

Memorandum 2006-38

**Beneficiary Deeds  
(Comments on Tentative Recommendation)**

The memorandum reviews comments received on the Commission’s tentative recommendation on *Revocable Transfer on Death (TOD) Deed (August 2006)*. Our objective is to make whatever changes appear warranted in light of the comments before finalizing a report to the Legislature on this matter. The Commission’s statutory mandate is to submit a report by January 1, 2007.

The following materials are attached to this memorandum.

	<i>Exhibit p.</i>
• Sarah Shena, Kings/Tulare Area Agency on Aging (8/29/06) . . . . .	1
• Alice Doxey, Laguna Woods (8/29/06) . . . . .	2
• James R. Birnberg, Encino (8/29/06) . . . . .	3
• Richard Hicks (9/1/06) . . . . .	4
• Carolyn Richards Tulberg, Ventura (9/4/06) . . . . .	5
• Joan B. Lee, Gray Panthers California (9/5/06) . . . . .	6
• Joseph A. Montoya, Sacramento (9/5/06) . . . . .	7
• Robert Lee Felts, Visalia (9/6/06) . . . . .	8
• Mary Pat Toups, Laguna Woods (9/9/06), (9/22/06) . . . . .	9
• Charles A. Collier, Jr., Los Angeles (9/27/06) . . . . .	11
• Edward H. Stone, Irvine (9/28/06) . . . . .	13
• John A. Cape, Grass Valley (9/29/06) . . . . .	15
• Peter H. Pickslay, La Mesa (10/2/06) . . . . .	20
• James A. Giblin, Pleasant Hill (10/4/06) . . . . .	21
• Kate (Benoit) Kalstein, California Judges Association (10/16/06) . . . . .	23
• Charlotte Ito, State Bar Trusts & Estates Section (10/16/06) . . . . .	25
• Petition of 83 Signatories re Revocable Transfer on Death Beneficiary Deeds (undated) . . . . .	31
• Sterling, <i>Legislative Interest in Transfer on Death Deeds Continues to Grow</i> , 27 BIFOCAL 75 (2006) . . . . .	60

The last item is simply informational. It is a brief article prepared by Law Revision Commission staff for BIFOCAL, the newsletter of the American Bar Association’s Commission on Law and Aging. The article summarizes the nature

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.

of the revocable TOD deed, state legislative activity, and some of the issues that should be considered in connection with these devices. See Exhibit pp. 60-61.

## GENERAL COMMENTS

### **Support**

The tentative recommendation was generally well received by our commenters.

Sarah Shena, of the Kings/Tulare Area Agency on Aging, believes the Commission's work on this matter is excellent. She indicates that she sees many clients who would benefit from having a TOD deed as an estate-planning option. Exhibit p. 1.

Alice Doxey, a Laguna Woods homeowner, does not comment directly on the tentative recommendation, but is supportive of the general principle. "My small estate does not warrant a Trust Fund, except for the fact I have real estate property." Exhibit p. 2.

Richard Hicks, a retired attorney, thinks this is long overdue and will be important as the baby boom generation enters maturity. Exhibit p. 4.

Carolyn Richards Tulberg, an emeritus attorney who works with the Volunteer Lawyers Services Program at the Ventura County Bar Association, has "seen how important and helpful it would be for the people who seek our help to have a simple way of transferring their real estate on death." Exhibit p. 5.

Joan B. Lee, writing on behalf of Gray Panthers California, expresses approval of the proposed legislation. She notes that it "will allow a homeowner to avoid the expenses of a Trust, and their estate to avoid the expenses of a Probate, and allow their heirs to avoid the payment of Capital Gains upon sale of the home after the Death of the homeowner." Exhibit p. 6.

Joseph A. Montoya, an emeritus attorney who works with the Senior Legal Hotline, indicates that his clients cannot afford a trust but want to save their children the cost of probate to transfer property on death. For this purpose the revocable TOD deed would accomplish what they want and need. "Of equal importance, it would give them peace of mind — a commodity they want and need, but which is not always available to them in the thickets of the law." Exhibit p. 7.

Robert Lee Felts, an emeritus attorney working in a nonprofit clinic that provides limited services to people who do not have necessary funds to retain

private counsel, serves seniors as well as others who are in this position. He supports legislation that would provide those seniors the opportunity to pass their home through a revocable transfer-on death deed. Exhibit p. 8.

Mary Pat Toups, of Laguna Woods, appreciates the job the Commission is doing on the study. Exhibit p. 9. She supports the tentative recommendation and will support the final recommendation because of the quality of work involved. Exhibit p. 10.

Chuck Collier is a past Chair of the Executive Committee of the State Bar Trusts & Estates Section and for many years served on the Joint Editorial Board for Uniform Trust and Estate Acts. He supports enactment of the proposal, observing that it “is very complete and reflects a great deal of consideration” by the Commission. Exhibit p. 12. He also notes that the National Conference of Commissioners on Uniform State Laws has decided to draft uniform legislation on this subject, which suggests approval of the concept.

Edward H. Stone’s practice involves probate and trust litigation and estates that require complicated tax planning. “I believe in this legislation.” Exhibit p. 13.

John A. Cape, of Grass Valley, strongly supports the creation of a TOD statute for real property. Exhibit p. 15.

Peter H. Picksley is an emeritus attorney who works pro-bono for the elderly. He approves of the work the Commission has done, and his clients “are very much in favor of the TOD.” Exhibit p. 20.

James A. Giblin is an emeritus attorney who volunteers legal services on behalf of Contra Costa Senior Legal Services at several senior centers in Contra Costa County. He fully supports the proposed legislation and compliments the Commission “for the thorough and balanced analysis of the transfer of real property rights in California as well as the Commission's guidance and rationale for proposed Revocable TOD Deed legislation.” Exhibit p. 21.

The petition signatories (Exhibit pp. 31-59) request that the Commission recommend enactment of a revocable TOD deed law, although they do not speak to the specifics of the tentative recommendation. The petition observes that several states have such a law and that it would allow a homeowner to avoid the expenses of probate, a trust, and capital gains tax.

## **Opposition**

The California Judges Association opposes the proposed legislation. The association’s opposition is based on (1) problems it sees with the proposal as

drafted (these are analyzed below) and (2) the availability of the existing devices of “joint tenancies and conveyance of a remainder interest after a life estate”. Exhibit p. 24. The association does not address the known deficiencies of joint tenancy tenure and of the intervivos deed with reserved life estate, which are catalogued in the tentative recommendation.

#### EXPERIENCE IN OTHER JURISDICTIONS

We have heard that there is litigation in Arizona over the beneficiary deed, but we haven’t been able to find out anything further about it, including what the issue or issues under litigation might be. See Exhibit p. 3.

#### GENERAL APPROACH

Mr. Cape believes the revocable TOD deed process should be kept simple. He is concerned that if the draft statute seeks to create solutions for all potential problems or all possible disposition scenarios the law will become too complex to be used in the manner intended, i.e., by the owners of small property interests. “Those are the persons who need to avoid the complications of a trust and the cost of probate.” Exhibit p. 15.

Mr. Giblin also makes a plea for simplicity, particularly in the statutory form:

I think it is important to keep in mind that statutory TOD Deeds would be used mainly by seniors. Many will be cash-poor and some not legally literate. Often they are widowed or divorced and simply want an easy way to make sure their house goes to their children or another relative. I think the use and success of the Deeds will be directly related to having available a simple, preferably single page, permissive, single purpose Statutory Form that is easy to understand and use by seniors or those assisting them.

Exhibit p. 22.

The staff agrees with these perspectives, and urges the Commission to keep them in mind as we proceed through the issues raised concerning the tentative recommendation.

## DEFINITION OF “REVOCABLE TOD DEED”

Section 5614 defines the term “revocable transfer on death deed” to mean an instrument that makes a donative transfer of real property effective on the death of the transferor.

Jim Birnberg, of Encino, questions whether, as a technical matter, the transfer is in fact effective on death; he suggests it is effective immediately, subject to revocation. He indicates that, analytically, the TOD beneficiary has a vested interest, subject to divestment. He offers several analogies. He suggests that the definition highlight the revocability of the instrument rather than its effective date. See Exhibit p. 3.

That is an interesting viewpoint. However, we have been careful not to embrace it in this study because we have been concerned not to create any immediate rights in the TOD beneficiary. The concept that a beneficiary might have rights as the result of execution of a revocable TOD deed appears to have caused some problems in practice in other jurisdictions.

Instead, the model we have looked to is that of a will. A beneficiary named in a will has no interest whatsoever until the testator’s death, and the will is revocable until that time. We have viewed the revocable TOD deed as a will substitute.

We cannot spell out all the attributes of the revocable TOD deed in a definition. Perhaps Mr. Birnberg is right that **we should not attempt to deal with the effective date of the instrument in a definition**. The substantive provisions of the draft statute address that matter at length. The staff would revise the definition in the following manner:

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

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

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

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

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

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

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

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

## RECORDATION

### **Recordation Before Death**

The tentative recommendation requires that the revocable TOD deed be recorded before the transferor's death. Mr. Collier agrees with that requirement (Exhibit p. 11), as do Mr. Cape (Exhibit p. 15) and Mr. Giblin (Exhibit p. 22).

Mr. Cape and Mr. Giblin also agree with the Commission's position that if multiple deeds are recorded, the last executed of the recorded deeds should prevail.

### **Prompt Recordation**

The tentative recommendation solicits comment on the question whether recordation should be required within a short time after execution by the transferor, for example within 30 or 60 days after execution. Considerations include:

- Prompt recordation could help expose fraud or undue influence before the transferor dies. But it could also frustrate the transferor's desire to maintain the privacy of the disposition.
- Prompt recordation would be evidence of the transferor's intent. However, it could frustrate the intent of a transferor who desires to pass the property to the beneficiary but is physically unable to record the instrument within the required period.
- A prompt recordation requirement could invalidate an otherwise validly recorded revocable TOD deed, surprising interested persons. That could be addressed to some extent by a prominent warning on the revocable TOD deed form that the deed must be recorded within the prescribed period.
- A prompt recordation requirement could help ensure that the revocable TOD deed is in fact recorded before the transferor's death,

helping to ameliorate the problem that could occur if the transferor holds off for privacy reasons until it is too late.

#### *Public Comment*

Ms. Toups opposes a short time for recordation; recordation before death should be sufficient. "Death is a clear, bright line, which will prevent confusion if numbers of days are used." Exhibit p. 10. She points out that other states have successfully used the date of death as the determining factor.

That is also Mr. Stone's position. Recording should be allowed any time before death "to assist in flexibility and not to create problems for the public." Exhibit p. 13. This is apparently also the position of Mr. Giblin, who says that "the grantor's freedom to change their mind, their overall intent and reduction of possible fraud" are best addressed by requiring recordation "any time" before the grantor's death. Exhibit p. 22.

Mr. Cape says that imposing a deadline would add a complication that makes the process unusual and is therefore likely to be overlooked. Even with a prominent warning on the document, inadvertence can lead to failure to meet an arbitrary deadline, which would frustrate the transferor's objective and likely end in litigation among prospective takers of the property. Exhibit p. 15.

The State Bar Trusts & Estates Section thinks there is insufficient justification for a time period requirement for recordation; recordation before death should be sufficient. Exhibit p. 26.

The California Judges Association, on the other hand, believes a short time limit is necessary for a revocable TOD deed; they suggest 30 days. "A short period will permit fraud or claims of fraud to be exposed when the evidence is better available." Exhibit p. 23.

#### *Staff Evaluation*

**The staff has mixed feelings about this matter.** We like the simplicity of a "record before death" requirement. On the other hand a prompt recording requirement would serve a useful purpose. It would (1) help ensure that the transferor actually intends to pass the property under the revocable TOD deed and (2) help protect against the possibility that a disappointed beneficiary discovers an unrecorded deed among the papers of an incompetent transferor and simply records it, even though the transferor may have developed a later estate plan that does not include that beneficiary.

If the Commission were inclined to adopt a prompt recording requirement, the possibility of a stale deed being recorded, or of a transferor misunderstanding or miscalculating the time limit, or of inadvertently missing the deadline, could be controlled by precluding the recorder from accepting a stale deed for recording. For example:

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

5626. (a) A revocable transfer on death deed is not effective unless the deed is recorded within 180 days after acknowledgment and before the transferor's death. The Recorder shall not accept the deposit for record of a revocable transfer on death deed more than 180 days after acknowledgment.

...

**Comment.** Subdivision (a) of Section 5626 requires recordation of the revocable TOD deed within 180 days after acknowledgment and before the transferor's death, but does not require recordation by the transferor — an agent or other person authorized by the transferor may record the instrument. The deed is considered recorded for purposes of this section when it is deposited for record with the county recorder. See Section 5612 (“record” defined).

...

Ultimately, however, the staff likes the simplicity and understandability of requiring recording any time before death. The benefits of a prompt recording requirement for a few decedents appear on balance to be outweighed by the detriments for many transferors.

POTENTIAL FOR FRAUD

The California Judges Association is concerned about the potential fraudulent abuse of the revocable TOD deed. They visualize a situation where the transferor executes the deed but then has a change of heart and does not record it. There is no delivery requirement. The unrecorded deed could be discovered by a beneficiary who records it. The deed would have “effect without intent” by the transferor. Exhibit p. 24.

The Commission has considered this scenario. The provision of the tentative recommendation that the deed must be recorded before the transferor's death would help protect against that sort of fraud. If the Commission adopts the type of prompt recording requirement discussed above, that would be a further protection. CJA has proposed a 30 day recordation period.

Ultimately, the Commission concluded that the revocable TOD deed would be less susceptible to fraudulent abuse than some other forms of transfer, such as creation of a joint tenancy or use of another type of transfer instrument that has immediate effect. We have attempted to solicit comment on this issue from elder abuse experts within the State Bar and the California District Attorneys Association, but so far without success.

#### EFFECT OF WILL

The tentative recommendation provides that if both a revocable TOD deed and a will purport to dispose of the same property, the revocable TOD deed prevails. The California Judges Association disagrees with that rule. They note that the deed may be recorded thousands of miles from where the transferor is located, making it difficult to revoke the deed when the transferor is disposing of the estate. “The proposed legislation would permit simplicity to trump sound estate planning.” Exhibit p. 24. They suggest that the statute could provide that a subsequently executed will that mentions and disposes of the real property revokes the deed.

The Commission concluded that a will should not override a revocable TOD deed because the recorded deed is a public record on which persons — including purchasers, lenders, and title insurers — may rely. Moreover, it would be highly unusual to allow a will to override a beneficiary designation of any type, whether in a trust, insurance policy, bank account, or security registration. The concept of the “blockbuster will” has been tossed about in estate planning circles for many years, but not been embraced. The staff would not do it for this one type of instrument.

Despite the possibility of a great physical distance between the location of the transferor and the location of the property, it is not difficult to have an instrument affecting the property recorded where the property is located. The transferor is not required to record the document personally; an agent such as an attorney or title company can, and ordinarily will, do it.

**The staff would not change the rule that a recorded revocable TOD deed is an effective disposition of the property unless a revocation of the deed is recorded before the transferor’s death.**

## TRANSFER SUBJECT TO LIFE ESTATE

The tentative recommendation solicits comment on the concept of permitting a revocable TOD deed to transfer property to a beneficiary subject to an intervening life estate. The statutory form revocable TOD deed also includes an optional provision for that purpose. The tentative recommendation asks:

Should the statutory form provide for a transfer subject to a life estate? A typical transfer of this type might pass the property to the transferor's surviving spouse for life and then to the transferor's children of a former marriage. Such a transfer could cause conflict between the surviving spouse and children over matters such as maintenance of the property, waste, encumbrance of the property, and the like. Should a more complex estate planning device such as a will or trust be used, or is a revocable TOD deed adequate for that purpose?

Existing California statutes outline some of the key incidents of the life estate, which are described below.

### **Creation of Life Estate**

A life estate, as well as an estate of inheritance (a fee), is a "freehold" estate. Civ. Code §§ 761, 765. What that may signify is unclear. The life estate is of feudal origin, and ancient rites seem to be involved. "As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold; and, as no other estates were conveyed with the same solemnity, therefore no others are properly freehold estates." 2 W. Blackstone, *Commentaries on the Law of England* § 140 (5th ed. 1770).

