

Memorandum 2007-1

2007 Legislative Program: Status of Bills

This memorandum outlines the status of the Commission’s 2007 legislative program. The staff will update this report orally at the meeting.

Two letters on the Commission’s recommendation on the *Revocable Transfer on Death (TOD) Deed* (October 2006) are attached in the Exhibit as follows:

Exhibit p.

- Valerie Merritt, Pasadena (12/6/06)1
- Charlotte K. Ito, Executive Committee of the Trusts and Estates
Section of the State Bar (12/29/06)5

Except as otherwise indicated, all statutory references in this memorandum are to the Probate Code.

RESOLUTION OF AUTHORITY

Pursuant to Government Code Section 8293, the Commission must seek legislative approval, at each regular session of the Legislature, of the calendar of topics authorized for study. The calendar must be approved by concurrent resolution.

This year, the Commission decided to request approval of three changes to its calendar:

- (1) The addition of authority to study venue statutes. This authority was requested in response to judicial commentary suggesting that the venue statutes are a “mass of cumbersome phraseology” that should be revised and clarified. See CLRC Memorandum 2006-36, pp. 17-18.
- (2) The removal of authority to study oral argument in civil procedure. That study is completed and no further action on the topic is contemplated. See *Oral Argument in Civil Procedure*, 35 Cal. L. Revision Comm’n Reports 181 (2006).
- (3) The removal of authority to study alternative dispute resolution. No action on the topic is contemplated at this time.

Any California Law Revision Commission document referred to in this memorandum can be obtained from the Commission. Recent materials can be downloaded from the Commission's website (www.clrc.ca.gov). Other materials can be obtained by contacting the Commission’s staff, through the website or otherwise.

The Commission's Assembly Member, Noreen Evans, has agreed to introduce the resolution approving our calendar of topics. However, the exact language of the resolution has not yet been determined.

The staff met informally with the staff of the Senate and Assembly Judiciary Committees to discuss the Commission's legislative program for 2007. The Senate Judiciary Committee staff requested additional information about the need for revision of the venue statutes. That information was provided and is under review.

The Assembly Judiciary Committee staff believes it would be better for the Commission to retain its authority to study alternative dispute resolution. There is no pressing need to delete the authority.

Once committee concerns have been addressed, the staff will work with Assembly Member Evans on the introduction of the resolution.

REVOCABLE TRANSFER ON DEATH DEED

In October 2006, the Commission approved its recommendation on the *Revocable Transfer on Death (TOD) Deed* (October 2006). See CLRC Minutes (October 2006), p. 19. Assembly Member Chuck DeVore will introduce a bill to implement the recommendation.

Recent developments regarding the proposed law are discussed below.

Position of the State Bar

The Commission received a letter from the Executive Committee of the Trusts and Estates Section of the State Bar ("TEXCOM"). See Exhibit p. 5.

Although some TEXCOM members have concerns about the recommendation, TEXCOM itself will not be taking any official position on the proposed law.

TEXCOM expressed appreciation to the Commission and its staff for the "exceptionally comprehensive, well-researched, and professional study of Revocable TOD Deeds." *Id.*

Judiciary Committee Concern

The staffs of both the Assembly and Senate Committees on the Judiciary independently expressed the same concern about the proposed law: that it would be too easy for a person to execute a revocable TOD deed, without having sufficient understanding of the consequences.

In particular, the statutory form would be so easy to execute, laypeople might feel comfortable using the form without the advice of counsel. That could lead to a range of unintended and undesirable consequences.

Both committees strongly advise that the statutory form language be revised to add much more robust and cautionary consumer advice. The staff has committed to working with the committees to develop language that would help consumers better understand the effect of executing a revocable TOD deed. In doing so, the staff will also consult with Assembly Member Devore's staff and representatives of the interested groups. It should be possible to bring back language for the Commission to consider at the March meeting.

Public Comment

On December 6, 2006, we received an email from Valerie Merritt, commenting on the recommendation. See Exhibit pp. 1-4. She requested that the Commission add revocable transfer on death deeds to the agenda for the December 8, 2006, meeting. It was too late to do so, but the Commission agreed to consider her email in connection with this memorandum. Issues raised in the email are discussed below.

General Definition Provisions

Ms. Merritt suggests that it would be helpful if the general definitions at the beginning of the Probate Code were adjusted to cover the terms used in the proposed law. There would then be no need to include separate definition provisions within the proposed law itself. See Exhibit p. 1. The suggestion does not raise a legal problem with the proposed law. It concerns only the organization of the law.

