust assets within a four-month period. This operates in a manner similar to the creditors’ claim procedure for decedent’s estates. It requires a petition to the court for approval and settlement of claims, notice to creditors, filing, allowance, and rejection of claims, establishment of claims by money judgment, allocation of debts between the trust and the settlor’s surviving spouse, and liability of the surviving spouse to creditors. Ironically, the need for the new trust claims procedure may have been substantially reduced by the enactment in 1990 of a one-year statute of limitations for actions based on the liability of a decedent (Code Civ. Proc. § 366.2). 13 CEB Est. Plan. & Cal. Prob. Rep. 65, 67 (December 1991).

Texas permits the decedent's personal representative to recover community property with a right of survivorship to the extent necessary to discharge decedent's liabilities. Tex. Prob. Code § 461 (set out in the attached Exhibit). Missouri permits the decedent's personal representative to recover a pro rata share of any nonprobate transfer to the extent necessary to discharge statutory allowances to the surviving spouse and unmarried minor children, and claims against the estate. Mo. Ann. Stat. § 461.300 (set out in the attached Exhibit). Professor Wellman has given the staff a copy of a draft proposal on creditors' rights in nonprobate assets for consideration by the National Conference of Commissioners on Uniform State Laws. The Texas and Missouri provisions and Professor Wellman's draft may provide the basis for a general provision for creditors' rights in nonprobate assets in California.

The Commission should consider the following alternatives:

(1) Approve the provision in the attached draft that "[t]his part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state," even though the rights of creditors against nonprobate assets are limited, and work on general provisions on creditors' rights against nonprobate assets as a separate study.

(2) Include in proposed Section 5509 an express provision making TOD securities subject to a family allowance and to approved claims of decedent's creditors to the extent the probate estate is insufficient:

5509. (a)

~~(b) This part does not limit the rights of creditors of security owners against beneficiaries and other transferees under other laws of this state~~ If the estate of the deceased owner is not sufficient to pay a family allowance ordered by the court and allowed claims against the estate, on request of the personal representative of a deceased owner, beneficiaries who receive property under this part are liable for restitution to the estate of a pro rata share of all property received by all beneficiaries under this part, or the value of the property, to the extent necessary to satisfy the family allowance and allowed claims. The liability of a beneficiary shall not exceed the value of the property received by that beneficiary under this part. On petition of the personal representative or any beneficiary, the court may determine the amounts of the shares to be restored to the estate by each beneficiary.

Nonprobate Transfer Revoked by Divorce

The New York State Bar Association suggested amending the uniform act to say divorce revokes a nonprobate transfer to the former spouse. This is consistent with the Commission's TR on *Effect of Dissolution of Marriage on Nonprobate Transfers* (January 1998). **Accordingly, the staff added language to Section 5507 in the attached draft to make clear it is subject to the Commission-recommended rule in proposed Section 5600.** (Statutory language is necessary because proposed Section 5600 defines "nonprobate transfer" to mean one described in Section 5000, leaving a question whether it would include a TOD transfer under the Uniform TOD Security Registration Act.)

Simultaneous Death; Homicide; Disclaimers; Apportionment of Estate Taxes

The New York State Bar Association suggested amending the uniform act to say that, if both the owner and TOD beneficiary die without evidence they died other than simultaneously, the security is treated as if the owner survived the beneficiary. This is consistent with California Probate Code Sections 220-226.

Under Probate Code Sections 250-258, one who feloniously and intentionally kills another may not receive a nonprobate transfer from the victim.

Under Probate Code Sections 260-288, a beneficiary may disclaim any property interest, including a POD account, joint tenancy interest, or any other interest created by testamentary or inter vivos instrument.

The Probate Code provides for proration of estate taxes among persons entitled to receive "from a decedent while alive or by reason of the death of the decedent any property or interest therein." Prob. Code §§ 20100, 20110. This includes property received by nonprobate transfer, such as by a joint tenant or trust beneficiary. B. Ross & H. Moore, California Practice Guide Probate § 16:581, at 16-140.4 (Rutter Group, rev. #1 1994).

The staff made clear in the Comment to Section 5507 in the attached draft that it is subject to all these provisions.

Application of Antilapse Statute to Deceased TOD Beneficiary

Under California's antilapse statute (Prob. Code § 21110), if a beneficiary of an interest effective on death fails to survive a transferor to whom the beneficiary is related by blood, issue of the deceased beneficiary take in the beneficiary's place. The Comment to UPC Section 6-307 makes clear the uniform act permits application of antilapse statutes:

The statement that a security registered in beneficiary form is in the deceased owner's estate when no beneficiary survives the owner is not intended to prevent application of any antilapse statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who failed to survive the owner.

The staff made clear in the Comment to Section 5507 that the antilapse statute may apply to a security registered in TOD form.

Establishment of Terms and Conditions by Registering Entity

Section 5510 in the attached draft permits registering entities to establish terms and conditions under which they will implement requests for registrations in beneficiary form, including proving death, dealing with fractional shares, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in place of the named beneficiary in the event of the latter's death. The New York City Bar Association had a problem with this provision:

An individual with several security holdings could find it difficult to change the beneficiary designation on all of his or her TOD securities because the rules may vary from issuer to issuer. The bill states that its goal is uniformity which appears to be undercut by allowing each issuer to have a different set of rules. There could be some serious substantive consequences if a multitude of rules is allowed to develop. Assuming that an individual wants to change the beneficiary from a niece to a nephew and dies after the revocation is mailed but before the issuer's records are changed, the results may vary from one issuer to the next. For example, one issuer could give effect to the revocation upon mailing while others could give effect upon receipt or actual reregistration A better approach to achieving uniformity may be to set forth "safe harbors" for the TOD registration request forms and forms to effect an amendment or revocation of the TOD registration.

The staff discussed this with John McCabe, Legal Counsel and Legislative Director for the NCCUSL, and with Professor Wellman. Mr. McCabe said this has not been a problem in uniform act states. TOD registrations are being done by brokers, not by individual corporations. National brokerages, such as Merrill Lynch, have adopted terms and conditions nationally, so they do not vary across state lines. Mr. McCabe said most customers have accounts with one broker, or

at most two. He did not view the possibility of widely varying terms and conditions as a practical problem.