The life estate was originally the highest estate that any person could have in a feud, since the feud was not originally hereditary. Life estates were given or conferred "by the same feudal rights and solemnities, the same investiture or livery of seisin, as fees themselves are; and they are held by fealty, if demanded, and such conventional rents and services as the lord or lessor, and his tenant or lessee, have agreed on." Blackstone, *id.* at § 167.

These days a life estate can be created by a variety of means, including deed, will, and trust. A life estate by deed, such as we are contemplating for the revocable TOD deed, has fallen into disuse. The law school paradigm of a conveyance of "Blackacre to A for life, remainder to B and his heirs" is almost unheard of. A life interest today is most commonly created by trust.

## **Possession, Maintenance, and Improvements**

A life tenant is entitled to exclusive occupancy of the property. However, the life tenant need not personally occupy the property, but may rent it out. The right to use the property includes the right to rents, issues, and profits.

It is possible to condition a life estate so that it is terminated by the life tenant's failure to reside on the premises. *Taylor v. McCowen*, 154 Cal. 798, 99 Pac. 351 (1908). In that case, presumably, a short term absence or vacation would be excused.

The owner of a life estate must keep buildings and fences in repair from ordinary waste, and must pay taxes and other annual charges, and a "just proportion" of extraordinary assessments benefiting the whole inheritance. Civ. Code § 840.

The life tenant must do nothing that would permanently diminish in value the remainder interest by neglecting to do what an ordinarily prudent person would do in preserving the person's own property. *Bliss v. Security-First Nat. Bank of Los Angeles*, 81 Cal. App. 2d 50, 183 P. 2d 312 (1947).

A life tenant has no duty to make improvements, and therefore cannot claim reimbursement from the remainder holder for an improvement that may benefit the property. Exceptions have been recognized, for example where an improvement is made under compulsion of a statute or ordinance or is necessitated by changed conditions to ensure reasonable income from unproductive or low income property. See 12 B. Witkin, *Summary of California Law*, Real Property § 27 (10th ed. 2005).

If property is encumbered by a mortgage, the life tenant is responsible for paying the interest and the holder of the remainder is responsible for paying the principal. *Boggs v. Boggs*, 63 Cal. App. 2d 576, 174 P. 2d 116 (1944). The logistics of such an arrangement are not clear.

A life tenant may encumber the property, but the encumbrance may not affect the remainder.

## **Consumption and Waste**

The owner of a life estate may use the land in the same manner as the owner of a fee simple, but "must do no act to the injury of the inheritance." Civ. Code § 818. The application of this standard in practice is a fertile source of litigation.

Not every change in the property caused or permitted by the life tenant is waste. It is not waste unless the remainder holder can prove a deleterious effect

on the property's value. For example, it is not waste to change pasture land into cultivated land if the change does not reduce the value of the land. But cutting timber is waste unless the timber is required for fuel or fencing or other agricultural operations, or is removed for the purpose of clearing the land for agricultural purposes. Removal of earth or minerals is waste unless the land was devoted to that use at the time the tenancy was created, or the removal was reasonably necessary to accomplish the purpose for which the land was demised. See Miller & Starr, *California Real Estate* § 9:22 (3d ed. 2000).

Although the cases have said that the life tenant may not consume the property so as to injure the remainder, the rule against consumption may be altered by the grantor, who may convey a life estate with power to consume the corpus. See cases cited in 12 B. Witkin, *Summary of California Law*, Real Property § 29 (10th ed. 2005). The grantor may condition the power to consume, for example, as needed for "support and maintenance," "benefit and comfort," or "use and enjoyment." Each of these limits implicates a different standard and may require litigation to resolve. See, e.g., *Hill v. Thomas*, 135 Cal. App. 2d 672, 288 P. 2d 157 (1955); *King v. Hawley*, 113 Cal. App. 2d 534, 248 P. 2d 491 (1952).

A life tenant who commits waste is liable for treble damages. Code Civ. Proc. § 732.

### **Legal Estates Principal and Income Law**

The foregoing common law principles (and their partial codification in the Civil Code) appear to overlap subsequent comprehensive statutory treatment of the subject. California enacted the Principal and Income Act of 1941 without coordinating or integrating it with the older statutes.

The 1941 Act applied to a trust as well as to a deed. The trust provisions of the 1941 Act have since been removed and relocated in the Trust Law, in the guise of the Uniform Principal and Income Act (Prob. Code § 16320 *et seq.*). The deed provisions of the 1941 Act were reenacted in 1968 as the Legal Estates Principal and Income Law (Civ. Code § 731 *et seq.*).

The Legal Estates Principal and Income Law by its terms applies to apportionment of rights between life and remainder interests in real property (as well as to apportionment between income and principal of personal property), where there is no trust. See Civ. Code §§ 731.02-731.04. The law includes special rules on (1) application of rents or income from the property, (2) treatment of animals, timber, minerals, oil and gas, and other natural resources, (3) depletion,

(4) replacement of the property, and (5) allocation of expenses, including taxes, utilities, insurance premiums, debt service, litigation costs, broker commissions, title charges, and the like. See Civ. Code §§ 731.05-731.15.

The Legal Estates Principal and Income Law has not been construed in a reported case. Presumably that is because a life estate these days is created by trust, not by deed, and is governed by trust law. Cf. Civ. Code § 731.04 (“This chapter shall govern the ascertainment of income and principle and the apportionment of receipts and expenses between tenants and remaindermen in all cases where a principal has been established without the interposition of a trust ...”)

### **Resolution of Conflicts**

Under common law principles, a remainder holder has the right to enforce the duties and obligations of a life tenant with respect to the maintenance and preservation of the property. The remainder holder may enter onto the property to determine whether waste is being committed by the life tenant. A remainder holder may bring an action for an injunction or damages against the life tenant or any other person in possession of the premises that is committing waste. The remainder holder also can redeem from the foreclosure of a lien that encumbers the interest of both the life tenant and remainder holder and, on redemption is subrogated to the rights of the lienor against the life tenant. Miller & Starr, *California Real Estate* § 9:32 (3d ed. 2000).

The Legal Estates Principal and Income Law appears to provide an alternative, should a person granting a life estate wish to avoid this sort of judicial supervision of relations between the life tenant and remainder holder. Civil Code Section 731.04 enables the grantor to specify the incidents of the life and remainder interests and also to grant discretion to the tenant or another person to direct the manner of ascertainment of income and principal and the apportionment of receipts and expenses. Moreover:

The exercise by the tenant or other designated person, of such discretionary power if in good faith and according to his best judgment, shall be conclusive, irrespective of whether it may be in accordance with the determination which the court having jurisdiction would have made.

Civ. Code § 731.04

## **Public Comment**

Ms. Toups thinks a life estate is essential to properly serve those elderly who cannot afford to pay a lawyer for a trust. Now they sign a quit claim deed or add a name to the deed, “with dire consequences” because they cannot afford to pay a lawyer for proper advice. Exhibit p. 10.

Mr. Stone likewise thinks a life estate is essential in second marriage situations to insure the surviving spouse a right to live in the improved real estate, and then after the death of both co-owners, “the proper beneficiary receives their parents’ interest.” Exhibit p. 13.

Mr. Cape believes that the most common use of the revocable TOD deed will be to pass a life estate to a surviving spouse with a full right to revoke the deed:

For instance, it is not uncommon to encounter in pro bono senior legal services work a situation where the husband dies and the surviving wife needs to be able to sell the house and move to a smaller property. She needs to have the power to revoke the entire TOD arrangement so that she can sell the house. That can be difficult if she has to obtain the approval of a beneficiary with rights that vested on the death of her husband. The spouse who is a surviving successor trustee on a simple revocable living trust commonly has the power to revoke the trust or dispose of the trust property. A surviving spouse who has executed a joint TOD deed should have the same option available.

Exhibit p. 16. He thinks the problem of taxes, insurance, waste, etc., would be covered by general law, the same as for any current life tenancy situation.

The California Judges Association believes that the life estate would be useful — “this commonly understood device would cure the joint co-owner TOD conundrum.” Exhibit p. 23.

The State Bar Trusts & Estates Section believes an intervening life estate should be permitted. They observe that, while the revocable TOD deed “may not be the most optimal way” to fractionate an interest, the legal life estate is a recognized manner of tenure; there is no reason to prohibit its creation by means of a revocable TOD deed. Exhibit pp. 25-26. The law of constructive trusts would apply in case of a dispute between the life and remainder interests.

Mr. Collier takes the opposite position. A revocable TOD deed should not allow for the creation of a life estate and remainder interest — “That should be handled by a trust.” Exhibit p. 12.

## Staff Evaluation

The staff's concern about allowing or encouraging execution of a revocable TOD deed subject to a life estate is fueled by the knowledge that these types of arrangements are often problematic. After the transferor dies it is not uncommon that animosities emerge between the transferor's surviving spouse (who continues to occupy the family home) and the transferor's children of a former marriage (whose inheritance is deferred).

The common law approach to resolving conflicts of this type requires judicial oversight. The Legal Estates Principle and Income Law perhaps offers more comprehensive and detailed rules to govern these conflicts. That law also appears to authorize a means to avoid judicial resolution of disputes by enabling the transferor to empower the life tenant, or to designate another person, with power of decision.

The staff believes that, if a transferor wishes to pass property free of probate but subject to a life estate, a trust is a preferable means to accomplish that. The transferor may spell out the proposed relationship between the parties in some detail, the trustee may supervise the arrangement, and judicial review is readily available if that proves to be necessary.

The staff believes simplicity should be the operative factor here. That factor becomes particularly compelling if we were to allow the life tenant ultimately to revoke the TOD deed. Would the beneficiary who has participated in insurance premiums, taxes, maintenance, and the like, then be entitled to reimbursement? With interest? We would be digging an ever deeper hole for users of the revocable TOD deed.

A revocable TOD transferor could arguably achieve trust-like results under the Legal Estates Principal and Income Law. However, that would require detailed conditions in the deed — for example subjecting the life estate to a residency requirement, or allowing for consumption of principal under a clear standard. A statutory form deed would not be a satisfactory vehicle for that purpose. Moreover, if such conditions were to appear in a revocable TOD deed, a title company would likely require a court order establishing rights of the parties before it would be willing to issue title insurance on a transaction affecting the property made by any of them during the term of the life estate.

We understand the impulse to allow for passage of property subject to a life estate, and understand that if we were to preclude that, the revocable TOD would become significantly less useful. **Our conclusion is that the statute**

**should not prohibit a person from drafting a revocable TOD deed that passes property to a beneficiary subject to a life estate, but the statute should not encourage it either.** And certainly the statutory form deed should not enable it; a person who wishes to use a revocable TOD deed for that purpose instead of a trust should have it professionally drafted so as to address the numerous issues that could readily arise under it.

If the Commission agrees with the staff's conclusion, we would remove the life estate option from the statutory form, but make clear in the statute that a revocable TOD deed may pass the property to a beneficiary subject to a life estate in another beneficiary.

## MULTIPLE OWNERS

### **Relations Between Co-Owners**

A major problem with the Commission's tentative recommendation is that it proposes no rules regarding treatment of a revocable TOD deed made by multiple owners of property. A joint revocable TOD deed raises issues with respect to revocability and exercise of other ownership rights during the lives of the co-owners as well as during the period between the deaths of the co-owners.

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

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

The Uniform TOD Security Registration Act, which is enacted in California, allows a security registration in beneficiary form by co-owners only if they hold

the security in some sort of survivorship form (joint tenancy, tenancy by the entirety, or community property with right of survivorship). Prob. Code § 5502. The beneficiary designation may be changed or revoked only by all then surviving owners. Prob. Code § 5506. The security passes on the death of the last to die of all co-owners. Prob. Code § 5507.

These approaches complicate ownership rights until the death of the last surviving owner, and create possible unfairness to the beneficiary of the first to die of the co-owners. An alternative would be to pass an interest to the revocable TOD beneficiary immediately on death of a co-owner, and allow revocation of the revocable TOD deed as to the surviving co-owner's interest. The effect of such a provision is that the TOD beneficiary of the first to die would become a co-owner with the surviving co-owner. That would perhaps diminish the attractiveness of the revocable TOD deed for some people.

### **Tentative Recommendation**

The tentative recommendation solicits public comment as to the appropriate consequences where co-owners jointly execute a revocable TOD deed. Alternatives mentioned in the tentative recommendation include:

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

### *Public Comment*

Mr. Collier does not believe that any of the possible solutions on which the Commission solicited comment solves all possible problems that might arise under multiple owner situations. However, he thinks the most desirable approach is the first one listed above — the interest of each co-owner passes on

the death of that co-owner, and a surviving co-owner retains a revocation right. “[E]ach co-owner added his or her share of the property to the revocable TOD deed upon its creation, and each should have the right to transfer his or her interest via a revocable TOD deed with the interests of the surviving owners remaining revocable.” Exhibit p. 12.

Mr. Cape believes that when co-owners (other than tenants in common) execute a revocable TOD deed, the property should pass to the designated beneficiary on the death of the last co-owner. If tenants in common or co-owners want a different result, they should execute separate revocable TOD deeds. He would set up the statutory form deed with passage to the co-owner as the default rule. If joint tenants or owners of CPWROS want their interest to pass to the beneficiary rather than to surviving co-owners, they should deliberately make that election. Exhibit p. 16.

The California Judges Association thinks that a joint revocable TOD deed should be operative for all interests simultaneously. They note that it is a common source of litigation that a surviving co-owner attempts to change the disposition. Therefore, after the death of the first co-owner the revocable TOD deed should become irrevocable. That would create a vested interest in the beneficiary, which could have Medi-Cal and other ramifications. Consequently, CJA concludes that a joint deed should be discouraged — “While there are other schemes that could be employed, CJA believes that it is best to keep this aspect simple and delete any provision for a joint TOD.”

The State Bar Trusts & Estates Section would give co-owners who jointly execute a revocable TOD a choice. The co-owners could have their deed either transfer the interest of each to the named beneficiary on the death of each co-owner, or the co-owners could have the property pass to the survivor of them and then to the beneficiary, in which case they could specify whether the survivor could revoke the TOD designation. Exhibit pp. 28-29. Absent an election, the default rule would be that the interest of each co-owner passes to the TOD beneficiary on the death of that co-owner. Exhibit p. 30.

The State Bar Section also believes that an individual co-owner acting alone should have a revocation right before the death of any co-owner. Notice to other co-owners of the revocation should not be necessary because the draft statute requires recordation of a revocation. Exhibit p. 30.

Ms. Toups would simply not allow a joint deed. She would require that each co-owner execute a separate revocable TOD deed for that co-owner’s interest in

the property, rather than a joint deed. Exhibit p. 10. Mr. Stone makes the same suggestion. Exhibit p. 13.

### *Staff Evaluation*

The staff believes that as a general rule, if co-owners of property join in a revocable TOD deed of the property, it is unsatisfactory to suspend passage of the property to the TOD beneficiary until the death of the last surviving co-owner. We can see nothing but complications with ownership rights during the interim, not to mention possible unfairness to beneficiaries of the first to die of the co-owners, particularly if the surviving co-owners are allowed to revoke the beneficiary designation or change beneficiaries.

Short of writing an elaborate statute that allows the parties to complicate the situation with all kinds of conditions and covenants in the TOD deed, the staff thinks we must go for simplicity here. **We would pass an interest immediately on death of a co-owner, and allow revocation as to a surviving co-owner's interest. We would also allow, but not encourage, co-owners to specify a different result, as suggested by the State Bar Section.** We would recast proposed Section 5662 to read:

#### **§ 5662. Co-owned property**

5662. If co-owners of real property join in a revocable transfer on death deed of the property, unless the deed otherwise provides:

(a) The property interest of a co-owner passes to the beneficiary on the death of that co-owner.

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

**Comment.** Section 5662 provides default rules governing a revocable TOD deed joined in by co-owners of the property. The revocation right under subdivision (b) applies before or after the death of another co-owners. The co-owners may provide a different result in the deed.

