

## Memorandum 2007-6

**Beneficiary Deeds (Discussion of Issues)**

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This memorandum presents possible revisions to the Commission's recommendation on the *Revocable Transfer on Death (TOD) Deed* (October 2006).

As noted in CLRC Memorandum 2007-1, the staff received informal input from both the Assembly and Senate Judiciary Committees suggesting that the proposed statutory form for the creation of a revocable TOD deed should be revised to provide better information to consumers about the effect and limitations of the device.

Those revisions would not change the substance of the proposed law, just its presentation to those who use the statutory form. A staff draft of a rewritten statutory form is attached for the Commission's review and is discussed below.

In preparing the draft, the staff discovered a possible minor defect in the recommendation, having to do with the effect of a will on a previously recorded revocable TOD deed. That issue is also discussed below.

Any changes to the recommendation that are approved by the Commission will be reflected in the final version of the recommendation (which has not yet been printed) and presented to Assembly Member Chuck DeVore as recommended amendments to AB 250 (which implements the Commission's recommendation).

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

## STATUTORY FORM

**Existing Form**

The Commission's recommendation includes proposed Section 5642, which sets out an optional statutory form for the creation of a revocable TOD deed. The form includes some advisory language, along with spaces to provide necessary information. The part of the form that is to be completed by the transferor is set

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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](http://www.clrc.ca.gov)). Other materials can be obtained by contacting the Commission's staff, through the website or otherwise.

out below (boilerplate elements of the form that are completed by the recorder's office and the notary are not reproduced):

...

**Notice to Owner.** 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.
- You may revoke this deed by recording another instrument before you die.
- The property conveyed by this deed may be liable for reimbursement of the state for Medi-Cal expenditures.
- If you hold this property in joint tenancy or as community property with right of survivorship, this deed will pass your interest in the property to the beneficiary and not to a surviving coowner. You may choose to make the beneficiary's right subject to a life estate in your surviving spouse.
- If you do not want these results, you should not use this form.

**Notice to Beneficiary.** 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.

- When the owner dies you should record evidence of death under Probate Code Section 210 and you must (1) file the change in ownership notice required by Revenue and Taxation Code Section 480 and (2) notify the Department of Health Services if required by Probate Code Section 215.
- You should file a claim for reassessment exclusion under Revenue and Taxation Code Section 63.1, if applicable.
- If you do not wish to receive the property, you may disclaim it under Probate Code Section 275.

**IDENTIFYING INFORMATION**

Owner(s) of Property Who Join in this Deed:

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

Address or Other Description of Property

\_\_\_\_\_

Name(s) of Beneficiary(ies):

\_\_\_\_\_

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**TRANSFER ON DEATH**

I transfer all my interest in the described property to the named beneficiary on my death. If I name more than one beneficiary, the beneficiaries shall take equal shares as tenants in common. If a named beneficiary dies before me, the share that would otherwise go to that beneficiary shall pass in accordance with applicable provisions of the California Probate Code.

If I sign here, I choose to make the beneficiary's right to the described property subject to a life estate in my surviving spouse.  
Signature(s) of owner(s) who make this choice:

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This revocable TOD deed revokes any previous revocable TOD deed I have made for the described property. This deed is revocable at any time before my death.

**SIGNATURE AND DATE**

Signature(s) of Owner(s) Who Join in this Deed:

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Date: \_\_\_\_\_

...

Most of the advisory language is at the top of the form, though there is also explanatory content in the text that follows the "Transfer on Death" heading.

**Draft Form**

The staff believes that a cleaner approach would be to divide the advisory language from the parts of the form that need to be filled in. That would streamline the part of the form that needs to be filled in and would allow the expanded advisory content to be presented as a comprehensive whole.

That is the approach used in the attached draft. The spaces provided for information and signature are on the face of the form, with the advisory content provided on the reverse. An "Important Notice" at the top of the form cautions that the form may not be appropriate for everyone and advises the reader to be sure to carefully read the information provided on the reverse.

The reverse side of the form reiterates that general warning and then presents a series of questions and answers that discuss the most common and important

operational issues, as well as highlighting some of the limitations of the revocable TOD deed. The staff attempted to draft that content in plain language to the extent possible, without oversimplifying.

### **Response to Draft Form**

In developing the form, the staff consulted with the interested individuals and groups that have been active in our deliberations: Mary Pat Toups, Charlotte Ito (Executive Committee of the Trusts and Estates Section of the State Bar), David Mandel (Senior Legal Hotline), and Craig Page (California Land Title Association).