Professor Wellman said that, with nine years of experience under the Uniform TOD Security Registration Act, it is too late to try to provide uniform statutory forms for issuers' terms and conditions. He said issuers are now using a variety of different forms. He did not view this as a serious problem.

Lack of Flexibility in TOD Designation

In 1990, the State Bar was concerned about the lack of flexibility resulting from the requirement that all owners must join to change a TOD beneficiary designation (proposed Section 5506). However, all present owners must hold a TOD security in survivorship form. The requirement that all owners must join to change a TOD beneficiary designation is consistent with the rule that one joint tenant generally cannot bind other joint tenants by an agreement relating to the property. 4 B. Witkin, *Summary of California Law Real Property* § 272, at 470 (9th ed. 1987).

In 1990, the State Bar was also concerned that TOD registration is too inflexible to deal with future events such as death of a named beneficiary. However, the Uniform Act permits application of the antilapse statute, which will substitute lineal descendants of a predeceased beneficiary who is related to the deceased owner. The Uniform Act also permits the owner to designate a substitute beneficiary in place of a predeceased beneficiary (proposed Section 5510).

The Uniform Act offers a reasonable number of options that should appeal to most users of the TOD designation. More complex arrangements should be accomplished by some other method, such as a will.

STAFF RECOMMENDATION

The staff recommends the Commission approve the attached TR for distribution for comment.

Respectfully submitted,

Robert J. Murphy
Staff Counsel

Exhibit

**VARIATIONS IN UNIFORM TOD SECURITY REGISTRATION ACT
IN THE STATE OF WASHINGTON**

Volume 8B of the Uniform Laws Annotated shows variations in uniform act language made by the eight states that had enacted it as of 1993. Of those eight states (Colorado, Minnesota, New Mexico, North Dakota, Oregon, Washington, Wisconsin, and Wyoming), only Washington made substantive variations, set out below.

§ 2. Ownership requirement to obtain registration in beneficiary form

The State of Washington revised the second sentence of Section 2 of the uniform act as follows:

Multiple owners of a security registered in beneficiary form shall hold the security as joint tenants with right of survivorship, as tenants by the entirety, or as owners of community property held in survivorship form either as separate property or as community property, and not as tenants in common.

§ 3. Law authorizing registration in beneficiary form

The State of Washington revised Section 3 of the uniform act as follows:

A security may be registered ~~registering entity may register a security in beneficiary form if the form is authorized by this chapter or a similar substantially identical statute of the another state if the state is:~~ (1) The state of organization of the issuer or registering entity, (2) the location of the registering entity's principal office, (3) the location of the office of its transfer agent or its office making the registration, or by this or a similar statute of the law of the state listed as (4) the location of the owner's listed address at the time of registration. A registration governed by the law of a jurisdiction in which this or similar substantially identical legislation is not in force or was not in force when a registration in beneficiary form was made is nevertheless presumed to be valid and authorized as a matter of contract law.

§ 6. Effect of registration in beneficiary form

The State of Washington revised the first sentence of Section 6 of the uniform act as follows:

The designation of a TOD or POD beneficiary on a registration in beneficiary form has no effect on ownership of the security until the owner's death, or on community property rights and obligations of owners.

§ 10. Terms, conditions, and forms for registration

The State of Washington revised Section 10 of the uniform act as follows:

10. (a) (1) A registering entity offering to accept registrations in beneficiary form may establish the terms and conditions under which it will receive and implement requests ~~(i) (a)~~ for registration in beneficiary form, and ~~(ii) (b)~~ for implementation of registrations in beneficiary form, including requests for cancellation of previously registered TOD beneficiary designations and requests for reregistration to effect a change of beneficiary. The terms and conditions so established may provide for proving death, avoiding or resolving any problems concerning fractional shares, and designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death. Substitution may be indicated by appending to the name of the primary beneficiary the letters LDPS, standing for "lineal descendants per stirpes." This designation substitutes a deceased beneficiary's descendants who survive the owner for a beneficiary who fails to so survive, the descendants to be identified and to share in accordance with the law of the beneficiary's domicile at the owner's death governing inheritance by descendants of an intestate. Other forms of identifying beneficiaries who are to take on one or more contingencies, and rules for providing proofs and assurances needed to satisfy reasonable concerns by registering entities regarding conditions and identities relevant to accurate implementation of registrations in beneficiary form, may be contained in a registering entity's terms and conditions.

~~(b) (2)~~ The following are illustrations of registrations in beneficiary form which that a registering entity may authorize:

(1) (a) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

(2) (b) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN TOD John S Brown Jr.

(3) (c) Multiple owners ~~primary and secondary (substituted)~~ multiple beneficiaries:

John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB
BENE Peter Q Brown

or

~~John S Brown Mary B Brown JT TEN TOD John S Brown Jr
LDPS.~~

CREDITORS' RIGHTS IN TEXAS AND MISSOURI

Texas and Missouri have provisions permitting creditors of the decedent to reach a pro rata share of nonprobate transfers:

Tex. Prob. Code § 461. Rights of creditors

461. The provisions of Part 1 of this chapter govern the rights of creditors in multiple-party accounts, as defined by Section 436 of Part 1. Except as expressly provided above in this section, the community property subject to the sole or joint management, control, and disposition of a spouse during marriage continues to be subject to the liabilities of that spouse upon death without regard to a right of survivorship in the decedent's surviving spouse under an agreement made in accordance with the provisions of this part. The surviving spouse shall be liable to account to the deceased spouse's personal representative for the property received by the surviving spouse pursuant to a right of survivorship to the extent necessary to discharge such liabilities. No proceeding to assert such a liability shall be commenced unless the personal representative has received a written demand by a creditor, and no proceeding shall be commenced later than two years following the death of the decedent. Property recovered by the personal representative shall be administered as part of the decedent's estate. This section does not affect the protection given to persons and entities under Section 460 of this code unless, before payment or transfer to the surviving spouse, the person or entity received a written notice from the decedent's personal representative stating the amount needed to satisfy the decedent's liabilities.