For supplemental rules applicable to property held in joint tenancy, see Section 5664. For supplemental rules applicable to community property, see Section 5666.

The effect of such a provision is that the surviving co-owner would become a tenant in common with the TOD beneficiary of the first to die. If that result is not desirable for an owner, other devices than the revocable TOD deed are available that enable development of a more sophisticated mechanism for dealing with what is basically a life estate in the survivor. The revocable TOD deed at its root

should be a simple means to transfer property at death without probate. For that purpose, the staff thinks the approach set out above does the job.

As to Ms. Toups' suggestion that a joint deed simply not be allowed — each co-owner would execute a separate revocable TOD deed for that co-owner's interest — the staff thinks that is not a bad idea. It would also be consistent with the California Judges Association's perspective. That could be effectuated by a provision along the following lines:

**§ 5662. Co-owned property**

5662. (a) A co-owner of real property may make a revocable transfer on death deed of that co-owner's interest in the property.

(b) If a co-owner makes a revocable transfer on death deed of an interest in property, the interest passes to the beneficiary on the co-owner's death.

(c) A co-owner who makes a revocable transfer on death deed of an interest in property may revoke the deed as to the interest, regardless of whether any other co-owner has made a revocable transfer on death deed of an interest in the property.

**Comment.** Section 5662 provides rules governing a revocable TOD deed executed by a co-owner of property. For supplemental rules applicable to property held in joint tenancy, see Section 5664. For supplemental rules applicable to community property, see Section 5666.

The main problem we have with such an approach is that it is silent as to what rules apply where co-owners purport to join in a revocable TOD deed. That is bound to happen despite the statute's encouragement of each owner to act alone. **We would not want to invalidate a joint deed.** We could perhaps design the statutory form so as to make it impossible (or at least awkward) for the deed to be executed by more than one person. But ultimately, why make people execute two separate instruments if we can achieve the same result with one joint instrument?

Whether joint tenancy or community property should receive differing treatment is discussed below.

**Joint Tenancy**

The tentative recommendation addresses the issue of a revocable TOD deed executed by a joint tenant. Section 5664 (joint tenancy property). It provides that the effect of such a deed is to pass the interest of the joint tenant to the TOD beneficiary on the death of the joint tenant; the interest does not pass to the surviving joint tenant by right of survivorship.

Suppose a revocable TOD deed is executed by several joint tenants acting together. Is there any reason to depart from the general principle that the share of each passes on the death of each, and that the survivor may change the TOD beneficiary or revoke the TOD deed as to the survivor's share?

There could be an enforceable agreement between the joint tenants that they will pass the property to the named beneficiary. (There could be such an agreement between tenants in common as well. If we address this issue for joint tenants, we should address it also for tenants in common). The problem is that such an agreement will not ordinarily appear of record. How will a title company learn of that agreement when it is asked to insure passage of title from the surviving joint tenant to a person who appears to be entitled as a result of a change of the beneficiary designation?

The general BFP protection written into the tentative recommendation should provide some cover for a title company:

**§ 5682. BFP protection**

5682. A person acting in good faith and for a valuable consideration with the beneficiary of a revocable transfer on death deed of real property for which an affidavit of death is recorded under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2 has the same rights and protections as the person would have if the beneficiary had been named as a distributee of the property in an order for distribution of the transferor's estate that had become final.

**Comment.** Section 5682 is drawn from Section 13203(a) (affidavit procedure for real property of small value).

In addition, **it would not hurt to augment the statute with broader third party protection.** Such a provision could be adapted from Probate Code Section 5003, which protects a "holder of property" that transfers the property pursuant to a nonprobate transfer. For example:

**§ 5684. Third party protection**

5684. (a) A third party may act in reliance on a transfer pursuant to a revocable transfer on death deed of real property, whether or not the transfer is consistent with the beneficial ownership of the property as between the transferor and other persons having an interest in the property or their successors, and whether or not the transfer is consistent with the rights of the beneficiary.

(b) Except as provided in this subdivision, no notice or other information shown to have been available to a third party affects the right of the third party to the protection provided by

subdivision (a). The protection provided by subdivision (a) does not extend to an act done after any of the following events:

(1) A contrary court order is recorded or served on the third party.

(2) A written notice of a person claiming an adverse interest in the property is recorded or served on the third party.

(c) The protection provided by this section does not affect the rights of the transferor and other persons having an interest in the property or their successors in disputes among themselves concerning the beneficial ownership of the property.

(d) The protection provided by this section is not exclusive of any protection provided the third party by any other provision of law.

(e) A person shall not record or serve notice under subdivision (b) in bad faith. If the court in an action or proceeding relating to the rights of the parties determines that a person has served or recorded notice under subdivision (b) in bad faith, the court shall award against the person the cost of the action or proceeding, including a reasonable attorney's fee, and the damages caused by the notice.

**Comment.** Section 5684 supplements the BFP protection of Section 5682. It is an adaptation of Section 5003 (holder of property that transfers the property pursuant to a nonprobate transfer on death). A third party protected by Section 5684 could include a title company that acts in reliance on transfer of property pursuant to a revocable TOD deed.

**The staff has some concern**, however, that such a provision (1) is very broad and could have unintended consequences, and (2) may be unnecessary in light of the BFP protection already included in the tentative recommendation.

### **Community Property**

General principles of California law apply to a nonprobate transfer of community property made with the joinder or written consent of both spouses. Prob. Code §§ 5010-5032. These provisions specify rules governing modification or revocation of the transfer by one spouse acting alone. The interrelation of the existing provisions is somewhat confusing (despite the fact that they were enacted on recommendation of the Commission). However, the general scheme for a joint nonprobate transfer of community property is:

(1) During the lifetimes of both spouses, either spouse acting alone may modify or revoke the transfer. The change is effective as to the interest of the spouse that makes the change, and has the effect of revoking the other spouse's joinder or consent to the nonprobate transfer. Prob. Code §§ 5023(b)(1), 5032.

However, a change by one spouse acting alone is not effective unless written notice is served on the other spouse during the other spouse's lifetime. Prob. Code § 5031.

(2) After the death of one spouse, the survivor may modify or revoke the transfer as to the survivor's interest, but that does not affect passage of the deceased spouse's interest in accordance with the terms of the transfer agreed to by the deceased spouse. Prob. Code § 5023(b)(2); 5030(c).

(3) A nonprobate transfer instrument agreed to by both spouses may expressly authorize the surviving spouse to make changes. In that case, a change by the surviving spouse is effective as to the interests of both spouses. Prob. Code § 5023(b)(3). How this works is described below.

As with other types of nonprobate transfer legislation, the foregoing rules specify property rights as between the spouses and their beneficiaries. The rules do not affect the right of a third party stakeholder of the property to transfer the property in accordance with the apparently valid terms of the nonprobate transfer instrument; the third party stakeholder is protected in making the transfer. The spouses, beneficiaries, and others who claim different rights to the property are left to thrash it out among themselves. See Prob. Code § 5012:

5012. A provision of this chapter concerning rights between a married person and the person's spouse in community property is relevant only to controversies between the person and spouse and their successors and does not affect the obligation of a holder of community property under an instrument of a type described in Section 5000 to hold, receive, or transfer the property in compliance with a provision for a nonprobate transfer on death, or the protection provided the holder by Section 5003.

This protection cannot readily be applied in the context of a revocable TOD deed. There is no third party stakeholder of real property that passes under a revocable TOD deed. There is only a title company that may issue title insurance covering the apparent passage of property to the TOD beneficiary pursuant to the deed.

The staff sees two ways to address this problem. The first is the same as that proposed for joint tenancy property — **adapt the third party stakeholder protection so it works for a revocable TOD deed**. See proposed Section 5684 (third party protection), above.

In addition, the general rules otherwise applicable to a nonprobate transfer of community property should be modified so that, **in the case of a revocable TOD**

**deed, a spousal consent to or modification or revocation of the deed is ineffective unless recorded.** The staff would substitute the following community property provision for the one in the tentative recommendation:

**§ 5666. Community property**

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

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

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

Under the rules governing a nonprobate transfer of community property, a person has the power of disposition at death of the person's interest in community property without the joinder of the person's spouse. A revocable transfer on death deed of community property joined in by both spouses is effective as to the interests of both spouses. The revocable TOD deed may be subject to subsequent modification or revocation as to the interest of each spouse. Comparable principles apply to the property of registered domestic partners under Family Code Section 297.5.

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

It should be noted that a third party that acts in reliance on apparent spousal rights under a revocable TOD deed is protected in that reliance. Section 5684 (third party protection).

## **Community Property with Right of Survivorship**

Community property with right of survivorship (CPWROS) is a hybrid. CPWROS, by agreement of the spouses, passes to the survivor by right of survivorship, in the same manner as joint tenancy. The survivorship right may be severed before the death of a spouse in the same manner as joint tenancy. Civ. Code § 682.1(a). In that case, the property becomes regular community property, one half of which may be disposed of at death by each spouse (including, if enacted, disposition by revocable TOD deed).

A joint tenant may sever a joint tenancy and make a different disposition of the joint tenant's interest in the property. Under the tentative recommendation, if a joint tenant records a revocable TOD deed, on the death of the joint tenant the property passes to the TOD beneficiary and not to the surviving joint tenant. See Section 5664.

The tentative recommendation applies the same rule to CPWROS. A revocable TOD deed of CPWROS severs the survivorship right of the surviving spouse and passes the decedent's interest to the TOD beneficiary instead. See Section 5666(b) (revocable TOD deed of CPWROS made by one spouse acting alone is governed by rules applicable to joint tenancy property).

If the survivorship right in CPWROS is terminated, what's left is regular community property. **A revocable TOD deed of the community property should be subject to the general rules governing a nonprobate transfer of community property.** The staff would make that clear in the draft:

### **§ 5668. Community property with right of survivorship**

5668. If a revocable transfer on death deed is made by an owner of community property with right of survivorship:

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

(b) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the community property with right of survivorship. The transfer is subject to Section 5666, relating to a revocable transfer on death deed of community property.

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

Subdivision (a) is consistent with Civil Code Section 682.1(a) (termination of survivorship right pursuant to same procedures by which joint tenancy may be terminated). In the case of

simultaneous death, Section 223 (joint tenants) controls; the one-half interest of each spouse passes under the revocable TOD deed or other dispositive instrument of that spouse.

On termination of the survivorship right, the property is treated as ordinary community property. A revocable TOD deed of the property is subject to the rules governing a nonprobate transfer of community property. Subdivision (b).

#### RIGHTS OF CREDITORS

The draft statute would impose personal liability on a TOD beneficiary for unsecured debts of the transferor. The liability may be enforced directly by a creditor or by the personal representative in an action requiring restitution of the property or its value to the transferor's estate. See Section 5676 (return of property to estate for benefit of creditors). The provision is drawn from a parallel one in existing law that is applicable where a decedent's successor takes real property of small value without probate. See Prob. Code § 13206.

Once TOD property has been returned to the estate, where does it stand in the hierarchy of properties that may be liquidated to satisfy the claims of creditors? The general rule on abatement (diminution of a beneficiary's interest in order to pay expenses) in a probate proceeding is set out at Probate Code Section 21402:

21402. (a) Shares of beneficiaries abate in the following order:

(1) Property not disposed of by the instrument.

(2) Residuary gifts.

(3) General gifts to persons other than the transferor's relatives.

(4) General gifts to the transferor's relatives.

(5) Specific gifts to persons other than the transferor's relatives.

(6) Specific gifts to the transferor's relatives.

(b) For purposes of this section, a "relative" of the transferor is a person to whom property would pass from the transferor under Section 6401 or 6402 (intestate succession) if the transferor died intestate and there were no other person having priority.

Presumably the abatement provision would cover TOD-deeded property that is returned to the estate, and presumably the TOD beneficiary would receive preferred treatment as the donee of a specific gift. See Prob. Code § 21117 (a "specific gift" is a transfer of specifically identified property). But this interpretation is not clear and slightly strained. **The staff thinks it would be useful to add constructional language** to the Comment to Section 5676 making

clear the legislative intent that the general abatement rule extends to property returned to the transferor's estate:

**Comment.** Section 5676 is drawn from Section 13206, relating to restoration of property to the estate by a decedent's successor who takes real property of small value under the affidavit procedure. The beneficiary of revocable TOD-deeded property that is restored to the transferor's estate under this section is the beneficiary of a specific gift for purposes of abatement under Section 21402.

Since the TOD-deeded property will receive favored treatment in the abatement process, it is quite possible that the property will not be exhausted (unless the estate is insolvent). Mr. Collier wonders what happens in that situation. "Is it provided elsewhere in the Code that to the extent all the value of the property transferred to the estate is not needed for creditors, the balance is restored to the intended beneficiary?" Exhibit p. 12.

The tentative recommendation answers this question in part. In an enforcement action to require restitution of the property, the judgment may enforce the beneficiary's liability "only to the extent necessary to protect the interests of creditors of the transferor." Section 5676(d). But this provision appears unduly narrow; it fails to address the situation where the beneficiary conveys the property to the transferor's estate voluntarily, under threat of litigation. **We would revise the draft statute to cover the voluntary return of property to the estate:**

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

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

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

(2) The restitution to the transferor's estate of the fair market value of the property if the beneficiary no longer has the property, together with (A) the net income the beneficiary received from the property prior to disposing of it and (B) interest from the date of disposition at the rate payable on a money judgment on the fair market value of the property. For the purposes of this paragraph, the "fair market value of the property" is the fair market value, determined as of the time of the disposition of the property, of the

property the beneficiary received pursuant to the revocable transfer on death deed, less the amount of any liens and encumbrances on the property at the time of the transferor's death.

(b) Subject to subdivision (c), if proceedings for the administration of the transferor's estate are commenced and a beneficiary made a significant improvement to the property received by the beneficiary pursuant to the revocable transfer on death deed, the beneficiary is liable for whichever of the following the transferor's estate elects:

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

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

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

(d) An action to enforce the liability under this section may be brought only by the personal representative of the estate of the transferor. ~~In an action to enforce the liability under this section, the court's judgment~~ Whether or not the personal representative brings an action under this section, the personal representative may enforce the liability only to the extent necessary to protect the interests of creditors of the transferor.

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

**Comment.** Section 5676 is drawn from Section 13206, relating to restoration of property to the estate by a decedent's successor who takes real property of small value under the affidavit procedure. The beneficiary of revocable TOD-deeded property that is restored to the transferor's estate under this section is the beneficiary of a specific gift for purposes of abatement under Section 21402.

Subdivision (d) makes clear that liability for restitution of property to the estate under this section is limited to satisfaction of creditor claims, regardless of whether restitution under this section is made voluntarily or pursuant to a court proceeding. Any surplus belongs to the beneficiary.

Should we make a parallel change to Probate Code Section 13206 (affidavit procedure for real property of small value), the provision from which Section 5676 is drawn? Also to Probate Code Sections 13111 (affidavit procedure for personal property in small estate) and 13562 (passage of property to surviving spouse without administration), which parallel Section 13206? **The staff would include parallel revisions in these three sections.**

#### FAMILY PROTECTION

One of the consequences of the increasing use of the nonprobate transfer as a means of disposing of property at death is that family protections, such as protection of an omitted spouse or child, do not generally apply to a nonprobate transfer. They were developed in the context of probate and largely apply to property that passes through probate.

The Commission has recognized this problem, and has noted that enabling passage of property pursuant to a revocable TOD deed would continue this trend. The Commission concluded that the problem should not be addressed by focusing on the revocable TOD deed in isolation. A global approach, involving all of the decedent's assets, is needed. The law has started in that direction, extending omitted spouse and child protection to property passing under a revocable trust. See Prob. Code § 21600. However, the law has not yet extended the family protections to other types of nonprobate transfer, such as a security registered in TOD form or a POD designation in an account in a financial institution.

The California Judges Association does not believe children are adequately protected under the tentative recommendation. "Omitted children should not be denied protection, particularly as TOD is predicated for use where the only estate is the house." Exhibit p. 24.