The staff recommends against changing the definition provisions. The inclusion of relevant definitions within the proposed law itself would be best for the many nonlawyers who are likely to read and use the proposed law.

Release of Power to Revoke

Ms. Merritt criticizes the proposed law for its failure to include any means of releasing the power to revoke a revocable TOD deed. See Exhibit pp. 1-2. Presumably, such a release would make the TOD deed irrevocable.

The Commission decided that the TOD deed should remain revocable until the transferor's death. An irrevocable instrument would arguably create some

present interest in the beneficiary. That shared interest in the property would breed litigation and add to the complexity of the proposed law.

Our aim is to provide a simple and relatively problem-free means of transferring real property on death, to be used by those whose needs are straightforward. If a transferor wants irrevocability, other instruments exist that can be used to that effect (e.g., an irrevocable trust). Or the transferor could simply execute a new deed that transfers title to the beneficiary immediately, subject to a reserved life estate. **The staff recommends against changing the proposed law with respect to the revocability of a TOD deed.**

Ms. Merritt's comments on proposed Section 5650 (in her paragraph number 6) are also aimed at implementing an option to make a revocable TOD deed irrevocable. See Exhibit p. 2. **The staff recommends against making any change to Section 5650, for the reasons discussed above.**

Standard for Capacity

Ms. Merritt argues that the standard for capacity to execute a revocable TOD deed should be the contract standard, rather than the testamentary standard. Testamentary capacity is a lower standard than contract capacity. It will therefore be harder to prove incapacity to execute a revocable TOD deed. "There is already too much elder financial abuse, and we do not want to make it more difficult to set aside deeds obtained as a result of it." See Exhibit p. 2.

The Commission considered the capacity issue at length and decided to use the testamentary standard.

A revocable TOD deed is a revocable gift, not an arm's length contractual exchange. The capacity required for a **donative** transfer of real property by deed is testamentary capacity. See, e.g., *Marback v. Marback*, 235 Cal. App. 2d 354, 356 (1965) ("The degree of mental competency requisite to sustain the validity of a deed has been held to be the same degree of competency to execute a will."). See also Restatement (Third) of Property (Wills & Don. Trans.) § 8.1 (2003) ("The capacity requirement applicable to wills ... applies to those will substitutes that are revocable and that serve to pass property to others at death while not depriving the owner of the benefit of the property during life.").

Note also, that two relatively recent Missouri cases have specifically applied the testamentary capacity standard to the execution of a revocable TOD deed. See *Allee v. Ruby Scott Sigeards Estate*, 182 S.W. 3d 772 (Mo. App. 2006); *Jolly v. Clarkson*, 157 S.W. 3d 290 (2005).

The staff recommends against applying the contract standard to the revocable TOD deed.

Time of Transfer

Ms. Merritt maintains that the proposed law is unclear as to when a transfer effected by a revocable TOD deed would take place. She then asserts that the transfer would take place at the time that the deed is executed; the beneficiary's right, though defeasible, would vest at that time. See Exhibit p. 2.

The staff disagrees. The proposed law is intended to operate like a will. It does not create any right in the beneficiary until it operates at the time of the transferor's death. This is stated expressly. See proposed Section 5650:

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

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

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

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

Proposed Section 5652 provides in part (with emphasis added): "A revocable transfer on death deed transfers all of the transferor's interest in the property to the beneficiary **on the transferor's death.**"

The *Tennant* case cited by Ms. Merritt involved a revocable lifetime transfer of property with a reserved life estate. The beneficiary's future interest, though revocable, vested at once. See *Tennant v. John Tennant Memorial Home*, 167 Cal. 570, 574, 140 P. 242 (1914). The other cases that she cites involved the time of vesting of the rights of a trust beneficiary or a joint tenant.

Those cases illustrate the sort of complexity that can result from an instrument that creates a vested future interest on execution. For example, *Estate of Murphy* (182 Cal. 740 (1920)) involved the question of what inheritance tax laws were in effect at the time that a trust beneficiary's rights vested.

The proposed law avoids all of the complications that can result when the beneficiary is given a vested right in the transferred property before the

transferor's death (e.g., disputes regarding waste, responsibility for property taxes, the rights of the beneficiary's creditors, etc.). **The staff recommends against any change in that policy.**

Tenancy in Common

A revocable TOD deed may name more than one beneficiary. If it does so, there is a presumption that the beneficiaries take as tenants in common. See proposed Section 5622(c).