Mo. Ann. Stat. § 461.300. Nonprobate transfer; liability for pro rata share

1. Each beneficiary who receives a nonprobate transfer of a decedent's property under sections 461.003 to 461.081 and each person who receives other property by a transfer other than from the administration of the decedent's probate estate that was subject to satisfaction of the decedent's debts immediately prior to the decedent's death, but only to the extent of the decedent's contribution to the value of such other property, shall be liable to account to the decedent's personal representative for a pro rata share of the value of all such property received, to the extent

necessary to discharge the statutory allowances to the surviving spouse and unmarried minor children, and claims, remaining unpaid after application of the decedent's estate, including expenses of administration and costs as provided in subsection 3 of this section, and including estate or inheritance or other transfer taxes imposed by reason of the decedent's death only where payment of those taxes is a prerequisite to satisfying unpaid claims which have a lower level of priority. No proceeding may be brought under this section when the deficiency described in this subsection is solely attributable to costs and expenses of administration.

2. The obligation of a beneficiary of a nonprobate transfer or other recipient of property under subsection 1 of this section may be enforced by an action for accounting commenced within eighteen months following the decedent's death by the decedent's personal representative, a creditor of the decedent's estate, the decedent's surviving spouse or one acting for an unmarried minor child of the decedent, but no action for accounting under this section shall be commenced by any person unless the personal representative has received a written demand therefor by a creditor, surviving spouse or one acting for an unmarried minor child of the decedent. Sums recovered in an action for accounting under this section shall be administered by the personal representative as part of the decedent's estate except as provided in subsection 3 of this section.

3. The judgment in a proceeding authorized by this section shall take into account the expenses of administration of the estate including the cost of administering the additional assets obtained in the proceeding, and the costs of the proceeding to the extent authorized by this subsection. If the proceeding is commenced by a person other than the personal representative, the court may order the costs of the proceeding, other than attorney fees, to be charged against the amounts recovered and recoverable as a result of the proceeding. If the proceeding is commenced by the personal representative, the court may order the costs of the proceeding, including attorney fees, to be treated as expenses of administration of the estate.

4. After an action for accounting has been commenced under this section, any party to the proceeding may join and bring into the action for accounting other persons who are liable to account to the decedent's personal representative under subsection 1 of this section.

5. This section shall not affect the right of any transferring entity, as defined in section 461.005, to execute a direction of the decedent to make a payment or to make a nonprobate transfer or other transfer described in subsection 1 of this section on death of

the decedent, or make the transferring entity liable to the decedent's estate, unless before the payment or transfer is made the transferring entity has been served with process in a proceeding brought under this section and the transferring entity has had a reasonable time to act on it.

6. This section does not create a lien on any property that is the subject of a nonprobate transfer or other property not subject to probate administration, except as a lien may be perfected by way of attachment, garnishment or judgment in an accounting proceeding authorized by this section.

7. An action for accounting under this section may be filed in probate division of the circuit court, and the probate division of the circuit court may hear and determine questions and issue appropriate orders in an action for accounting under this section.

8. The recipient of any property held in trust that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, and the recipient of any property held in joint tenancy with right of survivorship that was subject to the satisfaction of the decedent's debts immediately prior to the decedent's death, are subject to this section, but only to the extent of the decedent's contribution to the value of the property.

9. This section shall apply to all actions commenced after August 28, 1995, except that with respect to decedents dying prior to August 28, 1995, an action for accounting under this section may be commenced within two years following the decedent's death.

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Palo Alto, California 94303-4739

Law Revision Commission
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OCT 16 1997

Re: Uniform TOD Security Registration Act

File: _____

Dear Mr. Sterling:

On Saturday, October 11, 1997, the Executive Committee of the Estate Planning, Trust and Probate Law Section of the State Bar of California adopted the following resolution regarding the above Uniform Act:

The Estate Planning Probate and Trust Law Section of the State Bar of California approves in principal the Uniform TOD Security Registration Act and commits itself to working with the California Law Revision Commission to adapt the language of the Act to California Usage, including adaptation to concepts of community property law.

Although this is the motion which was approved, the dialogue surrounding the resolution included two important additional concepts. First, the section would likely oppose the Uniform Act if it were introduced without fine tuning, and second, there are a number of issues that were raised

Nathaniel Sterling, Executive Secretary
October 14, 1997
Page 2

in earlier study of the Act by our section and by the New York City and New York State Bar Associations which should be considered during that fine tuning. Those issues have to do with adaptation to community property, creditor protection, family protection and other issues. I am enclosing the complete package which was considered by the Trust and Estate Administration Committee of the Section in reaching its decision to recommend passage of the above resolution.

Would you please give me a call so that we could discuss how to move this project forward together with the Commission. We look forward to working with you on this matter.

Sincerely,



Warren A. Sinsheimer

Chair

Trust and Estate Administration Committee

WAS:mac
G:\GENERAL\ALTR\EXCOMM\19STRLNG.014
Enclosures

cc: (all without enclosures)
Bob Temmerman
Susan House
Larry Doyle
John McCabe
Hon. Ted Lempert

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

Staff Draft

TENTATIVE RECOMMENDATION

Uniform TOD Security Registration Act

March 1998

This tentative recommendation is being distributed so that interested persons will be advised of the Commission's tentative conclusions and can make their views known to the Commission. Any comments sent to the Commission will be a part of the public record and will be considered at a public meeting when the Commission determines the provisions it will include in legislation the Commission plans to recommend to the Legislature. It is just as important to advise the Commission that you approve the tentative recommendation as it is to advise the Commission that you believe revisions should be made in the tentative recommendation.

COMMENTS ON THIS TENTATIVE RECOMMENDATION SHOULD BE RECEIVED BY THE COMMISSION NOT LATER THAN June 1, 1998.

The Commission often substantially revises tentative recommendations as a result of the comments it receives. Hence, this tentative recommendation is not necessarily the recommendation the Commission will submit to the Legislature.

California Law Revision Commission
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SUMMARY OF TENTATIVE RECOMMENDATION

This tentative recommendation proposes the enactment of the Uniform TOD Security Registration Act. This uniform act allows the owner of securities to register the title in transfer-on-death form.

This recommendation was prepared pursuant to Resolution Chapter 102 of the Statutes of 1997.