CJA's observation suggests to the staff a possible middle ground. There is one type of family protection that might be particularly apt for the revocable TOD deed — the probate homestead. It would be possible to make a kind of hybrid protection for minor children. If a revocable TOD deed of the family home were executed before the birth or adoption of the transferor's minor child, a probate homestead could be imposed on the family home for the minority of the child.

There are a number of obvious drawbacks to such a provision. The minor child may have been provided for in another instrument, such as a trust or by

another type of nonprobate transfer that is not before the court. Moreover, such an approach would make the TOD property subject to the probate jurisdiction of the court, rendering the passage of title pursuant to the deed uncertain.

**On balance, the staff thinks the approach of the tentative recommendation is preferable.** But this is something the Commission should consider.

#### EFFECTUATION OF TRANSFER

The revocable TOD deed transfer mechanism relies on recordation of an affidavit of death and death certificate under Probate Code Section 210. See Section 5680 (beneficiary rights and duties). However, recently enacted legislation limits the persons authorized to obtain a death certificate on request. Authorized persons include a child, parent, grandparent, grandchild, sibling, spouse, or domestic partner of the decedent. See Health & Saf. Code § 10356(c). If the TOD beneficiary is someone else, a court order will be necessary to obtain the certificate.

The death certificate statute also authorizes procurement of a death certificate by “any person or agency empowered by statute” to act on behalf of the decedent or the decedent’s estate. Health & Saf. Code §10356(c)(5). **It may be useful by statute explicitly to empower a beneficiary named in the revocable TOD deed:**

#### § 5680. Beneficiary rights and duties

5680. (a) The beneficiary may establish the fact of the transferor’s death under the procedure provided in Chapter 2 (commencing with Section 210) of Part 4 of Division 2. For the purpose of this subdivision, the beneficiary is a person empowered by statute to act on behalf of the transferor or the transferor’s estate within the meaning of Section 103526 of the Health and Safety Code.

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

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

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

**Comment.** Subdivision (a) of Section 5680 establishes that a beneficiary may record an affidavit of death of the transferor to effectuate the transfer. See Section 212 (recordation is prima facie

evidence of death to the extent it identifies real property located in the county, title to which is affected by the death). Subdivision (a) authorizes the named beneficiary to obtain a certified copy of the transferor's death certificate under Health and Safety Code Section 103525 for the purpose of effectuating the transfer by revocable TOD deed.

Subdivision (b) cross-references the duty imposed on the beneficiary to file a change of ownership statement with the country recorder or assessor within 150 days after the transferor's death. See Rev. & Tax. Code § 480.

Subdivision (c) cross-references the duty imposed on the beneficiary to give the Director of Health Services notice of the death of a transferor who has received Medi-Cal benefits. See Section 215.

Subdivision (d) is a specific application of Division 10 (commencing with Section 20100), relating to proration of taxes. The beneficiary of a nonprobate transfer, such as a revocable TOD deed, is liable for a pro rata share of estate and generation skipping transfer taxes paid by the transferor's estate. See Sections 20100 et seq. (proration of estate tax), 20200 et seq. (proration of tax on generation-skipping transfer).

A beneficiary may disclaim the property under Section 275 (disclaimer).

## CONTEST OF DEED

### *Venue*

The tentative recommendation is silent on the venue for a contest of a revocable TOD deed. The California Judges Association suggests that the statute should be explicit that a contest is brought in the county of probate. Exhibit p. 24.

Ordinarily a proceeding involving title to real property is brought in the county in which the property is located. But it appears to the staff that CJA is correct — in the case of a revocable TOD deed, the county of probate makes more sense. A probate proceeding is in the county of the decedent's domicile or, in the case of a nondomiciliary, in the county of the decedent's death or where property of the decedent is located. Prob. Code §§ 7051, 7052.

However, the statute selected to govern the contest of a revocable TOD deed appears to suggest that the superior court in which the property is located is the proper court:

853. A person having or claiming title to or an interest in the property which is the subject of the petition may, at or prior to the hearing, object to the hearing of the petition if the petition is filed in

a court which is not the proper court under any other provision of law for the trial of a civil action seeking the same relief and, if the objection is established, the court shall not grant the petition.

Prob. Code § 853.

In light of this, **the staff agrees that venue in the probate county should be made explicit.** We would revise the contest provision along these lines:

**§ 5690. Contest of transfer**

5690. (a) The transferor's personal representative or an interested person may, under Part 19 (commencing with Section 850) of Division 2, contest the validity of a transfer of property by a revocable transfer on death deed.

(b) The proper county for a contest proceeding is the proper county for proceedings concerning administration of the transferor's estate, whether or not proceedings concerning administration of the transferor's estate have been commenced at the time of the contest.

(c) On commencement of a contest proceeding, the contestant may record a lis pendens in the county in which the revocable transfer on death deed is recorded.

**Comment.** Section 5690 incorporates the procedure of Sections 850-859, relating to a conveyance or transfer of property claimed to belong to a decedent or other person. A person adversely affected by a revocable TOD deed has standing to contest the transfer. Cf. Section 48 ("interested person" defined).

Grounds for contest may include but are not limited to lack of capacity of the transferor (Section 5620), improper execution or recordation (Sections 5622-5624), invalidating cause for consent to a transfer of community property (Section 5015), and transfer to a disqualified person (Section 21350). See also Section 5696 (fraud, undue influence, duress, mistake, or other invalidating cause).

The proper county for proceedings for administration of a decedent's estate is the county of the decedent's domicile or, in the case of a nondomiciliary, the county of the decedent's death or, if the decedent died outside the state, where property of the decedent is located. Prob. Code §§ 7051, 7052.

Recordation of a lis pendens within 40 days after the transferor's death preserves remedies for the contestant. See Section 5694 (remedies).

*Statute of Limitations*

The tentative recommendation would provide that, if a contest proceeding is brought within 40 days after the transferor's death and the contest is successful, the transfer may be set aside. If brought beyond that period and a bona fide

purchaser or encumbrancer has acquired intervening rights in the property, the transfer may not be set aside. The remedy in that situation would be damages.

The California Judges Association would increase the set aside period from 40 days to six months or more. “An elder abuser can get the affidavit of death recorded and the property sold within 40 days, before a grieving family can even have a probate petition heard.” Exhibit p. 24.

The period selected by the tentative recommendation is admittedly somewhat arbitrary. The concept is to have a reasonably short period; otherwise the property will be unmarketable until the statute of limitations runs.

The 40 day period was chosen for the tentative recommendation because that is the period for taking property outside probate under most small estate collection procedures. See Prob. Code §§ 13100, 13151, 13540. However, those are not the only relevant provisions, and the affidavit procedure for real property of small value may not be exercised until six months after the decedent’s death. Prob. Code § 13200.

The staff thinks the CJA makes a good point. **We would extend the 40 day period for setting aside a transfer under a revocable TOD deed to six months.**

#### STATUTORY FORM DEED

The tentative recommendation sets out a relatively simple statutory form for a revocable TOD deed and solicits comment on the following questions:

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

or trust be used, or is a revocable TOD deed adequate for that purpose?

- Should use of the statutory form be mandatory rather than permissive? A mandatory form would help standardize usage. However a mandatory form would have to be more complex, with a greater number of options and alternatives available to the transferor, and a lengthier explanation of consequences.

### **Single Purpose v. Multiple Purpose Form**

Ms. Toups prefers an all-purpose form, “to avoid use of the wrong form.” Exhibit p. 10.

Mr. Cape also thinks one generic form is preferable, similar to the statutory will form. The all-purpose form would specify the most common combinations of circumstances. “Trying to specify multiple forms for various situations could lead to confusion and use of the wrong form.” Exhibit p. 17. He expects that once the statute is in place the forms publishers and estate practitioners will make available preprinted forms that will serve most needs, as is the case in other states.

Mr. Giblin says that to serve the more common situations he sees, seniors would prefer a shorter single purpose form that “at most” allows for multiple beneficiaries. Exhibit p. 21.

The State Bar Trusts & Estates Section thinks there should be but one single purpose statutory form, which would serve as a model form. Multiple forms would create a risk that a person could inadvertently use the wrong form. “Transferors should be encouraged to consult with legal counsel to prepare a more complex Revocable TOD Deed.” Exhibit p. 28.

The staff agrees with these comments. **A simple all-purpose statutory form, with a few basic choices, is the way to go.** A person who wants to make a more complex arrangement can have an estate planning professional custom draft it, or use a trust. We would add a simple statement to the Notice to Owner on the form that, “This form provides only a few simple options; if you wish to make a more complex transfer, you should consult an estate planning professional.”

### **Life Estate Provision**

Ms. Toups prefers that the statutory form include a life estate option. Exhibit p. 10. So does Mr. Stone. Exhibit p. 14. Mr. Cape offers draft language for the form that includes more detail than the tentative recommendation:

**Name of Survivor Entitled to Occupancy.** (Who shall be entitled to the exclusive possession, use and enjoyment of the property and the rents, issues and profits therefrom for the said survivor's life.) [optional]: \_\_\_\_\_

The foregoing Survivor shall \_\_\_\_\_, shall not \_\_\_\_\_ have the power, during the said survivor's life, to revoke this deed and receive all my(our) interest in the property described above.

Exhibit p. 19.

Mr. Giblin, on the other hand, thinks the statutory deed form should be kept simple. "Consideration of items like life estates, etc., should be handled by clearly marked alternate form(s)." Exhibit p. 21.

The staff believes that passage of property under a revocable TOD deed subject to a life estate should be discouraged, not encouraged. See discussion of "Transfer Subject to Life Estate" above. **We would eliminate this provision from the form.**

#### **Multiple Ownership Provision**

Assuming we allow co-owners jointly to execute a revocable TOD deed, Mr. Cape suggests that the statutory form should require them to designate what the consequences would be on the death of each of the co-owners. "There are so many possible combinations of the consequences that it would be inappropriate to try to set out by statute what they would be." Exhibit p. 16. For example a deed from husband and wife might convey property to their joint beneficiary:

Excepting, however, and reserving to grantors for their lives and the life of the survivor of them the exclusive possession, use and enjoyment of said property and the rents, issues and profits therefrom, and further reserving to grantors for their lives and the life of the survivor of them the right to revoke this conveyance by a deed duly acknowledged and recorded.

**The staff would keep the statutory form simple, and embody in it whatever basic default rule the Commission proposes.** For example, if the default rule is that a share of the property passes to the TOD beneficiary on the death of each co-owner, and surviving co-owners may revoke as to their shares, that should be the rule stated in the statutory form. The form should not be cluttered with options and alternatives that will make it unduly complex. A person who wants a different result should have a custom revocable TOD deed prepared.

### Predeceased Beneficiary Provision

Mr. Cape suggests that the statutory form include options in case the named beneficiary should predecease the transferor. For example, the form might offer the following choices:

**Name and share of Beneficiary:** \_\_\_\_\_  
If this beneficiary does not survive me this person's share shall:  
\_\_\_\_ Be distributed pro-rata to the other beneficiaries.  
\_\_\_\_ Pass to the heirs and assigns of this beneficiary.  
\_\_\_\_ Pass in accordance with applicable provisions of the California Probate Code.

**Name and share of Beneficiary:** \_\_\_\_\_  
If this beneficiary does not survive me this person's share shall:  
\_\_\_\_ Be distributed pro-rata to the other beneficiaries.  
\_\_\_\_ Pass to the heirs and assigns of this beneficiary.  
\_\_\_\_ Pass in accordance with applicable provisions of the California Probate Code.

Mr. Cape says that, "Usually the transferor would expect that the property would pass to the heirs of a deceased beneficiary." Exhibit p. 16. He thinks that if the statute or deed provides that it would fall back into the estate of the transferor and trigger a probate and intestate distribution then the transferor should have to deliberately elect that consequence, which would be exactly what the transferor is trying to avoid by executing the revocable TOD deed in the first place.

The staff disagrees with this analysis. To begin with, Mr. Cape's assumption is not in accord with general thinking on the subject. The Probate Code assumes that, if the transferor is silent on the matter, the transferor's ordinary wish is that property will pass to the beneficiary's heirs *only if* the beneficiary is kindred of the transferor or the transferor's spouse; otherwise the transferor's ordinary intent will be that the gift should lapse and pass to the transferor's heirs under the transferor's will or by intestate succession. That is the effect of the anti-lapse statute. Prob. Code §§ 21109, 21110.

Moreover, if a revocable TOD deed were to provide that should a named beneficiary predecease the transferor the property passes to "the heirs and assigns of the beneficiary", that transfer is going to end up in court. No title company will insure a conveyance or encumbrance by a person purporting to own the property as an heir or assign without a court order confirming ownership by that person.

The staff is not opposed in principle to providing an opportunity for the transferor in a statutory form revocable TOD deed to specify the consequences of a beneficiary predeceasing the transferor. But the Probate Code attempts to effectuate what the ordinary transferor would want in the ordinary case. **Should we complicate the statutory form deed for everyone by including options that will rarely be exercised, or should we keep it simple?** If we omit options from the statutory form, a person that wants something different from the norm wouldn't be able to use the statutory form but would instead have to make a customized deed.

### **Mandatory v. Permissive Form**

Ms. Toups prefers that the statutory form be permissive rather than mandatory. Some persons are likely to prepare their own deed, unaware that the deed is made ineffective by statute. Exhibit p. 10. Mr. Giblin believes the statutory form should be permissive, thereby enabling it to be kept simple. Exhibit p. 22.

Mr. Cape would provide that other forms are permissible if "substantially similar" to the statutory form. Exhibit p. 17. The staff would not like to see a "substantially similar" limitation on a non-statutory form. That is likely to provoke litigation by a disappointed heir. We think we will have to rely on the forms publishers and estate planners to prepare appropriate and informative forms.

**The staff agrees that the statutory form should be permissive.** It is possible that a title company will be reluctant to insure title based on a non-statutory form. But that is likely to be the consequence when someone tries to use the revocable TOD deed for something other than a straightforward transfer of property on death.

### **Form Technicalities**

A number of technicalities have been raised concerning the statutory form revocable TOD deed (Section 5642), and the statutory form for revocation of the deed (Section 5644).

#### *Parcel Number*

Mr. Collier notes that the deed form and revocation form should include a space for the assessor's parcel number. Exhibit p. 12. Mr. Cape makes the same point. Exhibit p.17.

Mr. Giblin observes that “most seniors are well aware of and can easily find their annual property tax notices which clearly shows the parcel number of their property.” Exhibit pp. 21-22. He also notes that including a space for the parcel number may help in defining the property more precisely, especially for someone assisting a senior in filling out the revocable TOD deed, or its revocation.

**The staff will incorporate a space for the assessor’s parcel number in the next draft.**

#### *Miscellaneous Formal Requirements*

Mr. Cape notes the need for directions on where to mail the deed after recording, where to send tax statements, and a block for the recorder’s use. Exhibit p. 17. (He provides us with samples, which we do not reproduce here due to formatting difficulties.) **We will incorporate that material in the next draft, formatting limitations permitting.**

Mr. Cape also suggests that the statutory form deed should advise the beneficiary to file a claim for reassessment exclusion under Revenue and Taxation Code Section 63.1, if applicable. Exhibit p. 18. **The staff agrees that this is useful and important information;** it would be a simple matter to include it.

The California Judges Association would add a warning to the statutory form that its use will not prevent the state from obtaining Medi-Cal recovery from the property. Exhibit p. 24. **The staff agrees that this is useful information,** and it would be a simple matter to include it.

Finally, Mr. Cape suggests that the statutory form deed should address the issues of a transfer tax declaration and a preliminary change of ownership report. These suggestions raise interesting issues, which are elaborated below.

#### *Transfer Tax Declaration*

A documentary transfer tax of roughly one tenth of one percent of the value of the property may be imposed by a county on a deed that transfers property “sold within the county”. Rev. & Tax. Code § 11911. The tax does not apply to a deed that purports to transfer property to a beneficiary by reason of *intervivos* gift or death. Rev. & Tax. Code § 11930.

The recorder may not record a deed that is subject to the documentary transfer tax unless the tax is paid at the time of recording. A declaration of the amount of tax due must appear on or be attached to the deed. Rev. & Tax. Code § 11933.