Ms. Merritt correctly points out that the section does not expressly state any presumption that joint beneficiaries take in equal shares. See Exhibit p. 2. There would be no harm in adding clarifying language on that point and it might help to avoid a dispute. **The staff recommends that proposed Section 5622(c) be revised as follows, at the first opportunity:**

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

Property Tax Provision

Proposed Section 5656 makes clear that, for the purposes of property tax law, a change of ownership effected by a revocable TOD deed takes place at the time of death and not at the time of execution, recordation, or revocation of the deed.

Ms. Merritt feels that the provision is unnecessary and invites problems by stating a tax-related rule in the Probate Code, rather than in the Revenue and Taxation Code.

Her concern is reasonable. In general, it is inadvisable to divide provisions that govern a single issue between different codes. Over time, inconsistencies can develop if one section is amended without making a necessary conforming change to the related section.

However, in this instance **the staff feels that the Commission was correct to put Section 5656 where it is**. As discussed above, with respect to the placement of definitions, the proposed law is likely to be read and used by many nonlawyers. That weighs in favor of making the proposed law a self-contained whole.

The staff is also concerned that making any change to the Revenue and Taxation Code could have procedural consequences in the Legislature (e.g., a referral to the Revenue and Taxation Committees). Considering that we aren't

proposing any substantive change to existing tax law, that would complicate the process needlessly.

Ability to Create Life Estate

The proposed law would allow the use of a revocable TOD deed to grant a life estate to one person and a remainder to another. See proposed Section 5652(b).

Ms. Merritt warns of the difficulties that can result from division of an estate in this way. See Exhibit p. 3. The Commission was aware of those difficulties when it made its recommendation. The concerns are valid, but Ms. Merritt's email does not raise any new issues that would require reconsideration of the Commission's decision.

Comprehensive Review of TOD Legislation

Ms. Merritt recommends that the Commission undertake a comprehensive study of the law governing nonprobate transfers on death, on a priority basis. See Exhibit p. 3. The law governing the various nonprobate transfer instruments has developed piecemeal, and is not well coordinated.

The staff agrees that such a study would be appropriate for the Commission to undertake and is needed. However, there are many demands on the Commission's resources and such a study would require a considerable amount of work. Former Executive Secretary Nathaniel Sterling, who now serves as a Commission consultant, has indicated that he might be able to work on the project as a volunteer. The staff will bring the matter back to the Commission as part of its annual review of new topics and priorities, which traditionally takes place in the fall.

TIME LIMITS FOR DISCOVERY IN AN UNLAWFUL DETAINER CASE

This recommendation would make technical and minor substantive improvements to the law governing discovery in an unlawful detainer case. See *Time Limits for Discovery in an Unlawful Detainer Case* (October 2006). We are in the process of identifying an appropriate author for the measure.

STATUTES MADE OBSOLETE BY TRIAL COURT RESTRUCTURING

This recommendation continues the Commission's work to identify and correct statutes made obsolete as a result of trial court unification, the Lockyer-

Isenberg Trial Court Funding Act (1997 Cal. Stat. ch. 850), and the Trial Court Employment Protection and Governance Act (2000 Cal. Stat. ch. 1010). See *Statutes Made Obsolete by Trial Court Restructuring* (December 2006). We are in the process of identifying an appropriate author for the measure.

TECHNICAL AND MINOR SUBSTANTIVE STATUTORY CORRECTIONS

This recommendation would make a variety of technical and minor substantive improvements to the law generally. See *Technical and Minor Substantive Statutory Corrections*, 35 Cal. L. Revision Comm'n Reports 219 (2006). Assembly Member Jim Silva will be introducing a bill to implement this recommendation.

In working with the Office of the Legislative Counsel to prepare a bill draft for introduction, an issue arose. The deputy noted that one provision of the proposed law might have a substantive effect. If so, then the bill as a whole might violate the "single subject rule" provided in Article IV, Section 9 of the California Constitution:

A statute shall embrace but one subject, which shall be expressed in its title. If a statute embraces a subject not expressed in its title, only the part not expressed is void. ...

The staff was advised that nonsubstantive provisions can be grouped together without violating the single subject rule, but a substantive provision cannot be grouped with provisions addressing unrelated subjects, without risking violation of the single subject rule.