UNIFORM TOD SECURITY REGISTRATION ACT

The Law Revision Commission recommends that the Uniform TOD Security Registration Act¹ be enacted in California. This uniform act allows an owner of securities to register the title in transfer-on-death (TOD) form and to designate a death beneficiary in the instrument.² The uniform act enables an issuer, transfer agent, broker, or other intermediary to transfer securities on the owner's death directly to the designated TOD transferee. The uniform act has been enacted in 37 states.³

TOD registration is consistent with existing California law, which authorizes provisions for nonprobate transfer on death in a wide variety of written instruments, including a certificated or uncertificated security.⁴ It is also consistent with long-standing and well-established California policy favoring nonprobate transfers at death for bank deposits,⁵ certain state-registered vehicles and vessels,⁶ individual retirement accounts, pension plans, and other assets.⁷ The uniform act

1. The Uniform TOD Security Registration Act was approved and recommended for enactment in all the states by the National Conference of Commissioners on Uniform State Laws in 1989. The act was approved as an addition to the Uniform Probate Code as part of a revised Article VI (nonprobate transfers) and as a separate free-standing act.

2. Mutual fund shares and accounts maintained by brokers and others to reflect a customer's holdings of securities (so-called "street accounts") are also covered by the uniform act.

3. The 37 states that have enacted the Uniform TOD Security Registration Act are Alabama, Alaska, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Idaho, Illinois, Indiana, Iowa, Kansas, Maryland, Minnesota, Mississippi, Missouri (substantially similar), Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Virginia, Washington, West Virginia, Wisconsin, and Wyoming.

4. Prob. Code § 5000; 1 B. Ross & H. Moore, California Practice Guide Probate § 2:175-2:178.5, at 2-93 to 2-98 (Rutter Group, rev. 1994); see also Estate of Petersen, 28 Cal. App. 4th 1742, 1751-53, 34 Cal. Rptr. 2d 449, 456-58 (1994) (annuity contracts). Probate Code Section 5000 provides that a "provision for a nonprobate transfer on death in an insurance policy, contract of employment, bond, mortgage, promissory note, certificated or uncertificated security, account, agreement, custodial agreement, deposit agreement, compensation plan, trust, conveyance, deed of gift, marital property agreement, or other written instrument of a similar nature is not invalid because the instrument does not comply with the requirements for execution of a will, and this code does not invalidate the instrument." Probate Code Section 5003 gives immunity to a holder of property described in Section 5000 who transfers it in compliance with the provision for nonprobate transfer. Sections 5000 and 5003, therefore, may already validate a TOD designation in securities. See Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 807-811 (1987). Section 5000 is the same in substance as Section 6-101 of the Uniform Probate Code (1993). The Uniform TOD Security Registration Act extends the nonprobate transfer provision in Uniform Probate Code Section 6-101. *Id.* at 794. Professor Wellman concluded that, for securities, "TOD registration probably will not become a widely used new title form without legislative authorization" such as the Uniform TOD Security Registration Act. *Id.* at 836.

5. Prob. Code §§ 5100-5407.

6. Health & Safety Code §§ 18080.2, 18102.2, 18102.3 (manufactured home, mobilehome, commercial coach, truck camper, floating home); Veh. Code §§ 4150.7, 5910.5, 5910.7 (motor vehicle); Veh. Code § 9852.7, 9916.5, 9916.7 (undocumented vessel).

7. See also Educ. Code §§ 23300, 23811 (teachers' death benefits); Gov't Code §§ 21455-21458 (public employees' death benefits); 31 C.F.R. § 315.79(c) (U.S. savings bond in beneficiary form).

fleshes out the existing California authority for nonprobate transfer of certificated or uncertificated securities by giving specific authority to issuing entities to register securities in TOD form. It is an issuer protection measure that authorizes, but does not require, issuers to offer the TOD title form.⁸

TOD registration is designed to give an owner of securities who wants to arrange for a nonprobate transfer at death an alternative to the frequently troublesome joint tenancy form of title. Because joint tenancy registration of securities normally entails a sharing of lifetime entitlement and control, it works satisfactorily only as long as the co-owners cooperate. Difficulties arise when the co-owners fall into disagreement or when a co-owner becomes unable to manage his or her affairs or becomes insolvent. Joint tenancy registration to arrange for a nonprobate transfer at death may also create estate planning problems⁹ and may have undesired tax consequences.¹⁰

Use of the TOD registration form encouraged by the uniform act has no effect on the registered owner's full control of the affected security during his or her lifetime. A TOD designation and any beneficiary interest arising under the designation ends whenever the registered asset is transferred or whenever the owner otherwise complies with issuer's conditions for changing the title form of the investment. The uniform act recognizes that co-owners with a right of survivorship may be registered as owners together with a TOD beneficiary designated to take if the registration remains unchanged until the beneficiary survives the joint owners. In such a case, the survivor of the joint owners has full control of the asset and may change the registration form as the survivor sees fit after the other's death.

The proposed law is subject to other provisions of California law to the same extent as most other forms of nonprobate transfer: It does not limit rights of creditors of security owners against beneficiaries and other transferees under other laws of this state.¹¹ It does not deprive a married decedent of the right to dispose

8. The uniform act is sufficiently protective of issuers to attract their attention. Its primary purpose is "to induce a dominant segment of the world of financial intermediation to lead investors away from the joint and survivor title forms." Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga. L. Rev. 789, 835, 838 (1987). Implementation of the uniform act is wholly optional with issuers. The drafting committee that prepared the uniform act received advice and assistance from representatives of the mutual fund and stock transfer industries during its three years of preparatory work. Thus the uniform act takes full account of practical requirements for efficient transfer within the securities industry.

9. If the owner of a security takes title in joint tenancy with a nonowner, there is a present transfer of a share of the owner's interest. This transfer may create problems for the estate planner who is consulted after the security has been registered in joint tenancy. The estate planner has more flexibility if a TOD beneficiary is designated, since the TOD beneficiary designation can easily be changed.

10. The TOD beneficiary may have a more favorable basis for income tax purposes, since there is no transfer to the TOD beneficiary until the death of the owner of the security. In addition, creation of a joint tenancy may create a gift tax liability at the time the interest is created.