A revocable TOD deed would be exempt from the documentary transfer tax under these rules. Whether a declaration on the deed form is necessary showing \$0 taxes due is unclear; Mr. Cape's draft statutory form would include such a declaration. The staff thinks a declaration of that sort is probably not technically necessary under the law, but it may help avoid confusion and delay at the recorder's office. **We would add a documentary transfer tax declaration to the statutory form revocable TOD deed:** "This deed is exempt from documentary transfer tax under Rev. & Tax. Code § 11930."

#### *Preliminary Change of Ownership Report*

The property taxation laws authorize the assessor to require the filing of a "preliminary change in ownership report" concurrent with the recordation of any document effecting a change in ownership. Rev. & Tax. Code § 480.3. Recordation of a revocable TOD deed is not a change in ownership. See proposed Section 5656 (property taxation). Will the recorder be confused and refuse recordation of a revocable TOD deed unless a preliminary change of ownership report is filed? Perhaps. **We would add language to the statutory form revocable TOD deed making clear that the preliminary change of ownership report is excused:** "This deed is exempt from the preliminary change of ownership report under Rev. & Tax. Code § 480.3."

#### *Nonstatutory Form Deed*

The language proposed for the statutory form revocable TOD deed relating to the documentary transfer tax and the preliminary change of ownership report should facilitate recordation of the statutory form deed. But what about a nonstatutory form revocable TOD deed? **The staff thinks a substantive provision addressed to these points would be useful:**

#### **§ 5656. Property taxation**

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

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

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

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

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

Under subdivision (b), a change in ownership pursuant to a revocable TOD deed does not occur until the transferor's death. The TOD beneficiary is responsible for filing the change in ownership statement required by Revenue and Taxation Code Section 480. See Section 5680 (beneficiary rights and duties). Although a transfer of property by a revocable TOD deed is a change in ownership for reassessment purposes, the transfer may qualify for exclusion under the Revenue and Taxation Code, depending on the nature of the parties to the transfer. See, e.g., Rev. & Tax. Code §§ 62-63.1.

#### CONCLUSION

The staff recommends that the Commission proceed to a final recommendation on this matter, with any changes made as a result of consideration of issues at the October meeting.

Respectfully submitted,

Nathaniel Sterling  
Executive Secretary



KINGS/TULARE AREA AGENCY ON AGING  
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(559) 730-2553, (800) 321-2462, FAX (559) 737-4220  
John M. Davis, Director

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**Governing Board**

August 29, 2006

Supervisor Joe Neves, Chair  
Supervisor Phil Cox, Vice Chair  
Supervisor Tony Barba  
Supervisor Allen Ishida  
Supervisor Jim Maples

California Law Revision Commission (via email only)  
4000 Middlefield Road, Rm. D-1  
Palo Alto, CA 94303-4739

**Advisory Council**

Re: Thank You for Your Recommendation on TOD Deeds (#L-3032)

Suzann Wray, Chair  
Cheri Taylor, Vice Chair  
Mae Brixey, Secretary  
Simon Lakritz, Parliamentarian  
Loretta Costa  
Sharon DeMasters  
John Draxler  
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Sharon Lamagno  
Boyd Leavitt  
Kyle Melton  
Joy Myers  
George Patterson  
Joetta Raley  
George Shanley  
Leonard Smith  
Stan Stine  
Carla Treuting  
Don Turner  
Polly Vienna  
Stella Ybarra

To Whom It May Concern:

I would like to thank the Commission for its excellent work on this topic so far. I continue to see many clients who would benefit from having a TOD deed as an estate-planning option. They are all glad to hear that your commission is working on this now. Some have never before heard of a law being crafted that would benefit them.

My clients are generally not sophisticated enough (nor do they have enough surplus energy) to write and thank you for your work. So I am thanking you on their behalf, and on behalf of all the seniors and families who will benefit when the statute becomes law (it doesn't hurt to hope for the best).

Very truly yours,  
*Sarah Shena*  
Sarah Shena  
Attorney at Law

August 29, 2006

Law Revision Commission  
4000 Middlefield Road  
Room: D1  
Pala Alto, California 94303-4739

Regarding: AB 12  
Beneficiary Deeds

Dear Sir:

Yes, I hope this bill #AB12 meets with your approval. My small estate does not warrant a Trust Fund, except for the fact I have real estate property. Unfortunately this house has a Home Owners Association. Listed on the 'Deed' can be many names, each must pay the same annual dues as the owner. This is very expensive over the years; more so today, due to the high rate of inflation.

The other alternative, Probate, after death. The 'Will' is iffy at times regarding this matter. Thank you all for your understanding.

Very truly yours,



Alice Doxey  
799 Via Los Altos C  
Laguna Woods, CA 92637

Law Revision Commission  
RECEIVED

SEP 05 2006

File: \_\_\_\_\_

**From:** jbirnberg@OCLSLAW.COM  
**Subject:** **Revocable Transfer on Death (TOD) Deed - L-3032**  
**Date:** August 29, 2006  
**To:** sterling@clrc.ca.gov

Nat,

I posted the inquiry about Arizona litigation on the ACTEC website and only received unresponsive answers. I will try telephone calls to people I know in Phoenix and Tucson (the likely venues).

I looked at the draft language in the Tentative Recommendation and I have a problem with the definition in proposed Probate Code section 5614(a). In particular, I am not at all sure that "a revocable transfer on death deed" is "effective on the death of the transferor." I believe that such a deed is effective upon execution. *Tennant v. John Tennant Memorial Home*, 167 Cal. 540 (1914) indicates that the grant of the future interest after the death of the grantor is vested, subject to divestment by the exercise of the power to revoke. In other words, the rights of the remainder beneficiaries are the same as takers in default under a power of appointment. This is consistent with earlier cases dealing with revocable trusts and with the analysis in *Estate of Guernsey*, 177 Cal. 211 (1918) pertaining to the ownership rights of joint tenants being upon creation, not upon the death of a joint tenant. Perhaps, the definition could be "Revocable transfer on death deed" means an instrument that makes a donative transfer of real property under which the transferor retains the right to revoke the instrument until death." What do you think?

Jim

James R. Birnberg, Esq.  
Oldman, Cooley, Sallus, Gold, Birnberg & Coleman, LLP  
16133 Ventura Boulevard, Penthouse Suite A  
Encino, CA 91436-2447  
Tel: (818) 986-8080 ext. 134 Fax: (818) 789-0947  
jbirnberg@oclslaw.com

**From:** rhicks2@cox.net  
**Subject:** **Revocable Transfer-On-Death Deed**  
**Date:** September 1, 2006  
**To:** sterling@clrc.ca.gov

Dear Mr. Sterling.

I'd like to add my voice as a retired attorney to support the work of the Law Revision Commission in drafting legislation that will provide Californian's with a Revocable Transfer-On-Death Deed law. This is long over due and will certainly be important as we enter an ear of Baby Boomers moving into maturity. (Yep, they're getting old!). Thank you for your work on this important issue.

Sincerely,

Richard Hicks

**From:** c\_tulberg@yahoo.com  
**Subject:** **Revocable Transfer On Death Deed**  
**Date:** September 4, 2006  
**To:** sterling@clrc.ca.gov

Dear Mr. Sterling,

I am one of the emeritus attorneys who works with the Volunteer Lawyers Services Program at the Ventura County Bar Association. I have seen how important and helpful it would be for the people who seek our help to have a simple way of transferring their real estate on death. I am hopeful we will soon have the Revocable Transfer on Death Deed to offer as a means for them to do so. Thank you.

Sincerely yours,

Carolyn Richards Tulberg

**From:** joanblee78@lanset.com  
**Subject:** Comment - revocable transfer-on--death Deed  
**Date:** September 5, 2006  
**To:** Sterling@clrc.ca.gov

The California Law Revision Commission has published their Tentative Recommendation on the Revocable Transfer-on-Death Deed.

We understand that the Commission is soliciting "public comment".

We wish to express our approval of the proposed statute of the Commission that creates a Revocable Transfer-on-Death Deed, which will allow a homeowner to avoid the expenses of a Trust, and their estate to avoid the expenses of a Probate, and allow their heirs to avoid the payment of Capital Gains upon sale of the home after the Death of the homeowner.

Please consider our approval in any decisions you make.

Joan B. Lee  
Legislative Liaison  
Gray Panthers California  
916-332-5980  
FAX 916-332-5980  
5313 Fernwood Way  
Sacramento, CA 95841

**From:** sactojoe@ardennet.com  
**Subject:** Revocable Transfer-on-death deed  
**Date:** September 5, 2006  
**To:** sterling@clrc.ca.gov

Dear Commissioners:

In re: Revocable Transfer - on Death Deed

My name is Joseph A. Montoya. I am a Emeritus Attorney Member of the California State Bar. I volunteer with the Senior Legal Hot Line in Sacramento. We give legal advice to Senior Citizens (over 60 ) who live all over the state. The vast majority of our clients are either low income or those with too much income to qualify for free services.

One of the most frequently asked questions that I get concerns a transfer of property on death. All want to save their children the cost of probate, and none can afford a Living Trust. I always advise against making the children "Joint Tenants" – for many obvious reasons. This leaves Will and Probate.

The "Revocable Transfer – Death Deed" would be a a God send for my clients. It would accomplish what they want and need without the cost that they cannot pay. Of equal importance, it would give them peace of mind – a commodity they want and need, but which is not always available to them in the thickets of the law.

Sincerley,

Joseph A. Montoya  
Emeritus Attorney

Cc: Mary Pat Toups

**From:** rfelts61@earthlink.net  
**Subject:** Revocable Transfer-on-death deed  
**Date:** September 6, 2006  
**To:** sterling@clrc.ca.gov

Dear Mr. Sterling,

I am an emeritus attorney working in a nonprofit clinic that provides limited services to people do not have necessary funds to retain private counsel. We serve seniors as well as others who are in this position.

I join with others who have offered support to the CLRC recommendation for the passage of legislation that would provide such seniors the opportunity to pass their home through a revocable transfer-on death deed.

Thank you for including my support with that of others who have expressed this, or a similar view.

Robert Lee Felts - No. 30485

3467B Bahia Blanca West  
Laguna Woods, California  
92637

SEP 12 2006

Te.l. (949) 707-5861

Fax (949) 457-9233

File: \_\_\_\_\_ Email toupssmp@fea.net

www.TRANSFER-ON-DEATH-DEEDS.COM

Date: September 9, 2006  
To: California Law Revision Commission  
From: Mary Pat Toups, Emeritus Attorney  
Re: Revocable Transfer on Death Deed

*Mary Pat Toups*

I write to give credit to the MANDATORY State Bar of California's Trusts and Estates Section Executive Committee representatives for the fact that they tried to persuade me, during February, March, and April of 2005 that the subject addressed in AB12 Beneficiary Deeds introduced on December 6, 2004 by Assemblyman Chuck DeVore, should be referred to the California Law Revision Commission.

I was wrong, and they were right. I want this letter to be attached to the next Commission report for the October 26, 2006 meeting.

Assemblyman Chuck DeVore's Capitol Director, Jaime Huff, agreed with the state bar position, at that time, but I would not.

For two years, I had tried to work with the VOLUNTARY California Bar Association's Conference of Delegates on a Resolution, creating a CA Revocable Transfer-on-Death Deed, submitted to that group by the Orange County Bar Association. Both years the opposition of the Trust and Probate lawyers was so strong, that we withdrew the Resolution. The Trust and Probate lawyers insisted that anyone who owned a home could afford to pay a lawyer for a trust. I finally gave up on them and talked to Assemblyman Chuck DeVore.

When opposition developed to AB12, I believed the opponents were trying to defeat this concept, by referring it to a Commission they could control. I did not realize, at that time, that no group of lawyers can control this Commission.

Finally I agreed that Assemblyman Chuck DeVore should amend AB12 to send the concept to the California Law Revision Commission.

While attending every meeting of the Commission since July, 2005, I have developed great admiration for the Commission and the staff. You have done a wonderful job.

I now realize how right the state bar lawyers were in proposing that this matter be referred to the Commission. I want to publicly recognize this.

cc: Jaime Huff  
cc: Charlotte K. Ito  
cc: Craig C. Page  
cc: Larry Doyle

# MARY PAT TOUPS

EMERITUS ATTORNEY

3467B Bahia Blanca West  
Laguna Woods, California  
92637-8600

Law Revision Commission  
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Email [toupsmp@fea.net](mailto:toupsmp@fea.net)

[www.TRANSFER-ON-DEATH-DEEDS.COM](http://www.TRANSFER-ON-DEATH-DEEDS.COM)

File: \_\_\_\_\_  
Date: September 22, 2006  
To: California Law Revision Commission  
From: Mary Pat Toups  
Re: Revocable Transfer-on-Death Deed



Although I have attended all Commission meetings since July, 2005, and spoken from time to time, I decided I want the printed record to include some of my thoughts on the Revocable Transfer-on-Death Deed (RTODD). I support the Commission's TENTATIVE RECOMMENDATION Revocable Transfer on Death (TOD) Deed, August 2006.

On page 27 the Commission solicits comments on whether recordation should be required within a short time after execution. I oppose a short time for recordation. I prefer that a RTODD should be ineffective unless recorded before the transferor's death. Death is a clear, bright line, which will prevent confusion if numbers of days are used. Other states use Death of the determining factor, successfully.

On page 37 the Commission solicits comments on appropriate consequences where co-owners jointly execute a RTODD. This new RTODD will be most popular with couples, who mainly want to arrange a Life Estate for the spouse (or lover) while assuring that the issue of each owner receives the property after the death of the last to die. I believe separate deeds would be appropriate, and prevent confusion. Even if the couple did not use the Life Estate, a separate deed would be appropriate. Requiring all owners to agree to a RTODD is counter-productive to the use of this deed.

On page 46 the Commission solicits comments on a life estate and remainder interest with a RTODD. The Life Estate is essential to properly serve those elderly who cannot afford to pay a lawyer for a trust. They want their loved ones to avoid Probate, and to avoid payment of Capital Gains Taxes. Now they sign Quit Claim Deeds, or add names to their deed, with dire consequences, because they cannot afford to pay a lawyer for proper advice.

On page 76 the Commission solicits comments on the statutory form. I prefer an all-purpose form, to avoid the use of the wrong form. I prefer that the form include the Life Estate. I prefer that the statutory form be permissive, rather than mandatory, because some would decide to draft their own form without realizing that the deed they draft is ineffective.

I will support the statute this Commission recommends to the Legislature, because I appreciate the quality of work done by the Commission and the staff.

I R E L L & M A N E L L A L L P

A REGISTERED LIMITED LIABILITY LAW PARTNERSHIP  
INCLUDING PROFESSIONAL CORPORATIONS

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September 27, 2006

Law Revision Commission  
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SEP 29 2006

File: \_\_\_\_\_

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

Re: Tentative Recommendation on Revocable Transfer on Death (TOD) Deed

Dear Commissioners:

This letter responds to the Tentative Recommendation dated August 2006 and certain issues raised in that Recommendation.

The undersigned writes this in his individual capacity and not on behalf of any organization or firm with which he is currently connected. He is, however, a past Chair of the Trust & Estate Section Executive Committee, State Bar of California and for many years has served on the Joint Editorial Board, Uniform Trust and Estates Acts, in connection with Uniform Acts under the auspices of the National Conference of Commissioners on Uniform Estate Laws.

My comments are as follows:

1. The Joint Editorial Board Uniform Trust & Estate Acts has presented to the Scope and Program Committee of the National Conference of Commissioners on Uniform Estate Laws a written request that there be a uniform law drafted for the Transfer of Death deed. If approved by appropriate parties, a drafting committee will be appointed and begin working on that project. It is expected to take two to three years before being completed. Appointing a drafting committee would suggest approval of the concept of the TOD deed.
2. The concept of the Revocable TOD Deed is an appropriate one for legislation.
3. Consistent with the existing TOD legislation in other jurisdictions, which require that the TOD deed be recorded prior to the death of the grantor, California should adhere to that rule.
4. As to a situation where there are multiple owners who execute a revocable TOD deed, none of the solutions suggested on page 37, solve all possible problems that

California Law Revision  
Commission  
September 27, 2006  
Page 2

might arise under multiple owner situations. However, each co-owner added his or her share of the property to the revocable TOD deed upon its creation, and each should have the right to transfer his or her interest via a revocable TOD deed with the interests of the surviving owners remaining revocable. That is, their interest would be revocable. Alternative 1. on page 37 is a more desirable consequence.