The draft was also provided to Assembly Member DeVore and to counsel at the Assembly and Senate Committees on the Judiciary.

The staff has not yet heard back from the Judiciary Committees on whether the additions to the consumer advisory language in the draft would address the concerns that they raised.

Once we receive feedback from the committees, **the Commission will need to decide whether to approve the draft for incorporation into the proposed law**, with or without any changes that may be proposed.

### **Note Regarding TOD Registration of Mobile Homes**

As noted at the January meeting, existing law authorizes the registration of a mobile home in “beneficiary form,” which provides for a nonprobate transfer of the home to a named beneficiary on the owner’s death. See Health & Safety Code §§ 18080.2, 18102.2-18102.3. Those sections were added on the Commission’s recommendation. See *TOD Beneficiary Designation for Vehicles and Certain Other State-Registered Property*, 21 Cal. L. Revision Comm’n Reports 2883 (1990).

That law does not provide a statutory form, but instead authorizes the Department of Housing and Community Development to prescribe a form for TOD registration of a mobile home. See Health & Safety Code § Section 18102.2(j).

The form prescribed by the department provides no consumer advisory language. It is therefore not useful as a model in the development of the revocable TOD deed form. However, it is worth noting that concerns about fraud that might result from use of the proposed revocable TOD deed already exist with respect to TOD registration of mobile homes. It is true that a mobile home is generally a less valuable asset than real property, but not always. A quick Internet search of mobile home prices in California shows that most are priced

between \$100,000 and \$250,000, not including lot rental costs. Some cost less, but the staff also found some in the \$500,000 range.

We should do what we can to help transferor's understand the effect of the revocable TOD deed, but it appears that Californians have been transferring mobile homes by TOD registration for over fifteen years without any advice on the form.

#### EFFECT OF LATER EXECUTED WILL

Proposed Section 5660 governs the situation where there is both a recorded revocable TOD deed and another instrument that purport to dispose of the same property. Which controls? Section 5660 provides:

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

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

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

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

The term "instrument" includes a will. Section 45. Thus, it would appear that a recorded will would control over a revocable TOD deed if the will was executed after the deed.

However, the Comment to proposed Section 5660 includes the following statement: "Under this section the transferor's will does not override a revocable TOD deed, notwithstanding a devise of the property in the will and regardless of the date of execution of the will." On its face, that statement seems to contradict Section 5660, which does not differentiate between a will and any other type of "instrument."

The explanation for this apparent inconsistency is that a will is not ordinarily a recordable instrument. If a will cannot be recorded, then it will always yield to a revocable TOD deed, under Section 5660(a).

In practice, it is extremely unlikely that anyone would ever attempt to record a will. Doing so would serve no purpose under existing law. During the testator's life, a will has no effect on title to real property. Even after the testator's death, the validity and effect of a will is not evidenced by the will itself. If real property is to be distributed under a will, the probate court will issue an order distributing the property. The personal representative records that order, or a deed, or both, to show the change in title. See Section 11751. The will itself is not recorded.

However, recordation of a will is not expressly *prohibited*. Government Code Section 27280 provides broadly that any instrument affecting title to real property can be recorded. If the proposed law is enacted, then a will might arguably *become* a document that affects title — because recordation of a will could make a revocable TOD deed inoperative under Section 5660.

A similar question was at issue in *Estate of England*, 284 Cal. Rptr. 361 (1991). The court held that an unrecorded will does not sever a joint tenancy, because Civil Code Section 683.2(c)(2) requires that a document severing a joint tenancy be recorded. The court left open the question of whether a recorded will might sever a joint tenancy. That dictum seemed to accept the possibility that a will could be recorded.

If, in some unusual circumstance, a will is actually recorded, then the existing Comment probably misstates the effect of Section 5660. Under that section, a recorded will would appear to control over an earlier executed revocable TOD deed.

**The staff recommends that the Comment language discussing the effect of a will under Section 5660 be deleted, and that conforming changes be made to the preliminary part.** That would avoid any confusion that could arise in the rare instance where a transferor successfully records a will. The law would then provide predictable and uniform results whenever *any* conflicting dispositive instrument is recorded. This change would not require an amendment of AB 250.

Respectfully submitted,

Brian Hebert  
Executive Secretary

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

Recording Requested By:

When Recorded Mail This Deed To

Name:

Address:

Assessor's Parcel Number:

Space Above For Recorder's Use

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

**IMPORTANT NOTICE**

This deed will determine the ownership of the described property after your death. This deed may have unintended effects and may not be appropriate for your needs. YOU SHOULD CAREFULLY READ ALL OF THE INFORMATION ON THE OTHER SIDE OF THIS FORM AND CONSULT AN ATTORNEY BEFORE USING THIS DEED. Provide only the information requested on the form. DO NOT INSERT ANY OTHER INFORMATION OR INSTRUCTIONS. This form MUST be recorded before your death or it will not be effective.