11. This provision is the same as California Probate Code Section 5000(c) (nonprobate transfer in written instrument) and Section 9(b) of the Uniform TOD Security Registration Act (1989).

by will of his or her half interest in a community property security.¹² A TOD designation in a security by a married person naming his or her spouse as beneficiary will be revoked by dissolution of their marriage.¹³ The proposed law is subject to provisions relating to simultaneous death,¹⁴ effect of homicide,¹⁵ disclaimers,¹⁶ apportionment of estate taxes,¹⁷ and antilapse.¹⁸

12. Prob. Code §§ 5020, 5021.

13. Prob. Code § 5600 (proposed in Commission's Tentative Recommendation on *Effect of Dissolution of Marriage on Nonprobate Transfers* (January 1998)).

14. Prob. Code §§ 220-226.

15. Prob. Code §§ 250-258.

16. Prob. Code §§ 260-288.

17. Prob. Code §§ 20100, 20110.

18. Prob. Code § 21110. Applying the antilapse statute is consistent with the intent of Section 7 of the Uniform TOD Security Registration Act (1989). See Comment to Section 7 of that act.

PROPOSED LEGISLATION

1 **Prob. Code §§ 5500-5511 (added). Uniform TOD Security Registration Act**

2 SECTION 1. Part 3 (commencing with Section 5500) is added to Division 5 of
3 the Probate Code, to read:

4 PART 3 . UNIFORM TOD SECURITY
5 REGISTRATION ACT

6 **§ 5500. Short title; purposes; construction**

7 5500. (a) This part may be cited as the Uniform TOD Security Registration Act.

8 (b) This part shall be liberally construed and applied to promote its underlying
9 purposes and policy (1) to encourage development of a title form for use by
10 individuals that is effective, without probate and estate administration, to transfer
11 property at death in accordance with directions of a deceased owner of a security
12 as included in the title form in which the security is held and (2) to protect issuers
13 offering and implementing the new title form.

14 (d) Unless displaced by the particular provisions of this part, the principles of
15 law and equity supplement its provisions.

16 **Comment.** Section 5500 is the same in substance as Section 11 of the Uniform TOD Security
17 Registration Act (1989). As to construction of provisions drawn from uniform acts, see Section
18 2(b). Paragraphs (1) and (2) of subdivision (b) are not found in the uniform act but are included as
19 a useful statement of the underlying purposes and policy of this part. For a severability provision,
20 see Section 11.

21 **§ 5501. Definitions**

22 5501. In this part:

23 (a) “Beneficiary form” means a registration of a security which indicates the
24 present owner of the security and the intention of the owner regarding the person
25 who will become the owner of the security upon the death of the owner.

26 (b) “Register,” including its derivatives, means to issue a certificate showing the
27 ownership of a certificated security or, in the case of an uncertificated security, to
28 initiate or transfer an account showing ownership of securities.

29 (c) “Registering entity” means a person who originates or transfers a security
30 title by registration, and includes a broker maintaining security accounts for
31 customers and a transfer agent or other person acting for or as an issuer of
32 securities.

33 (d) “Security” means a share, participation, or other interest in property, in a
34 business, or in an obligation of an enterprise or other issuer, and includes a
35 certificated security, an uncertificated security, and a security account.

36 (e) “Security account” means (1) a reinvestment account associated with a
37 security, a securities account with a broker, a cash balance in a brokerage account,

1 cash, interest, earnings, or dividends earned or declared on a security in an
2 account, a reinvestment account, or a brokerage account, whether or not credited
3 to the account before the owner's death, or (2) a cash balance or other property
4 held for or due to the owner of a security as a replacement for or product of an
5 account security, whether or not credited to the account before the owner's death.

6 **Comment.** Section 5501 is the same as paragraphs (1), (7), (8), (9), and (10) of Section 1 of the
7 Uniform TOD Security Registration Act (1989). Definitions in Section 1 of the Uniform TOD
8 Security Registration Act that are not included here are in other provisions of this code. See
9 Sections 34 ("devisee"), 44 ("heir"), 56 ("person"), 58 ("personal representative"), 62
10 ("property"), 74 ("state").

11 The definition of "security" includes shares of mutual funds and other investment companies.
12 Cf. Com. Code § 8102 (definitions). The defined term "security account" is not intended to
13 include securities held in the name of a bank or similar institution as nominee for the benefit of a
14 trust.

15 "Survive" is not defined. No effort is made in this part to define survival as it is for purposes of
16 intestate succession in Section 6403, which requires survival by an heir of the ancestor for 120
17 hours. For purposes of this part, "survive" is used in its common law sense of outliving another
18 for any time interval, no matter how brief. The drafters of the uniform act sought to avoid
19 imposition of a new and unfamiliar meaning of the term on intermediaries familiar with the
20 meaning of "survive" in joint tenancy registrations.

21 **§ 5502. Ownership requirement to obtain registration in beneficiary form**

22 5502. Only individuals whose registration of a security shows sole ownership by
23 one individual or multiple ownership by two or more with right of survivorship,
24 rather than as tenants in common, may obtain registration in beneficiary form.
25 Multiple owners of a security registered in beneficiary form hold as joint tenants
26 with right of survivorship, as tenants by the entireties, or as owners of community
27 property held in survivorship form, and not as tenants in common.

28 **Comment.** Section 5502 is the same as Section 2 of the Uniform TOD Security Registration
29 Act (1989).

30 Section 5502 is designed to prevent co-owners from designating any death beneficiary other
31 than one who is to take only upon survival of *all* co-owners. It coerces co-owning registrants to
32 signal whether they hold as joint tenants with right of survivorship (JT TEN), as tenants by the
33 entireties (T ENT), or as owners of community property. Also, it imposes survivorship on co-
34 owners holding in a beneficiary form that fails to specify a survivorship form of holding. Nothing
35 in Section 5502 authorizes a California married couple to register a security as "tenants by the
36 entireties," since California does not recognize that form of ownership. See Civ. Code § 682.
37 However, a California corporation may register a security to be held as tenants by the entireties if
38 the shareholders are residents of another state which recognizes that form of ownership.
39 Similarly, California does not permit property to be held as community property with a right of
40 survivorship. However, this title form is recognized in Nevada and Arizona.. See Nevada Rev.
41 Stat. Ann. ch. 111.064 (Michie 1993); Ariz. Rev. Stat. Ann. § 33-431 (Supp. 1997).