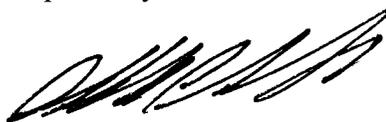
5. With reference to the issue on page 46, I believe a revocable TOD deed should not allow for the creation of a life estate and remainder interest. That should be handled by a trust.

6. At pages 75-77, for the proposed revocable transfer on death deed and a revocation of such a deed, the assessor's parcel number, which is a necessary element of recording documents should be added to each form by adding an APN number \_\_\_\_\_.

7. Is it provided elsewhere in the Code that to the extent all the value of the property transferred to the estate is not needed for creditors, the balance is restored to the intended beneficiary?

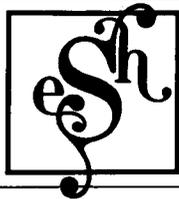
In general, the proposed statute is very complete and reflects a great deal of consideration by the Commission. I support enactment.

Respectfully submitted,



Charles A. Collier, Jr.

CAC:pr



EDWARD H. STONE  
A LAW CORPORATION

18201 Von Karman Ave., Ste. 1160 • Irvine, California 92612-1005 • (949) 833-7708 Fax (949) 833-7583

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File: \_\_\_\_\_

September 28, 2006

California Law Revision Commission  
9000 Middlefield Road  
Room D-1  
Palo Alto, CA 94303-4739

**Re: Revocable Transfer on Death (TOD) Deed**

**TO WHOM IT MAY CONCERN:**

I have been following this legislation because of my friend, Mary Pat Touns. I believe in this legislation. The majority of my practice, when I am not involved in probate and trust litigation, has been estates that require complicated tax planning.

My comments, besides believing in the legislation, are to specific questions.

**Recordation**

To assist in flexibility and not to create problems for the public, I believe a Revocable Transfer on Death Deed should allow for recording any time prior to death.

**Co-Owners**

As to husband and wife or any co-owners in granting any life estate given, I prefer separate deeds for each individual.

Also, I realize each co-owner could deed their share, but in marriages in which each party has children from a prior marriage, a life estate is essential to insure a right to live in the improved real estate and then after the death of both co-owners, the proper beneficiary receives their parents' interest.



California Law Revision Commission  
September 28, 2006  
Page Two

Form

The form as drafted should have optional language for a life estate.

Very truly yours,

EDWARD H. STONE,  
A Law Corporation

By: \_\_\_\_\_

Edward H. Stone

EHS:sg

**From:** John Cape <[jacape@lanset.com](mailto:jacape@lanset.com)>

**Date:** September 29, 2006

**Subject:** TOD DeedPproject

**To:** California Law Revision Commission Staff

The Commission staff has done great work in collecting the information on the use of revocable deeds in various jurisdictions and of drafting a proposal for a California statute. I strongly support the creation of such a Transfer on Death statute for real property.

I believe that the process should be kept as simple as possible, or the objective of creating a reasonable TOD procedure for owners of small interests in real property will not be realized. If the draft statute seeks to create solutions for all potential problems or all possible disposition scenarios the law will become too complex to be used in the manner intended, i.e., by the owners of small property interests. Those are the persons who need to avoid the complications of a trust and the cost of probate.

Property owners with large or multiple property holdings should create a detailed estate plan to minimize taxes so the TOD procedure would not normally be used by them.

In response to the Commission's requests for comments, I submit the following for your consideration:

1. Should there be a requirement that the TOD deed be recorded within a specific time after execution?

No. I do not believe there is such a requirement for any other deed. Imposing a deadline will add a complication that takes the process more "out of the ordinary" so it is likely to be overlooked. Even with a prominent warning on the document, inadvertence can easily lead to a failure to meet an arbitrary deadline. Such a failure would also frustrate the objective of the transferor and be likely to precipitate litigation between the disappointed TOD beneficiary and an heir who would claim the property under the intestacy rules.

I support the Commission's position that a TOD deed must be recorded before the transferor's death. I also believe that the last executed of the recorded deeds should prevail.

2. What should be the appropriate consequences where co-owners execute a revocable deed?

When co-owners, other than tenants in common, execute the statutory form TOD deed, the property should pass to the designated beneficiaries on the death of the last co-owner. Tenants in common and co-owners who want a different disposition should be advised to execute separate TOD deeds. The draft TOD deed should include a clause where joint tenants or owners of community property with right of survivorship must deliberately elect to have their interest pass to the TOD beneficiary rather than to the surviving co-owner. (See suggested edits of Statutory Form.)

3. Should the transferor be allowed to fractionate interests between a life estate and a remainder?

Yes. The most common use of the TOD deed will be a husband and wife where the surviving spouse should be deliberately designated on the deed form to have a life estate in the entire property and a full right to revoke the joint TOD deed.

For instance, it is not uncommon to encounter in pro bono senior legal services work a situation where the husband dies and the surviving wife needs to be able to sell the house and move to a smaller property. She needs to have the power to revoke the entire TOD arrangement so that she can sell the house. That can be difficult if she has to obtain the approval of a beneficiary with rights that vested on the death of her husband. The spouse who is a surviving successor trustee on a simple revocable living trust commonly has the power to revoke the trust or dispose of the trust property. A surviving spouse who has executed a joint TOD deed should have the same option available.

There is a problem with who will be responsible for taxes, insurance, waste, etc., during the life tenancy. I assume this is covered by existing law and would be treated the same as for any current life tenancy situation.

4. The statutory form may need to require that when co-owners jointly execute a revocable TOD deed they must designate what the consequences would be on the death of each of the co-owners. There are so many possible combinations of the consequences that it would be inappropriate to try to set out by statute what they would be. (I have attached several forms of a revocable deed that may provide some ideas on how the arrangements could be described.)

5. The statutory form should include a clause where the transferor must deliberately elect for each beneficiary how that person's interest will pass if that beneficiary predeceases the transferor. Usually the transferor would expect that the property would pass to the heirs of a deceased beneficiary. If the statute or

the deed provides that it would fall back into the estate of the transferor and trigger a probate and intestate distribution then the transferor should have to deliberately elect that consequence. (Such a consequence would likely be exactly what the transferor is trying to avoid by executing the TOD in the first place.)

6. The statute should include a single generic form similar to the statutory will form. It would include the most common combinations of circumstances and make clear that other forms that substantially conform to the TOD deed requirements would be permissible. Trying to specify multiple forms for various situations could lead to confusion and use of the wrong form. I expect that once the statute is in place the forms publishers and estate practitioners would make available preprinted forms that would serve the needs, as is the case in other states.

7. The TOD Deed and Revocation forms need to include the headings required by the Recorder as described in my note on the proposed Deed form and as shown on the attached Revocable Deed forms.

Thank you for all you work on the TOD deed project. If you have any questions or concerns about my comments please call me at 530.346.2705.

John A. Cape  
19890 Venus Ct.  
Grass Valley, CA 95949

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

*(Note to CLRC: The normal directions on where to mail the deed after recording; where to send tax statements; the Assessor's Parcel Number; the Transfer Tax Declaration and the block for the recorder's use should be at the top of the deed. This would also apply to the Deed of Revocation)*

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

**Notice to Owner(s).** This deed may have significant and unintended consequences for your estate plan; you should consult a professional before using it. This deed **MUST** be recorded before you die in order to be effective. The recorder may also require that you file a preliminary change of ownership report and a claim for reassessment exclusion described below. You may revoke this deed by recording another instrument before you die. If you hold this property in joint tenancy or as community property with right of survivorship on your death this deed, unless you designate otherwise herein, will pass your interest in the property to the beneficiary and not to the surviving joint tenant or spouse.

**Notice to Beneficiary(ies).** This deed does not transfer ownership of the property to you until the owner dies, and you acquire no rights in the property until then. The owner may revoke this deed at any time. If this deed has not been revoked, when the owner dies you should record evidence of death under Probate Code Section 210 and you must (1) file the preliminary change of ownership report required by Revenue and Taxation Code Section 480; (2) if applicable, file a claim for reassessment exclusion, R&T Section 63.1; and (3) notify the Department of Health Services if required by Probate Code Section 215. If you do not wish to receive the property, you may disclaim it under Probate Code Section 275.

**IDENTIFYING INFORMATION**

**Name of Owner:** \_\_\_\_\_

Co-Owners Who Join in this Deed: \_\_\_\_\_

**Assessor's Parcel Number** \_\_\_\_\_

**Legal description of property and city or county where located:**

\_\_\_\_\_  
\_\_\_\_\_

**Name and share of Beneficiary:** \_\_\_\_\_

If this beneficiary does not survive me this person's share shall:

\_\_\_\_\_ Be distributed pro-rata to the other beneficiaries.

\_\_\_\_\_ Pass to the heirs and assigns of this beneficiary.

\_\_\_\_\_ Pass in accordance with applicable provisions of the California Probate Code.

**Name and share of Beneficiary:** \_\_\_\_\_

If this beneficiary does not survive me this person's share shall:

- \_\_\_\_\_ Be distributed pro-rata to the other beneficiaries.
- \_\_\_\_\_ Pass to the heirs and assigns of this beneficiary.
- \_\_\_\_\_ Pass in accordance with applicable provisions of the California Probate Code.

**Name and share of Beneficiary:** \_\_\_\_\_

If this beneficiary does not survive me this person's share shall:

- \_\_\_\_\_ Be distributed pro-rata to the other beneficiaries.
- \_\_\_\_\_ Pass to the heirs and assigns of this beneficiary.
- \_\_\_\_\_ Pass in accordance with applicable provisions of the California Probate Code.

**Name of Survivor Entitled to Occupancy. (Who shall be entitled to the exclusive possession, use and enjoyment of the property and the rents, issues and profits therefrom for the said survivor's life.) [optional]:**

**The foregoing Survivor shall \_\_\_\_\_, shall not \_\_\_\_\_ have the power, during the said survivor's life, to revoke this deed and receive all my(our) interest in the property described above.**

**TRANSFER ON DEATH**

I(We) transfer all my(our) interest in the described property to the named beneficiary(ies) on my(our) death. If I(we) name more than one beneficiary, unless otherwise designated herein, the beneficiaries shall take equal shares as tenants in common. If a named beneficiary dies before me(the last survivor of us), the share that would otherwise go to that beneficiary shall, unless otherwise designated herein, pass in accordance with applicable provisions of the California Probate Code. If I(we) name a survivor entitled to occupancy property transferred on my(our) death to the named beneficiary(ies) is subject to the right of the named survivor to occupy the property for life as a life tenant.

This revocable TOD deed revokes any previous revocable TOD deed I(we) have made for the described property. This deed is revocable by me(us)at any time before my death(the death of the last survivor of us).

**SIGNATURE AND DATE**

**Signature of Owner:** \_\_\_\_\_

Signatures of Co-Owners \_\_\_\_\_

Who Join in this Deed: \_\_\_\_\_

\_\_\_\_\_

**From:** pickicelli@cox.net  
**Subject: Transfer on Death Deed**  
**Date:** October 2, 2006  
**To:** Sterling@clrc.ca.gov

I want you to know that I approve of the work the Commission has done on the Revocable Transfer on Death Deed. I am an emeritus attorney and work pro-bono for the elderly. I can assure you that my clients are very much in favor of the TOD.

Sincerely, Peter H. Picksly, Emeritus Attorney.

**From:** JGiblin123@aol.com  
**Subject: Revocable Transfer on Death (TOD) Deed**  
**Date:** October 4, 2006  
**To:** sterling@clrc.ca.gov  
**Cc:** toupsmp@fea.net

October 4, 2006

Mr. Nathaniel Sterling  
Executive Secretary of the California Law Revision Commission  
4000 Middlefield Road, Room D-One  
Palo Alto, CA 94303-4739

Re: Tentative Recommendation, Revocable Transfer on Death (TOD) Deed

Dear Mr. Sterling:

I am a California State Bar Emeritus Attorney who volunteers legal services on behalf of Contra Costa Senior Legal Services at several Senior Centers in Contra Costa County. At the invitation of Emeritus Attorney Mary Pat Toups, I have written earlier to the Commission in support of the need for a Revocable TOD Deed.

I read the August 2006 Tentative Recommendation and proposed legislation of the California Law Revision Commission and would like to compliment the CLRC for the thorough and balanced analysis of the transfer of real property rights in California as well as the Commission's guidance and rationale for proposed Revocable TOD Deed legislation. I fully support the proposed legislation.

Since the proposed legislation will be subject to fine-tuning based on comments of others before it is presented to the Legislature, I would like to add the following comments regarding content of the proposed permissive Statutory Forms for the Commission's consideration:

Single purpose form(s): To serve the more common situations I see, I think seniors would prefer a shorter, simpler single purpose form that, at most, allows for multiple beneficiaries. I think consideration of items like life estates, etc., should be handled by clearly marked alternate form(s).

Parcel number: I think it would be helpful to seniors and others if the property address portion of the of the proposed contents under proposed section 5642 (and the revocation contents of proposed section 5644) include, after "Address or Other Description of Property", a parenthetical "such as the parcel number." I think most seniors are well aware of and can easily find their annual

property tax notices which clearly shows the parcel number of their property. Also, including a space for the parcel number (perhaps labeled as optional, but recommended) may help in defining the property more precisely, especially for someone assisting a senior in filling out the Deed (or revocation form).

Recordation: I think the grantor's freedom to change their mind, their overall intent and reduction of possible fraud are better addressed by requiring that the TOD Deed be recorded any time prior to the grantor's death. Also, I agree with the Commission's suggestion that the last executed of multiple recorded deeds should prevail and best the evidence of intent.

No doubt there will be comments from others on the more complex points of the recommendation. But I think it is important to keep in mind that statutory TOD Deeds would be used mainly by seniors. Many will be cash-poor and some not legally literate. Often they are widowed or divorced and simply want an easy way to make sure their house goes to their children or another relative. I think the use and success of the Deeds will be directly related to having available a simple, preferably single page, permissive, single purpose Statutory Form that is easy to understand and use by seniors or those assisting them.

Sincerely,

James A. Giblin  
5 Sheryl Ct  
Pleasant Hill, Ca 94523



# CALIFORNIA JUDGES ASSOCIATION

*The Voice of the Judiciary*

Law Revision Commission  
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OCT 17 2006

File: \_\_\_\_\_

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October 16, 2006

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

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STANLEY S. BISSEY  
EXECUTIVE DIRECTOR

**RE: Revocable Transfer on Death Deed**

Dear Mr. Sterling:

I write to you on behalf of the California Judges Association (CJA) regarding your request for public comment on the California Law Revision Commission's tentative recommendation proposing enactment of a revocable transfer on death (TOD) deed for real property. CJA respectfully opposes the proposed legislation.

After thorough discussion by the CJA Probate and Mental Health Law Committee, we wish to share the following:

Request for Comment: *Should there be a time limit from execution within which the TOD must be filed?*

CJA strongly believes that a time limit must be set for the filing of a TOD deed. A short time limit, 30 days, is necessary so that a forgetful transferor and his estate planner will be able to discover it. A short period will permit fraud or claims of fraud to be exposed when the evidence is better available. An invalid deed can not be revoked until the secret is known.

Request for Comment: *What is the effect of co-owners jointly creating a TOD?*

CJA finds that TOD has the deceptive allure of simplicity while both owners are alive and in agreement. It is a common source of litigation that a surviving co-owner attempts to change the disposition. Therefore a joint TOD must be effective for all interests at the same time and be irrevocable on the first owner's death. This would create a present interest in the beneficiary and may have Medi-Cal and other ramifications. While there are other schemes that could be employed, CJA believes that it is best to keep this aspect simple and delete any provision for a joint TOD.