The suspect provision is the proposed amendment of Civil Code Section 1812.515:

1812.515. (a) Every job listing service subject to this title shall maintain a bond issued by a surety company admitted to do business in this state. The principal sum of the bond shall be ten thousand dollars (\$10,000) for each location. A copy of the bond shall be filed with the Secretary of State.

(b) The bond required by this section shall be in favor of, and payable to, the people of the State of California, and shall be conditioned that the person obtaining the bond will comply with this title and will pay all sums due any individual or group of individuals when the person or his or her representative, agent, or employee has received those sums. The bond shall be for the benefit of any person or persons damaged by any violation of this title or by fraud, dishonesty, misstatement, misrepresentation,

deceit, unlawful acts ~~of~~ or omissions, or failure to provide the services of the job listing service in performance of the contract with the jobseeker, by the job listing service or its agent, representatives, or employees while acting within the scope of their employment.

...

As a practical matter, the staff is convinced that the proposed change would simply correct a drafting error. Nonetheless, we do not want to complicate matters with respect to a bill that is intended as an omnibus collection of entirely nonsubstantive and noncontroversial corrections.

The staff instructed the deputy to omit Section 1812.515 from the draft. We will keep our eyes open for any appropriate vehicle for the provision that might come along.

Respectfully submitted,

Brian Hebert
Executive Secretary

Exhibit

**EMAIL FROM VALERIE MERRITT
(DEC. 6, 2006)**

From: "Valerie J. Merritt" <valerie@cmdrlaw.com>
Date: December 6, 2006 11:51:57 AM PST
To: sterling@clrc.ca.gov
Cc: "James R. Birnberg" <jbirnberg@OCLSLAW.COM>
Subject: COMMENTS ON STUDY L-3032 – TRANSFER ON DEATH
(BENEFICIARY) DEEDS

Dear Nat,

Jim Birnberg and I have gone over the Tentative Recommendation on Revocable Transfer on Death (TOD) Deed, as modified by Memorandum 2006-38 and the minutes of the meeting of the California Law Revision Commission for October 27, 2006. While it may be a little late to comment, we are hoping our comments will result in improved proposed legislation.

1. Definitions. The definitions at the beginning of the Probate Code are unchanged in this TR. There should be revisions to Section 24 ("beneficiary") and Section 81 ("transferor") to cross-reference. A new section (e) should be added to Section 24 to address beneficiaries of TOD deeds. If the requirement of naming the beneficiary is in Section 24, it need not appear in Section 5608, although we can see the reasons for having all provisions related to TOD deeds in one place. We see no reason for Section 5616 as its definition of "Transferor" adds nothing to Section 81 when read in conjunction with Section 45, which defines "Instrument" as including deeds.

2. Release of Power to Revoke. In general, the release of the power to revoke subsequent to the execution of the TOD Deed and prior to death is not addressed in the TR. The release of the power to revoke during lifetime converts the transfer at death to a transfer effective with the release. There is no form for such a document or provision that would make it a recordable instrument. In proposed Section 5614, subsection (a) does not recognize the possibility of transfer prior to death and is therefore inaccurate. It should read "under which the transferor retains the right to revoke" instead of "effective on the death of the transferor."

3. Standard for Capacity. Proposed Section 5620 establishes the standard of capacity as that of testamentary, rather than contractual, capacity. It is more difficult to prove a lack of testamentary capacity than a lack of contractual capacity. Our section is concerned that the lower standard of testamentary capacity will make it more difficult to set aside deeds obtained by fraud or undue influence. There is already too much elder financial abuse, and we do not want to make it more difficult to set aside deeds obtained as a result of it. We ask that you revisit this issue and change the standard to that of contractual capacity. We believe the level of capacity should be the same as for any other real property transaction, not testamentary capacity. We believe that Section 5630 should also be governed by the standard for contracts or transfers of real property generally rather than that for testamentary capacity.

4. Time of Transfer. Because of the nature of the transfer instrument, there is some inherent confusion as to when the transfer takes place. The transfer takes place at the time the deed is executed, even though the beneficiary has no present interest in the transferred property. The designated beneficiary is vested at the time of the transfer, although subject to divestment if there is a revocation. The statutory scheme does not grant this vested beneficiary the usual rights of vested beneficiaries, but it does make it clear that the original transfer document (the TOD deed) is the source of the transfer. At death without revocation, the beneficiary may claim title based on that TOD deed. There is no subsequent transfer document. This is why capacity at the time of signing the deed is important. For some cases that address the issue of when the interests are created, look to the Tennant case, cited in the TR, *Gray v. Union Trust Co*, 171 Cal. 637 (1915); *Estate of Murphy*, 182 Cal. 740 (1920); *Estate of Guernsey*, 177 Cal.211 (1918); and *Estate of Darby*, 93 Cal.App.2d 96 (1949).