42 Tenancy in common and community property otherwise than in a survivorship setting are
43 negated for registration in beneficiary form because persons desiring to signal independent death
44 beneficiaries for each individual's fractional interest in a co-owned security normally will split
45 their holdings into separate registrations of the number of units previously constituting their
46 fractional share. Once divided, each can name his or her own choice of death beneficiary.

47 The term "individual," as used in this section, limits those who may register as owner or co-
48 owner of a security in beneficiary form to natural persons. However, the section does not restrict
49 an individual using this ownership form as to the choice of death beneficiary. The definition of

1 “beneficiary form” in Section 5501 indicates that any “person” may be designated beneficiary in a
2 registration in beneficiary form. “Person” is defined in Section 56 so that a church, trust
3 company, family corporation, or other entity, as well as an individual, may be designated as a
4 beneficiary.

5 **§ 5503. Law authorizing registration in beneficiary form**

6 5503. A security may be registered in beneficiary form if the form is authorized
7 by this or a similar statute of the state of organization of the issuer or registering
8 entity, the location of the registering entity’s principal office, the office of its
9 transfer agent or its office making the registration, or by this or a similar statute of
10 the law of the state listed as the owner’s address at the time of registration. A
11 registration governed by the law of a jurisdiction in which this or similar
12 legislation is not in force or was not in force when a registration in beneficiary
13 form was made is nevertheless presumed to be valid and authorized as a matter of
14 contract law.

15 **Comment.** Section 5503 is the same as Section 3 of the Uniform TOD Security Registration
16 Act (1989). The section encourages registrations in beneficiary form to be made whenever a state
17 with which either of the parties to a registration has contact has enacted this or a similar statute.
18 Thus, a registration in beneficiary form of X Company shares might rely on the enactment of the
19 uniform act in X Company’s state of incorporation, or in the state of incorporation of X
20 Company’s transfer agent. Or, an enactment by the state of the issuer’s principal office, of the
21 transfer agent’s principal office, or of the issuer’s office making the registration also would
22 validate the registration. An enactment of the state of the registered owner’s address at the time of
23 registration also might be used for validation purposes. The last sentence of Section 5503 is
24 designed to establish a statutory presumption that a general principle of law is available to
25 achieve a result like that made possible by this part.

26 **§ 5504. Origination of registration in beneficiary form**

27 5504. A security, whether evidenced by certificate or account, is registered in
28 beneficiary form when the registration includes a designation of a beneficiary to
29 take the ownership at the death of the owner or the deaths of all multiple owners.

30 **Comment.** Section 5504 is the same as Section 4 of the Uniform TOD Security Registration
31 Act (1989). As noted in the Comment to Section 5502, this part places no restriction on who may
32 be designated beneficiary in a registration in beneficiary form. Any legal entity may be
33 designated beneficiary in a registration in beneficiary form.

34 **§ 5505. Form of registration in beneficiary form**

35 5505. Registration in beneficiary form may be shown by the words “transfer on
36 death” or the abbreviation “TOD,” or by the words “pay on death” or the
37 abbreviation “POD,” after the name of the registered owner and before the name
38 of a beneficiary.

39 **Comment.** Section 5505 is the same as Section 5 of the Uniform TOD Security Registration
40 Act (1989). The abbreviation “POD” is included for use without regard for whether the subject is
41 a money claim against an issuer, such as its own note or bond for money loaned, or is a claim to
42 securities evidenced by conventional title documentation. The use of “POD” in a registration in
43 beneficiary form of shares in an investment company should not be taken as a signal that the
44 investment is to be sold or redeemed on the owner’s death so that the sums realized may be
45 “paid” to the death beneficiary. Rather, only a transfer on death, not a liquidation on death, is

1 indicated. The drafters of the uniform act would have used only the abbreviation “TOD” except
2 for the familiarity, rooted in experience with certificates of deposit and other deposit accounts in
3 banks, with the abbreviation “POD” as signaling a valid nonprobate death benefit or transfer on
4 death.

5 **§ 5506. Effect of registration in beneficiary form**

6 5506. The designation of a TOD beneficiary on a registration in beneficiary form
7 has no effect on ownership until the owner’s death. A registration of a security in
8 beneficiary form may be canceled or changed at any time by the sole owner or all
9 then surviving owners without the consent of the beneficiary.

10 **Comment.** Section 5506 is the same as Section 6 of the Uniform TOD Security Registration
11 Act (1989). The section simply affirms the right of a sole owner, or the right of all multiple
12 owners, to end a TOD beneficiary registration without the assent of the beneficiary. The section
13 says nothing about how a TOD beneficiary designation may be canceled, meaning that the
14 registering entity’s terms and conditions, if any, may be relevant. See Section 5510. If the terms
15 and conditions have nothing on the point, cancellation of a beneficiary designation presumably
16 would be effected by a reregistration showing a different beneficiary or omitting reference to a
17 TOD beneficiary.

18 **§ 5507. Ownership on death of owner**

19 5507. On death of a sole owner or the last to die of all multiple owners,
20 ownership of securities registered in beneficiary form passes to the beneficiary or
21 beneficiaries who survive all owners. On proof of death of all owners and
22 compliance with any applicable requirements of the registering entity, a security
23 registered in beneficiary form may be reregistered in the name of the beneficiary
24 or beneficiaries who survive the death of all owners. Until division of the security
25 after the death of all owners, multiple beneficiaries surviving the death of all
26 owners hold their interests as tenants in common. If no beneficiary survives the
27 death of all owners, the security belongs to the estate of the deceased sole owner or
28 the estate of the last to die of all multiple owners.