Request for Comment: *Should a transferor be allowed to fractionate his interest between a life estate and a remainder interest?*

Yes, this commonly understood device would cure the joint co-owner TOD conundrum.

Additional Comments:

- Recording is required where the property is situated, which may be thousands of miles from the transferor attempts to better dispose of his estate. The proposed legislation would permit simplicity to trump sound estate planning. CJA recommends that a subsequent will, unless it states otherwise, be sufficient to revoke a TOD. One alternative would be to provide that a subsequently executed will which mentions and disposes of the real property revokes the TOD.
- CJA does not believe that the proposed legislation adequately protects omitted children. Omitted children should not be denied protection, particularly as TOD is predicated for use where the only estate is the house.
- CJA also remains concerned about potential for fraud in these circumstances, particularly in light of the deletion of the delivery requirement. For example, a TOD signed in extremis and pocketed by the transferor, later discovered by beneficiary would have effect without intent.
- If the recommended legislation is adopted, CJA would suggest the following amendments:
  1. The recommended legislation should make explicit that a petition to set aside the TOD under Probate Code section 850 should be brought in the county of probate.
  2. The statute of limitations for the remedy of voiding the TOD, proposed section 5694, should be increased to six months or more. (An elder abuser can get the affidavit of death recorded and the property sold within 40 days, before a grieving family can even have a probate petition heard.)
  3. A warning should be added to the statutory form that use of the TOD will not prevent the State from obtaining Medi-Cal recovery from the property.

Based on the above, and in light of existing law permitting joint tenancies and conveyance of a remainder interest after a life estate, CJA respectfully opposes the proposed legislation to enact a revocable TOD deed for real property.

Sincerely,



Kate Kalstein  
Legislative Counsel



## TRUSTS & ESTATES SECTION

THE STATE BAR OF CALIFORNIA

TO: Nathaniel Sterling, CLRC Staff (By E-Mail [sterling@clrc.ca.gov](mailto:sterling@clrc.ca.gov) and Regular Mail)

FROM: Charlotte K. Ito  
Luce, Forward, Hamilton & Scripps LLP  
121 Spear Street, Suite 200  
San Francisco, CA 94105  
Phone: (415) 356-4622  
Fax: (415) 356-3893  
E-Mail: [cito@luce.com](mailto:cito@luce.com)

Date: October 16, 2006

Re: Revocable Transfer on Death Deeds – Comments Solicited by the Commission

This memorandum is prepared in response to the California Law Revision Commission Tentative Recommendation regarding the Revocable TOD Deed and comments requested therein.

### ISSUE 1

Should the transferor be statutorily authorized to fractionate the beneficial interests that pass under a Revocable TOD Deed between a life estate and remainder interest (proposed Probate Code Section 5622)?

### SECTION POSITION

Yes, the transferor should be authorized to fractionate the beneficial interests that pass under a Revocable TOD Deed between a life estate and remainder interest.

### EXECUTIVE COMMITTEE VOTE

Unanimous vote in favor of authorizing fractionation.

### ANALYSIS

Under California Civil Code Sections 731 - 749 and 761-784, a transferor is able to create a legal life estate and a remainder estate through a deed or a testamentary bequest. If the property were sold during the period of the life estate, the holder of the life estate would be required to disburse the portion of the proceeds attributable to the remainder interest to the remainder. The law of constructive trusts would apply in case of a dispute between the life and remainder interests.

Because fractionation of interests is available already, there is no reason to prohibit its application to the Revocable TOD Deed. While the Revocable TOD Deed may not be the most optimal way to fractionate an interest, that is a determination to be made by the transferor.

## **ISSUE 2**

Should recordation of a Revocable TOD Deed be required within a short time after execution by the transferor, for example, within 30 or 60 days after execution?

## **SECTION POSITION**

No, there is insufficient justification for a time period requirement for recording a Revocable TOD Deed in order for it to be effective. If a Revocable TOD Deed is the last executed deed that is recorded before a transferor's death, this document should control. Recordation before death is key.

## **EXECUTIVE COMMITTEE VOTE**

21 votes in favor of, and 3 votes in opposition to, the recommendation not to require recordation of a Revocable TOD Deed within a short time after execution.

## **ANALYSIS**

Since a Revocable TOD Deed will be used upon death and not upon delivery, there must be a mechanism to give it effect. Recordation of the document is thought to be the most reasonable way of providing this mechanism. Before analyzing whether a deadline for recording Revocable TOD Deeds should be required, consideration should be given to the purpose of recording in California, and how the recordation of a Revocable TOD Deed would fit within that framework.

Recording provides constructive notice to third parties of any interest that exists on a given piece of property before such parties purchase it for consideration. California has adopted a race-notice system of recording in which a transfer of real property is void against a subsequent third party who is a bona fide purchaser that in good faith and for valuable consideration acquires title by an instrument that is first duly recorded. Thus, California's recording statute will protect a third party purchaser of real property against another person who has an interest in the property if the purchaser in good faith had neither actual nor constructive notice of the adverse interest, and records the instrument that vests title in the purchaser before the adverse interest is recorded.

Notice is key in real property transactions and thus properly applied to the Revocable TOD Deed which is recorded to provide constructive notice to the world about the particular estate that is to be granted from the transferor to the transferee should the Revocable TOD Deed remain in effect at the transferor's death.

It seems sensible to assume that many transferors need simple, bright line rules on how to use the Revocable TOD Deed. Accordingly, the CLRC has recommended that a Revocable TOD Deed be recorded during the transferor's lifetime to be effective. In case of multiple Revocable TOD Deeds, the last Revocable TOD Deed executed by the transferor and recorded would be effective.

The arguments for requiring that the Revocable TOD Deed be recorded within a certain period after execution are:

- (a) A rule to promptly record the Revocable TOD Deed encourages transferors to promptly record, thereby promoting cleaner chains of title.
- (b) The time requirement establishes another bright line rule for effectiveness.
- (c) Prompt recordation operates as evidence of the transferor's intent.
- (d) Prompt recordation also ameliorates the confusion that may occur when a transferor has executed multiple Revocable TOD Deeds on a piece of property and the execution date and recording dates are out of order.
- (e) The sooner the Revocable TOD Deed is of public record, the sooner that a Revocable TOD Deed procured by fraud or malfeasance can be discovered. In addition, the requirement of prompt recording would bar a Revocable TOD Deed that an individual executed but later decided not to record from being subsequently recorded.

The arguments against requiring that the Revocable TOD Deed be recorded within a certain period after execution are:

- (a) The recordation deadline poses a risk primarily to the transferee. It more likely will set up a trap where someone misses the statutory period but records the Revocable TOD Deed anyway. After the transferor dies, another heir may litigate that he or she is entitled to the property because the Revocable TOD Deed had not been recorded within the statutory period. A better rule is that the Revocable TOD Deed that is executed last as to the same property should automatically revoke the prior Revocable TOD Deed.
- (b) A recording deadline creates a hurdle to effectiveness that most laypersons may not know about or understand and may unnecessarily thwart a transferor's intent. If the purpose of a Revocable TOD Deed is to provide transferors with a do-it-yourself means of transferring assets that avoid probate, the process should be as simple as possible without rules in place that may trip up an unwitting transferor.
- (c) Prompt recordation would frustrate a transferor's desire to maintain privacy of the disposition.

### **ISSUE 3**

Should there be a single all-purpose statutory form or a number of single-purpose statutory forms?

### **RECOMMENDATION**

There should be only one single purpose statutory form such as the sample form provided on Pages 75 through 76 of the Tentative Recommendation, which would serve as a model form.

### **EXECUTIVE COMMITTEE VOTE**

Unanimous vote in favor of one single purpose statutory form such as the sample form provided in the Tentative Recommendation.

### **ANALYSIS**

Instead of providing for multiple forms, the statute should provide for a simple single purpose, multiple beneficiary statutory form. Multiple forms would create a risk that a person could inadvertently use the wrong form. It is unreasonable to expect a layperson to understand the various types of distributions and options available and the consequences of selecting one over the other. Transferors should be encouraged to consult with legal counsel to prepare a more complex Revocable TOD Deed.

### **ISSUE 4**

What approach should be taken for co-owners who jointly execute a Revocable TOD Deed?

### **RECOMMENDATION**

Co-owners who jointly execute a Revocable TOD Deed should have available the options of (a) transferring the interest of each co-owner to the named beneficiary on the death of that co-owner, or (b) transferring the co-owner's interest to the surviving co-owner and then to the named beneficiary upon the death of the surviving co-owner, with the deed of the surviving co-owner being either revocable or irrevocable.

### **EXECUTIVE COMMITTEE VOTE**

23 votes in favor of and 1 vote in opposition to the recommendation that the options of (a) transferring the interest of each co-owner to the named beneficiary on the death of that co-owner, or (b) transferring the co-owner's interest to the surviving co-owner and then to the named beneficiary upon the death of the

surviving co-owner, with the deed of the surviving co-owner being either revocable or irrevocable, being made available to co-owners who jointly execute a Revocable TOD Deed.

## ANALYSIS

A married person cannot transfer property described in Probate Code Section 5000 (e.g., insurance policy, contract of employment, bond, pension plan, compensation plan, IRA) without the consent of his or her spouse. (Prob. Code §§ 5000-5032). A transfer made without spousal consent can be set aside by the Probate Court. (Prob. Code § 5021). If a married person wishes to modify the provision for a nonprobate transfer on death, the following rules apply: (Prob. Code § 5023(b))

If a married person executes a provision for a nonprobate transfer of community property on death with the written consent of the person's spouse and thereafter executes a modification of the provision for transfer of the property without written consent of the spouse, the modification is effective as to the person's interest in the community property and has the following effect on the spouse's interest in the community property:

- (1) If the person executes the modification during the spouse's lifetime, the modification revokes the spouse's previous written consent to the provision for transfer of the property.
- (2) If the person executes the modification after the spouse's death, the modification does not affect the spouse's previous written consent to the provision for transfer of the property, and the spouse's interest in the community property is subject to the nonprobate transfer on death as consented to by the spouse.
- (3) If a written expression of intent of a party in the provision for transfer of the property or in the written consent to the provision for transfer of the property authorizes the person to execute a modification after the spouse's death, the spouse's interest in the community property is deemed transferred to the married person on the spouse's death, and the modification is effective as to both the person's and the spouse's interests in the community property.

In addition, under current law, each co-owner is able to make a gift over to each other upon death and transfer to an alternate beneficiary upon the death of all co-owners (the "Co-Owner Gift-Over Provision"). Because this mechanism exists already, there is no reason to prevent its application to the Revocable TOD Deed.

The statutes for the nonprobate transfers of community property and Co-Owner Gift-Over Provisions may be applied to Revocable TOD Deed transfers. **Under this application, the default provision for the Revocable TOD Deed would lock in the deceased co-owner's interest.** For example, death severs a joint tenancy and the deceased joint tenant's interest passes to the named beneficiary at that time. The surviving joint tenant's interest would remain revocable and the surviving joint tenant's interest would not pass to the named beneficiary until the surviving joint tenant's death.

If, however, the transferor provides in the Revocable TOD Deed that the surviving co-owner can **modify** the named beneficiary, then the surviving co-owner would have the authority to do so.

#### **ISSUE 5**

Should an individual co-owner acting alone have a revocation right before the death of any co-owner, and if so, whether there should be a notification requirement, assuming recordation is required.

#### **RECOMMENDATION**

Yes, an individual co-owner acting alone should have a revocation right before the death of any co-owner, assuming recordation of the Revocable TOD Deed is required.

#### **EXECUTIVE COMMITTEE VOTE**

Unanimous in favor of an individual co-owner acting alone having a revocation right before the death of any co-owner, assuming that recordation of the Revocable TOD Deed is required.

#### **ANALYSIS**

The Revocable TOD Deed is intended to be a will substitute, so an individual co-owner should have a revocation right before the death of any co-owner. Recordation of the revocation before death would constitute proper and sufficient notice under the race notice principles. Given the protection afforded by recordation of the revocation and the absence of a notification requirement under analogous provisions, there should be no notification requirement for the revocation of the Revocable TOD Deed. This recommendation assumes that the revocation is not effective as to the surviving co-owner's interest.

cc: John A. Hartog, Chair, State Bar Trusts & Estates Exec Comm (jahartog@calteclaw.com)  
Peter Stern, Vice-Chair, State Bar Trusts & Estates Exec Comm (pstern1939@aol.com)  
James B. MacDonald, Chair, Estate Planning Subcommittee (jbm@bmo-law.com)  
Neil Horton, Chair, CLRC Subcommittee (email@laweaastbay.com)

REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED

This Petition will be mailed to the CALIFORNIA LAW REVISION COMMISSION, 4000 Middlefield Road, Room D-1, Palo Alto, CA 94303-4739.

Signers of this Petition request that the Commission recommend to the California Legislature the enactment of a new law that would allow Californians to transfer real estate to a beneficiary on the death of the property owner without probate. Several states have such a non-probate real estate transfer law.

This REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED would allow the homeowner to avoid the expenses of Probate, a Trust, and Capital Gains Taxes.

The first name is to be used as an example.

NAME	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B - Bahia Blanca West Laguna Woods, CA, 92637
2. Jean Vansteenkiste	Spotted Pony Ln L Hills CA 92653
3. Kenyon VanDegrift	2053B VIA MARIPOSA EAST, LAGUNA WOODS, CA 92637
4.	Law Revision Commission RECEIVED
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NAME	ADDRESS
1. Mary Pat Toups	3467B - Bahia Blanca West Mary Pat Toups Laguna Woods, CA, 92637
2. GEORGE W. ANDREWS	118-6 VIA ESTADOS Geo W. Andrews LAGUNA WOODS, CA 92637
3. George M. Floyd	3097C Via Serena S, Laguna Wood, CA 92637
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NAME	ADDRESS
1. Mary Pat Toups	3467B - Bahia Blanca West Laguna Woods, CA, 92637
2. Bette Bond	34,2 Calle Azul Laguna Woods, Cal. 92631
3.	
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NAME:

ADDRESS

1. Mary Pat Toups 3467 B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Elizabeth J. Brant 223-B Ada Marissa Laguna Woods, CA 92637

3. Robert A. Cunniff 24055 Paseo Del Lago #1102 Laguna Woods, CA 92637

4. Stanley J. Skiff 24055 PASEO DEL LAGO #911 LAG. WOODS CA 92637

5. Elizabeth Kubraka 24055 PASEO DEL LAGO #254 LAG. WOODS 92637

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The first name is to be used as an example.

NAME:

ADDRESS

1. Mary Pat Toups 3467B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Connie Seger 172 H ave. Mayica CA 92637  
CONNIE C. SEGER

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The first name is to be used as an example.

NAME; ADDRESS

1. Mary Pat Toups 3467B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637
2. Charlotte Brady 495-B, Calle Cediz  
Charlotte Brady Laguna Woods, Calif. 92637
3. JOANN C GLEASNER 2194-U Via Mariposa E  
Joann C Gleasner Laguna Woods, CA 92637
4. Ruth A. Scull  
Barbara J. Johnson 4004 Calle Sancerre  
Laguna Woods CA 92637
5. Barbara J. Johnson  
Laguna Woods CA 92637
6. DONNA JOHNSON 3096 Via Suenadi Unit B  
Donna Johnson Laguna Woods Ca 92637
7. John R. Andes 2405-3G Via Mariposa W.  
John R. Andes Laguna Woods, CA. 92637
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The first name is to be used as an example.