5. Technical Problem in Proposed Section 5622. In proposed Section 5622(c), there is a presumption multiple beneficiaries take as tenants in common, but there is no presumption they take in equal shares. In Section 5642, the statutory form, there is the statement (at line 4 and 5 on page 76 of the TR) that multiple beneficiaries shall take equal shares as tenants in common. We believe these two sections should be consistent. Therefore, we recommend a change to Section 5622(c) to state that the presumption is equal shares as tenants in common.

6. Effect of Transfer During Lifetime of Transferor. Proposed Section 5650 (b) and (c) are correct so far as they go. The rights of the transferee under the deed are analogous to those of a taker in default under a general power of appointment, whose interests are vested subject to divestment by exercise of the power to revoke. The first sentence of the comment to Section 5650 is wrong, as a transfer may take effect prior to death if the transferor releases the power to revoke. In fact, the comment should generally be revised to recognize this possibility.

7. Property Taxation. We believe it is dangerous to put provisions with regard to changes in ownership and real property taxation in the probate code. Proposed section 5656 is unnecessary. The subject matter is already covered in Revenue & Taxation Code Section 62(e). Having the same provisions in two locations invites the possibility one may be changed without changing the other, with the resultant need to determine which controls. It is better to keep all of the change in ownership provisions together in the Revenue and Taxation Code. Furthermore, the statement in the second sentence of the Comment is misleading: it is not the transfer “by a revocable TOD deed” that is a change of ownership, it is the termination of the right to revoke the deed (which presumably takes place at death) that is the taxable event.

8. Ability to Fractionate Between Life Estate and Remainder Interest. The Commission has specifically asked for comments on whether the owner should be allowed to use a TOD Deed to convey a life estate followed by a remainder interest. As of the October 27, 2006, meeting, it appears that the Commission has decided not to allow such fractionate transfers and to add a warning to the statutory form directing owners to consult an estate planning professional. This decision allows for a clear bright line rule applicable in all circumstances. While the co-ownership of original owner 2 with the beneficiary of original owner 1 can create potential problems, these problems also exist with more common testamentary dispositions. The rules regarding legal life estates (life estates outside trusts) are far from adequate to deal with the issues that arise now, and it is not appropriate to encourage the creation of more legal life estates.

9. Comprehensive Review of TOD Legislation. As the Commission points out, there are now multiple forms for transfers on death and they are not fully consistent with one another. We recommend that the Commission make it a priority to review all of these statutes and the bringing of uniformity to them to the extent possible.

We are concerned that this TR is considered to be ready to submit to the legislature where there are still serious issues to address. We ask that it be added to the Agenda for your next meeting on December 8, 2006.

Sincerely,
Valerie J. Merritt

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TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

TO: Brian Hebert, CLRC Executive Secretary (By E-Mail bhebert@clrc.ca.gov)

FROM: Charlotte K. Ito
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Date: December 29, 2006

Re: Follow-up -- Revocable Transfer on Death (TOD) Deeds

At the October 27, 2006 meeting, CLRC Staff observed that the Trusts & Estates Section of the State Bar of California ("TEXCOM") had not taken a position on the Revocable TOD Deed proposal and inquired whether TEXCOM intended to do so. This question was communicated to TEXCOM at its November 11, 2006 meeting, during which many members voiced concerns about the Revocable TOD Deed proposal. TEXCOM voted 23-1 to take no overall position on the Tentative Recommendation.

TEXCOM expressed its appreciation to the Commission and Staff for the exceptionally comprehensive, well-researched, and professional study of Revocable TOD Deeds.

cc: By E-Mail:
John A. Hartog, Chair, State Bar Trusts & Estates Exec Comm (jahartog@calteclaw.com)
Peter Stern, Vice-Chair, State Bar Trusts & Estates Exec Comm (psstern1939@aol.com)
James B. MacDonald, Chair, Estate Planning Subcommittee of the State Bar Trusts & Estates Exec Comm (jbm@bmo-law.com)