29 **Comment.** Section 5507 is the same as Section 7 of the Uniform TOD Security Registration
30 Act (1989). Even though multiple owners of a security registered in beneficiary form hold with
31 right of survivorship, no survivorship rights attend the positions of multiple beneficiaries who
32 become entitled to securities by reason of having survived the sole owner or the last to die of
33 multiple owners. Issuers (and registering entities) who decide to accept registrations in
34 beneficiary form involving more than one primary beneficiary should provide by rule whether
35 fractional shares will be registered in the names of surviving beneficiaries where the number of
36 shares held by the deceased owner does not divide without remnant among the survivors. If
37 fractional shares are not desired, the issuer may wish to provide for sale of odd shares and
38 division of proceeds, for an uneven distribution with the first or last named to receive the odd
39 share, or for other resolution. Section 5508 deals with whether intermediaries have any obligation
40 to offer beneficiary designations of any sort. Section 5510 enables issuers to adopt terms and
41 conditions controlling the details of applications for registrations they decide to accept and
42 procedures for implementing such registrations after an owner’s death.

43 The statement that a security registered in beneficiary form is in the deceased owner’s estate
44 when no beneficiary survives the owner is not intended to prevent application of any antilapse
45 statute that might direct a nonprobate transfer on death to the surviving issue of a beneficiary who
46 failed to survive the owner. See, e.g., Section 21110 (antilapse). Rather, the statement is intended

1 only to indicate that the registering entity involved should transfer or reregister the security as
2 directed by the decedent's personal representative.

3 See also the Comment to Section 5501 regarding the meaning of "survive" for purposes of this
4 part.

5 **§ 5507.5. Community property rights of nonconsenting spouse; effect of dissolution of**
6 **marriage**

7 5507.5. This part is subject to Chapter 2 (commencing with Section 5010) of
8 Part 1 [and to Part 4 (commencing with Section 5600)].

9 **Comment.** Section 5507.5 makes clear that rights granted by this part are subject to Sections
10 5010-5032 (community property rights of nonconsenting spouse in nonprobate transfers) [and
11 5600-5602 (dissolution of marriage revokes all nonprobate transfers to former spouse)].

12 Property rights under this part may be subject to other statutory qualifications than those noted
13 in Section 5507.5. See, e.g., Sections 220-226 (simultaneous death), 250-258 (effect of
14 homicide), 260-288 (disclaimer). Property received under Section 5507 may be subject to
15 apportionment of estate taxes. See Sections 20100-20225. If a TOD beneficiary fails to survive
16 the owner, the beneficiary's interest may be subject to the antilapse statute. See Section 21110.

17 **LRC Staff Note.** In AB 1683 (Kuykendall), the community property problem is dealt with
18 by the following language: "Nothing in this part alters the community character of
19 community property or community rights in community property." The staff believes it
20 is better to make a specific reference to Sections 5010-5032, which spell out the rights of a
21 nonconsenting spouse in a nonprobate transfer of community property, as in Section
22 5507.5 above.

23 The bracketed language, "Part 4 (commencing with Section 5600)," refers to the
24 Commission's Tentative Recommendation on *Effect of Dissolution of Marriage on*
25 *Nonprobate Transfers* (January 1998), which would provide that dissolution of marriage
26 revokes all nonprobate transfers to a former spouse. Assuming the Uniform TOD
27 Security Registration Act and the proposal on effect of dissolution of marriage are
28 introduced in separate bills in 1999, the two bills will have to be double-jointed in the
29 usual Legislative Counsel form.

30 **§ 5508. Protection of registering entity**

31 5508. (a) A registering entity is not required to offer or to accept a request for
32 security registration in beneficiary form. If a registration in beneficiary form is
33 offered by a registering entity, the owner requesting registration in beneficiary
34 form assents to the protections given to the registering entity by this part.

35 (b) By accepting a request for registration of a security in beneficiary form, the
36 registering entity agrees that the registration will be implemented on death of the
37 deceased owner as provided in this part.

38 (c) A registering entity is discharged from all claims to a security by the estate,
39 creditors, heirs, or devisees of a deceased owner if it registers a transfer of the
40 security in accordance with Section 5507 and does so in good faith reliance (1) on
41 the registration, (2) on this part, and (3) on information provided to it by affidavit
42 of the personal representative of the deceased owner, or by the surviving
43 beneficiary or by the surviving beneficiary's representatives, or other information
44 available to the registering entity. The protections of this part do not extend to a
45 reregistration or payment made after a registering entity has received written

1 notice from any claimant to any interest in the security objecting to
2 implementation of a registration in beneficiary form. No other notice or other
3 information available to the registering entity affects its right to protection under
4 this part.

5 (d) The protection provided by this part to the registering entity of a security
6 does not affect the rights of beneficiaries in disputes between themselves and other
7 claimants to ownership of the security transferred or its value or proceeds.

8 **Comment.** Section 5508 is the same as Section 8 of the Uniform TOD Security Registration
9 Act (1989), except for substitution of “part” for “act” and “Section 5507” for “Section 7.” A
10 “request” for registration in beneficiary form may be in any form chosen by a registering entity.
11 This part does not prescribe a particular form and does not impose record-keeping requirements.
12 Registering entities’ business practices, including any industry standards or rules of transfer agent
13 associations, will control.

14 The written notice referred to in subdivision (c) would qualify as a notice under Section 8403
15 of the Uniform Commercial Code.

16 “Good faith” as used in subdivision (c) is intended to mean “honesty in fact and the observance
17 of reasonable commercial standards of fair dealing in the trade,” as specified in Section
18 2103(1)(b) of the Uniform Commercial Code.

19 The protections described in this section are designed to meet any questions regarding
20 registering entity protection that may not be foreclosed by issuer protections provided in the
21 Uniform Commercial Code. For a discussion of the relevant Uniform Commercial Code
22 provisions, see Wellman, *Transfer-on-Death Securities Registration: A New Title Form*, 21 Ga.
23 L. Rev. 789, 823 n.90 (1987).

24 **§ 5509. Nontestamentary transfer on death; rights of creditors**

25 5509. (a) A transfer on death resulting from a registration in beneficiary form is
26 effective by reason of the contract regarding the registration between the owner
27 and the registering entity and this part and is not testamentary, and is not invalid
28 because the registration does not comply with the requirements for execution of a
29 will, and this code does not invalidate the registration.

30 (b) This part does not limit the rights of creditors of security owners against
31 beneficiaries and other transferees under other laws of this state.

32 **Comment.** Section 5509 is the same as Section 09 of the Uniform TOD Security Registration
33 Act (1989), with the addition of the last portion of subdivision (a) which is drawn from Section
34 5000.