NAME:

ADDRESS

- |     | NAME:            | ADDRESS  |
|-----|------------------|--|
| 1.  | Mary Pat Toups   | 3467B - Bahia Blanca West<br>Laguna Woods, CA, 92637 |
| 2.  | Norma Jean Davis | 4/37 Avenida Sevilla unit A<br>Laguna Woods Ca 92637 |
| 3.  |                  |  |
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NAME	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Sue P. Miller Sue P. Miller	3350-P Bahia Blanca E. Laguna Woods Ca. 92637
3. Alberta J. Booth Alberta J. Booth	31423 So Coast Hwy #58 Laguna Beach, CA 92651
4. Dorothy Leight DOROTHY LEIGHT	4011-1 Calle Sanora Lag Woods AL
5. Fran Bott Fran Bott	405 B AV CASTILLA Laguna Wets 92637
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NAME ADDRESS

1. Mary Pat Toups 3467B-Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Esther Sullivan 489 Calle Cadiz L.W. 92637  
ESTHER SULLIVAN 489 CALLE CADIZ LW 92637

3. Theresa Lambden 440-A Avenida Sevilla L.W. 92637  
THERESA LAMB DEN 440-A AVENIDA SEVILLA. CA. 92637

4. Eileen B. Donohue, 3331-N Bahia Blanca E, Laguna Woods 92637  
E,ileen B Donohue, 3331-N Bahia Blanca E, Laguna Woods ca 92637

5. Robert M. Prestidge 389-B Avenida Castilla, Laguna Woods CA 92637  
Robert M. Prestidge 389-B Avenida Castilla, Laguna Woods CA 92637

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NAME	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B - Bahia Blanca West Laguna Woods, CA, 92637
2. Alfreda Dockery Alfreda Dockery	4015-3C Calle Sonora Oeste Laguna Woods, Ca 92637
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NAME:

ADDRESS

- |                   |                           |
|-------------------|---------------------------|
| 1. Mary Pat Toups | 3467B - Bahia Blanca West |
| Mary Pat Toups    | Laguna Woods, CA, 92637   |
| 2. Peggie Zuber   | 656-O Avenida Sevilla     |
| Peggie Zuber      | Laguna Woods CA 92637     |
| 3. William Zuber  | Laguna Woods, CA 92637    |
| William Zuber     | 656-O Avenida Sevilla     |

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NAME:

ADDRESS

- | NAME:             | ADDRESS  |
|-------------------|--|
| 1. Mary Pat Toups | 3467B - Bahia Blanca West<br>Laguna Woods, CA, 92637 |
| 2. JEAN ANDERSON  | LAGUNA WOODS, CA 92637                               |
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NAME	ADDRESS
1. Mary Pat Toups	3467B - Bahia Blanca West
Mary Pat Toups	Laguna Woods, CA, 92637
2. Nan Vaughan	2367 A Via Mariposa
NAN VAUGHAN	Laguna Woods CA, 92637
3. Nancy Riester	2019 W. Mariposa Unit E, Laguna Woods, Ca
	92637
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NAME	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B - Bahia Blanca West Laguna Woods, CA, 92637
2. Dorothy O. Nedel Dorothy O. Nedel	28012 Via Chocano Mission Viejo CA 92692
3. CLARK THEMLING - 162-C	MAJORCA - LAGUNA WOODS CA 92637
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NAME:

ADDRESS

1. Mary Pat Toups 3467 B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637
2. PATRICIA BATES 31631 SEA SHADOWS LAGUNA WOODS 92677  
92637
3. Rosemarie Vandendries 3496 P Monteflamoso Laguna Woods  
92637
4. Patricia A. Howard 3337 Punta Alta IF Laguna Woods  
92637
5. Bernice A. Adams 24281 Tahoe Court Laguna Woods 92677  
BERNICE A ADAMS
6. Julian B. Adams 24281 TAHOE CT Laguna Woods 92677  
JULIAN B. ADAMS
7. Anna C. Minot 86-S Calle Aragon Laguna Woods 92637
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NAME	ADDRESS
1. Mary Pat Toups	3467B - Bahia Blanca West
Mary Pat Toups	Laguna Woods, CA, 92637
2. Glenda Gribben	3013 D Via Buena Vista
GLENDIA GRIBBEN	Laguna Woods, CA 92637
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NAME	ADDRESS
1. Mary Pat Toups Mary Pat Toups	3467B-Bahia Blanca West Laguna Woods, CA, 92637
2. Lorraine Donley Lorraine Donley	2393 Via Mariposa W. Laguna Woods W 92637
3. VIOLA M. SMITH Viola M. Smith	LAGUNA WOODS 92637 5365 ALGARROBO 3-E
4. BARBARA A. MONFETTE Barbara A Monfette	3293 D San Amadeo Calif 92637
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NAME ADDRESS

1. Mary Pat Toups 3467 B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Mary Louise Wilcox 527 Calle Aragon Unit C  
Mary Louise Wilcox Laguna Woods CA 92637

3. Glennette F. Hobbs 5334 B - Rayo del Sol  
Glennette F. Hobbs Laguna Woods, CA 92637

4. Stanley C. Lynn 5557 B Rayo del Sol  
Stanley C. Lynn Laguna Woods CA 92637

5. Kathleen Bryant Trvo Maya  
KATHLEEN BRYANT Laguna Woods 92637

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NAME:

ADDRESS

- | NAME:             | ADDRESS                                |
|-------------------|--|
| 1. Mary Pat Toups | 3467B - Bahia Blanca West              |
| Mary Pat Toups    | Laguna Woods, CA, 92637                |
| 2. Dorothy Warnke | 2229 D - Via Puerta Laguna Woods 92637 |
| Dorothy Warnke    | Laguna Woods CA 92637                  |
| 3. James Warnke   | 2229 D - Via Puerte                    |
|                   | Laguna Woods CA 92637                  |

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NAME ADDRESS

1. Mary Pat Toups 3467B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. John R West J. 5510 - 1-G Paseo del Lago West  
John R West Laguna Woods Ca 92637

3. Joan A West 5510 - 1-G Paseo Del Lago - W  
Joan A West Laguna Woods Ca, 92632

4. Billy Donoske Laguna Woods, Ca 92637

5. Liz Duke Laguna Woods, Ca. 92637

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1. Mary Pat Toups 3467B-Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. ~~Moray M. Stolle~~ 60-A Calle Cortez Laguna Woods CA 92637  
Shirley Wenham 282-0 AVO CARMEL Laguna Woods CA 92637

3. Jane E Boyd 326-A Avenida Carmel Laguna Woods 92637

4. Johann Leuck 2400-1H Via Mariposa W Laguna Woods CA 92637

5. Martha Randall 2402<sup>36</sup> Via Mariposa West Laguna Woods

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# REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED

This Petition will be mailed to the CALIFORNIA LAW REVISION COMMISSION, 4000 Midlefield Road, Room D-1, Palo Alto, CA 94303-4739.

Signers of this Petition request that the Commission recommend to the California Legislature the enactment of a new law that would allow Californians to transfer real estate to a beneficiary on the death of the property owner without probate. Several states have such a non-probate real estate transfer law.

This REVOCABLE TRANSFER-ON-DEATH BENEFICIARY DEED would allow the homeowner to avoid the expenses of Probate, a Trust, and Capital Gains Taxes.

The first name is to be used as an example.

NAME ADDRESS

1. Mary Pat Toups 3467 B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. GERALD L. SCOTT 1521 Dana Pl - Orange CA 92866  
Gerald L. Scott

3. Elliott Alchajeff 3109-B 9. Via Serena, Laguna Woods, CA 92637  
E Alchajeff

4. ANN McAFEE 26802 VIA MATADOR MISSION VUEO, CA 92691  
Ann McAfee

5. Marilyn Walsh 904 A Ronda Sevilla, Laguna Woods, Ca 92637  
MARILYN WALSH

6. Shirley Patten 903-C Ronda Sevilla Laguna Woods 92637

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ADDRESS

1. Mary Pat Toups 3467B-Bahia Blanca West

Mary Pat Toups Laguna Woods, CA, 92637

2. BENICE EVANS 4008-1A CALLE SONORA O. LAGUNA Woods CA 92637

BENEVIÈVE RICHER 136 Q AVE MAJORCA LAGUNA Woods, CA 92637

3. GEORGETTE A. DAVISSON 136-Q AVE MAJORCA, LAGUNA Woods CA 92637

Georgette A. Davison Laguna Woods, Ca 92637

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1. Mary Pat Toups 3467B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. MARJORIE McFARLAND, 5523-B VIA LA NEVA LAGUNA  
WAYNE McFARLAND, ✓ ✓ 2 WOODS

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ADDRESS

1. Mary Pat Toups 3467B-Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Dorothy Wojno 3420-2A Calle Azul  
Laguna Woods, CA 92637

3. Albert Iten, CA 92677 Laguna Niguel  
ALBERT ITEN 30226 CHAPALA CT

4. Grace V. Iten 30226 Chapala Court

GRACE V. ITEN LAGUNA NIGUEL CA. 92677

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NAME:

ADDRESS

1. Mary Pat Toups 3467B - Bahia Blanca West

Mary Pat Toups Laguna Woods, CA, 92637

2. Ronile Mae Donald 40-C Calle Aragon, Laguna Woods, Ca  
92637

3. James W. Hall 4002 Calle Sonoma Unit 2E Laguna Woods,  
CA 92637

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NAME:

ADDRESS

1. Mary Pat Toups 3467B-Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Theresa Houser 851-B Roca Mendocino L.W.  
Theresa Houser

3. Patricia McCoy 791-B Via Los Altos 92637  
PATRICIA McCoy

4. Ann Hillstrom 4005 9<sup>th</sup> Calle Deana 92637  
ANN HILLSTROM

5. Jonathan Adler 2315-B V.A PUERTA, LAGUNA WOODS, CA 92637  
JONATHAN ADLER

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NAME:

ADDRESS

1. Mary Pat Toups 3467B - Bahia Blanca West

Mary Pat Toups Laguna Woods, CA, 92637

2. HAROLD WILFONG 5370-1E Punte Alta Laguna Woods, CA 92637  
Harold Wilfong

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NAME:

ADDRESS

1. Mary Pat Toups 3467B - Bahia Blanca West  
Mary Pat Toups Laguna Woods, CA, 92637

2. Anita M. Ward 23442 El Toro Rd Apt W319  
Anita M. Ward Lake Forest, Ca 92630

3. Helen Lyon 23442 El Toro Rd. Lake Forest 92630  
Helen W. Lyon

4. ~~Marion R. Kirkpatrik~~ 5370 SANTA ALTA # 1E  
MARION R. KIRKPATRICK LAGUNA WOODS CA 92637

5. Ruth M. Payne - 395D Ave Castilla, Laguna Woods  
RUTH M. PAYNE

6. WARD PAYNE - 395D AVE. CASTILLA - LAGUNA WOODS, 92637  
WARD PAYNE

7. Janet L. McLaughlin 2001-C Via Mariposa W. Laguna Woods, Ca 92637  
Janet L. McLaughlin

8. Charles E. McLaughlin 2001-C Via Mariposa W -  
Charles E McLaughlin 20 Laguna Woods, CA 92637.

9. Edith M. Grant 611-a Ave. Seville Laguna Woods, CA 92637  
Edith M. Grant

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## Bar Associations in Focus on Aging and the Law

### *State Legislative Activities*

## Legislative Interest in Transfer on Death Deeds Continues to Grow: State Efforts to Help Senior Homeowners

By Nathaniel Sterling

**Note:** The California Law Revision Commission (CLRC) has statutory responsibility to conduct substantive reviews of California statutory and decisional law and recommend legislation on needed law reforms. The California Legislature authorized the CLRC to study the revocable transfer on death deed (revocable TOD deed), or beneficiary deed as it is known in some jurisdictions, for possible adoption in California. The revocable TOD deed transfers real property to a named beneficiary on the death of the owner without probate; it is revocable until that time.

The purpose of the study is to review the experiences of the nine states that have enacted revocable TOD deed legislation, to examine associated issues in connection with a revocable TOD deed, and make recommendations regarding adoption of legislation establishing revocable TOD deeds.

The Staff Draft of Tentative Recommendations was issued in July 2006 and the CLRC is soliciting public comments on the tentative recommendations. The CLRC will report its findings to the California Legislature by January 1, 2007. This article provides a primer on revocable TOD deeds and identifies the significant legal and policy issues that must be resolved in development of legislation governing revocable TOD deeds.

—Holly Robinson, associate staff director  
ABA Commission on Law and Aging

Nine states have now enacted legislation authorizing a revocable transfer on death (TOD) deed of real property, also known as a beneficiary deed. The oldest and most complete statute is Missouri's, enacted in 1989. The newest is Wisconsin's, enacted in 2006. Other states are investigating the concept, including California and Utah. The National Conference of Commissioners on Uniform State Laws has decided to draft uniform legislation on the subject.

A property owner may use a revocable TOD deed to transfer property to a named beneficiary on the owner's death. The property passes by operation of law outside probate, much like survivorship in joint tenancy.

The revocable TOD deed offers a number of advantages over joint tenancy. It does not convey an immediate interest to the beneficiary and is therefore not subject to partition or to the beneficiary's creditors. It is revocable, enabling the transferor to make a different disposition of the property. It does not trigger an acceleration clause in a mortgage or a property tax reassessment.

It has been argued that the revocable TOD deed is preferable to an inter vivos trust in some circumstances. If the decedent's only significant asset is the family home, the revocable TOD deed provides a simple, inexpensive, understandable means of passing the property to heirs without probate.

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The ABA Health Law Section and the American Association of Homes and Services for the Aging (AAHSA) are co-sponsors of the ABA Legal Program at the **2006 AAHSA Annual Meeting, November 5-8, 2006, in San Francisco**. Sessions include:

- ◆ What's So Fair About Fair Housing Laws?
- ◆ Negotiated Risk in Assisted Living: Implications for Provider Liability
- ◆ Survey Enforcement Case Studies
- ◆ Resident Tax Issues: Maximize Benefits and Reduce Risk
- ◆ Exceptions, Appeals, and Grievances Under Medicare Part D
- ◆ The New Medicaid: Surviving and Thriving in the New World of Rebalancing

For more information, see:  
<http://am2006.expoexchange.com>.

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 NEWSLETTER OF THE AMERICAN BAR ASSOCIATION  
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## Revocable TOD Deeds

*Continued from page 75*

Unlike most forms of nonprobate transfer, including a trust, the revocable TOD deed does not rely on a third party holder of the property to effectuate the transfer. The transfer occurs by operation of law, and is dependent on the mechanism of title insurance. That could be a problem, because the title industry is apprehensive about the concept of a recorded instrument that is revocable. It must be said, however, that in jurisdictions where the title industry has expressed concern, the problems have been resolved and title insurance is now routine for property passing by revocable TOD deed.

Significant issues that must be resolved in development of legislation governing the revocable TOD deed include (1) the capacity required to execute the deed, (2) whether the deed must be recorded before the transferor's death in order to be effective, (3) the effect of multiple deeds executed for the same property, (4) the effect of the deed on property titled in joint tenancy, (5) whether a will may override the deed, (6) the means of challenging a deed believed to have been affected by fraud or undue influence, (7) the result if fewer than all co-owners join in the deed, (8) whether the owner may make a deed for less than the owner's full interest in the property, (9) whether divorce should revoke a deed to a former spouse, (10) whether anti-lapse principles should apply if the named beneficiary predeceases the transferor, (11) whether family protection such as for an omitted spouse or child or the probate homestead should apply, (12) rights of creditors against the property or against the beneficiary, and (13) the effect of the deed on Medicaid eligibility and reimbursement.

There is not yet good source material concerning the revocable TOD deed. The most extensive analysis is that done by the California Law Revision Commission (see <http://www.clrc.ca.gov>). A recent article is Michael A. Kirtland's and Catherine Anne Seal's *Beneficiary Deeds and Estate Planning*, 66 Ala. Law. 118 (2005). Citations to the nine existing state statutes are:

- Mo. Rev. Stat. § 461.025 (1989)
- Kan. Stat. Ann. § 59-3501 (1997)
- Ohio Rev. Code Ann. § 5302.22 (2000)
- Ariz. Rev. Stat. § 33-405 (2001)
- N.M. Stat. Ann. § 45-6-401 (2001)
- Nev. Rev. Stat. § 111.109 (2003)
- Colo. Rev. Stat. § 15-15-401 (2004)
- Ark. Code Ann. §18-12-608 (2005)
- Wisc. Stat. § 705.15 (2006)

*Nathaniel Sterling is the executive secretary of the California Law Revision Commission in Palo Alto, Calif.*