**IDENTIFYING INFORMATION**

Owner(s) of Property Who Join in this Deed:

\_\_\_\_\_

Address or Other Description of Property:

\_\_\_\_\_

Name(s) of Beneficiary(ies):

\_\_\_\_\_

**TRANSFER ON DEATH**

I transfer all of my interest in the described property to the named beneficiary(ies) on my death. This revocable TOD deed revokes any previous revocable TOD deed I have made for the described property. This deed is revocable at any time before my death.

Signature(s) of Owner(s) Who Join in this Deed:

\_\_\_\_\_ Date \_\_\_\_\_

**OPTIONAL LIFE ESTATE IN SURVIVING SPOUSE**

If I sign here, I choose to make the beneficiary's right to the described property subject to a life estate in my surviving spouse. DO NOT SIGN HERE IF YOU DO NOT WANT TO CREATE A LIFE ESTATE IN YOUR SURVIVING SPOUSE. Signature(s) of owner(s) who make this choice:

\_\_\_\_\_

**ACKNOWLEDGMENT OF NOTARY**

State of California )  
County of \_\_\_\_\_ )

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

Signature of Notary \_\_\_\_\_

## COMMON QUESTIONS ABOUT THE USE OF THIS FORM

**WHAT DOES THE TOD DEED DO?** At the time of your death, the TOD deed transfers your share of the property described in the deed to the beneficiary named in the deed, without probate administration. The TOD deed has no effect until your death and can be revoked at any time before your death.

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

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

**HOW DO I REVOKE THE TOD DEED?** There are three ways to revoke a TOD deed: (1) Complete, notarize, and **RECORD** a revocation form or other document that specifically states that it revokes the deed. (2) Create and **RECORD** a new TOD deed, trust, or other estate planning document that disposes of the same property and is signed and dated after the TOD deed that you wish to revoke. (3) Sell or give away the property before your death and **RECORD** the deed. A TOD deed only affects property that you own.

**IF I CREATE A NEW TOD DEED, TRUST, OR OTHER ESTATE PLANNING DOCUMENT THAT DISPOSES OF THE SAME PROPERTY, DOES THAT REVOKE A RECORDED TOD DEED?** Not necessarily. If you want to revoke a TOD deed, the new estate planning document must be **RECORDED**, and must be signed and dated later than the deed that you wish to revoke. A simpler and more certain way to revoke a TOD deed is to **RECORD** a properly completed and notarized revocation form.

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

**WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE?** Your beneficiary will need to record evidence of your death (under Probate Code Section 210) to complete the change in ownership. Your beneficiary must file the change in ownership notice required by Revenue and Taxation Code Section 480. Your beneficiary may be required (under Probate Code Section 215) to notify the Department of Health Care Services.

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

**WHAT IF A BENEFICIARY DIES BEFORE I DO?** If the beneficiary is a relative, the property will pass to your beneficiary’s descendants. Otherwise, the property will become part of your general estate. If you have an estate planning document that disposes of your general estate, then that document would control. Otherwise, the property would pass by the general rules of intestacy.

**HOW DOES A TOD DEED AFFECT PROPERTY THAT I OWN IN JOINT TENANCY OR AS COMMUNITY PROPERTY WITH A RIGHT OF SURVIVORSHIP?** This deed will end the right of survivorship of your joint tenant, spouse, or domestic partner. If you want a different result, you should not use this form.

**HOW DOES A TOD DEED AFFECT COMMUNITY PROPERTY?** This deed will dispose of your share of the community property described in the deed. If you wish to dispose of the entire community property asset, your spouse or domestic partner should join in signing the deed or execute and record a written consent to the transfer.

**WHAT IS THE “OPTIONAL LIFE ESTATE IN SURVIVING SPOUSE?”** You may choose to use the TOD deed to pass your property to your surviving spouse for the duration of your surviving spouse’s life (a “life estate”). Your surviving spouse’s ability to transfer or borrow against the property will be limited. When your surviving spouse dies, the property would then transfer to your named beneficiary. To choose this option you **MUST** sign where indicated on the form.

**CAN I IMPOSE OTHER CONDITIONS ON THIS TOD DEED?** No. This form may not be used to impose other conditions.

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

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

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

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

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