35 **§ 5510. Terms, conditions, and forms for registration**

36 5510. (a) A registering entity offering to accept registrations in beneficiary form
37 may establish the terms and conditions under which it will receive and implement
38 requests (1) for registration in beneficiary form, and (2) for implementation of
39 registrations in beneficiary form, including requests for cancellation of previously
40 registered TOD beneficiary designations and requests for reregistration to effect a
41 change of beneficiary. The terms and conditions so established may provide for
42 proving death, avoiding or resolving any problems concerning fractional shares,
43 designating primary and contingent beneficiaries, and substituting a named
44 beneficiary’s descendants to take in the place of the named beneficiary in the event
45 of the beneficiary’s death. Substitution may be indicated by appending to the name

1 of the primary beneficiary the letters LDPS, standing for “lineal descendants per
2 stirpes.” This designation substitutes a deceased beneficiary’s descendants who
3 survive the owner for a beneficiary who fails to so survive, the descendants to be
4 identified and to share in accordance with the law of the beneficiary’s domicile at
5 the owner’s death governing inheritance by descendants of an intestate. Other
6 forms of identifying beneficiaries who are to take on one or more contingencies,
7 and rules for providing proofs and assurances needed to satisfy reasonable
8 concerns by registering entities regarding conditions and identities relevant to
9 accurate implementation of registrations in beneficiary form, may be contained in
10 a registering entity’s terms and conditions.

11 (b) The following are illustrations of registrations in beneficiary form which a
12 registering entity may authorize:

13 (1) Sole owner-sole beneficiary: John S Brown TOD (or POD) John S Brown Jr.

14 (2) Multiple owners-sole beneficiary: John S Brown Mary B Brown JT TEN
15 TOD John S Brown Jr.

16 (3) Multiple owners-primary and secondary (substituted) beneficiaries:

17 John S Brown Mary B Brown JT TEN TOD John S Brown Jr SUB BENE Peter
18 Q Brown

19 or

20 John S Brown Mary B Brown JT TEN TOD John S Brown Jr LDPS.

21 **Comment.** Section 5510 is the same as Section 10 of the Uniform TOD Security Registration
22 Act (1989). Use of “and” or “or” between the names of persons registered as co-owners is
23 unnecessary under this part and should be discouraged. If used, the two words should have the
24 same meaning insofar as concerns a title form, i.e., that of “and” to indicate that both named
25 persons own the asset.

26 Descendants of a named beneficiary who take by virtue of an “LDPS” designation appended to
27 a beneficiary’s name take as TOD beneficiaries rather than as intestate successors. If no
28 descendant of a predeceased primary beneficiary survives the owner, the security passes as part of
29 the owner’s estate as provided in Section 5507.

30 § 5511. Application of part

31 5511. This part applies to registrations of securities in beneficiary form made
32 before, on, or after January 1, 2000, by decedents dying on or after January 1,
33 2000.

34 **Comment.** Section 5511 is the same as Section 11 of the Uniform TOD Security Registration
35 Act (1989), except that it applies this part to registrations made before, “on,” or after the operative
36 date.

CONFORMING REVISIONS

37 Com. Code § 8107 (amended). Appropriate person; effectiveness of endorsement, 38 instruction, or entitlement order

39 8107. (a) “Appropriate person” means any of the following:

40 (1) With respect to an endorsement, the person specified by a security certificate
41 or by an effective special endorsement to be entitled to the security.

1 (2) With respect to an instruction, the registered owner of an uncertificated
2 security.

3 (3) With respect to an entitlement order, the entitlement holder.

4 (4) If the person designated in paragraph (1), (2), or (3) is deceased, the
5 designated person's successor taking under other law or the designated person's
6 personal representative acting for the estate of the decedent.

7 (5) If the person designated in paragraph (1), (2), or (3) lacks capacity, the
8 designated person's guardian, conservator, or other similar representative who has
9 power under other law to transfer the security or financial asset.

10 (6) With respect to an endorsement or an instruction, the beneficiary of a
11 security registered in beneficiary form as defined in subdivision (a) of Section
12 5501 of the Probate Code, if the beneficiary has survived the death of the
13 registered owner or all registered owners.

14 (b) An endorsement, instruction, or entitlement order is effective if it is made by
15 any of the following:

16 (1) It is made by the appropriate person.

17 (2) It is made by a person who has power under the law of agency to transfer the
18 security or financial asset on behalf of the appropriate person, including, in the
19 case of an instruction or entitlement order, a person who has control under
20 paragraph (2) of subdivision (c) or paragraph (2) of subdivision (d) of Section
21 8106.

22 (3) The appropriate person has ratified it or is otherwise precluded from
23 asserting its ineffectiveness.

24 (c) An endorsement, instruction, or entitlement order made by a representative is
25 effective even if:

26 (1) The representative has failed to comply with a controlling instrument or with
27 the law of the state having jurisdiction of the representative relationship, including
28 any law requiring the representative to obtain court approval of the transaction.

29 (2) The representative's action in making the endorsement, instruction, or
30 entitlement order or using the proceeds of the transaction is otherwise a breach of
31 duty.

32 (d) If a security is registered in the name of or specially endorsed to a person
33 described as a representative, or if a security account is maintained in the name of
34 a person described as a representative, an endorsement, instruction, or entitlement
35 order made by the person is effective even though the person is no longer serving
36 in the described capacity.

37 (e) Effectiveness of an endorsement, instruction, or entitlement order is
38 determined as of the date the endorsement, instruction, or entitlement order is
39 made, and an endorsement, instruction, or entitlement order does not become
40 ineffective by reason of any later change of circumstances.

41 **Comment.** Section 8107 is amended to add paragraph (6) to subdivision (a). This is a technical
42 amendment to make clear that a TOD beneficiary is an "appropriate person" when the beneficiary
43 has survived the registered sole owner or all the registered owners of a security registered in

- 1 beneficiary form under the Uniform TOD Security Registration Act (1989). See Prob. Code §§
 - 2 5500-5511. See also Section 8102 (“entitlement order,” “financial asset,” “endorsement,”
 - 3 “instruction,” “security,” “security certificate,” and “uncertificated security” defined).
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