

## Memorandum 2015-53

**Revocable Transfer on Death Deed: Follow-Up Study**

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In 2006, the Commission<sup>1</sup> recommended that California authorize the use of a revocable transfer on death deed (“RTODD”) to transfer real property on death, outside of probate.<sup>2</sup>

This year, legislation was enacted to implement the core of the Commission’s recommendation (with some significant changes as to the scope and effect of the proposed law).<sup>3</sup>

One difference between the Commission’s recommendation and the new statute is that the statute contains a “sunset” provision — the statute will be repealed on January 1, 2021 (unless the sunset date is extended or repealed before that date).<sup>4</sup> The sunset provision expressly states that the repeal of the statute will not affect the validity of an RTODD executed before the sunset date.<sup>5</sup>

The new law also requires the Commission to conduct a follow-up study of the efficacy of the RTODD:

(a) The California Law Revision Commission shall study the effect of California’s revocable transfer on death deed set forth in Part 4 (commencing with Section 5600) of Division 5 of the Probate Code and make recommendations in this regard. The commission shall report all of its findings to the Legislature on or before January 1, 2020.

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

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

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1. 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.

The Commission welcomes written comments at any time during its study process. Any comments received will be a part of the public record and may be considered at a public meeting. However, comments that are received less than five business days prior to a Commission meeting may be presented without staff analysis.

2. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103 (2006).

3. AB 139 (Gatto); 2015 Cal. Stat. ch. 293.

4. Prob. Code § 5600(c).

5. *Id.*

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

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

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

(5) Whether the revocable transfer on death deed has been used to perpetuate [sic]<sup>6</sup> financial abuse on property owners and, if so, how the law associated with the deed should be changed to minimize this abuse.

(c)(1) The report required by subdivision (a) shall comply with Section 9795 of the Government Code.

(2) Pursuant to Section 10231.5 of the Government Code, this section is repealed on January 1, 2024.<sup>7</sup>

Although the deadline for completion of the report is over four years away, the staff believes that it would be helpful to do some immediate planning on how to conduct the necessary study. That is the purpose of this memorandum.

#### NATURE OF THE INQUIRY

The statute is fairly specific about the types of questions that the Commission needs to answer. Those questions are predominantly empirical:

- Is the RTODD “working effectively”?
- Is the RTODD “subject to misuse or understanding”?
- Has the RTODD “been used to [perpetrate] financial abuse on property owners”?

Based on the answers to those questions, the Commission is charged with making recommendations on whether the law authorizing the RTODD should continue in effect and whether it should be revised to improve its operation and prevent abuse.

The staff foresees considerable difficulty in acquiring the information required to reliably answer the empirical questions posed in this study. The main problem is one of timing. The new law sets a four-year deadline for completion of the study. That may not be enough time for problems with the RTODD to arise and become publicly known.

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6. The staff presumes that the Legislature intended to require study of the extent to which the RTODD can be used to “perpetrate” fraud, rather than “perpetuate” it.

7. 2015 Cal. Stat. ch. 293, § 21.

Recall that the RTODD operates only on death and has no effect on property rights before death. Moreover, the law does not require that an RTODD be delivered to beneficiaries.<sup>8</sup> This means that an RTODD could be created largely in secret and then lie dormant until the transferor's death. In that situation, any problems with the deed would not be discovered until after the transferor's death.

If a problem is discovered after a transferor's death, it is likely that the first publicly available evidence of the problem would be the filing of contest litigation in trial court. Unfortunately, trial court records are not easily searched. To the staff's knowledge, there is no uniform computer system cataloging cases across all counties. Nor does there seem to be a requirement that cases be coded with sufficient precision to distinguish an RTODD contest from other actions contesting the ownership of property transferred on death. The staff does not believe it would be practicable to look for evidence of RTODD problems in trial court records.

If an RTODD contest case were to be litigated and then *appealed*, the appellate decision would appear in hard copy appellate reports and in easily searched electronic databases. It would therefore be a simple matter to find relevant appellate decisions. The difficulty, again, is one of timing. It is unlikely that a person will execute an RTODD, die, and have an interested person file a contest, which is then fully litigated and appealed, *all within a span of four years*. The staff will look for such cases, but it is improbable that any will be found.

It is possible that some abuse of the RTODD might arise and be discovered *before* a transferor's death. But the solution in such a case would be to revoke the deed. The revocation of an RTODD would not include any explanation of the reason for revocation, so recorded revocation documents would not provide reliable evidence of abuse. A transferor might simply have changed his or her mind.

If abuse of an RTODD were to lead to criminal charges, there would be some public evidence of the abuse. But, again, trial records are difficult to search and it is unlikely that an appeal would be completed within the four-year deadline for this study.

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8. Prob. Code § 5626(b) (effective Jan. 1, 2016).

## PROPOSED METHODOLOGY

Given the difficulties described above, the staff recommends that the Commission take a two-pronged approach to the conduct of this study:

- (1) Request information from directly-involved groups.
- (2) Research appellate law in other jurisdictions that authorize the use of a transfer on death deed.

Those two prongs are discussed further below.

### **Request Information from Directly-Involved Groups**

There are a number of groups whose members may directly encounter RTODDs in the course of their work. An account of their experiences could shed useful light on how RTODDs are being used (or misused). For example:

- **Estate planning attorneys** may have experience preparing RTODDs on behalf of clients, may be involved in litigation contesting an RTODD, or may be asked for advice on how to deal with the abusive or erroneous misuse of an RTODD.
- Similarly, **judges** may have experience with contest litigation involving an RTODD.
- **Title insurers and escrow agents** may have experience with the transfer of real property title by RTODD. They can report whether RTODDs are causing any operational problems in that regard.
- **District attorneys and police who specialize in prosecuting elder financial abuse** could report whether they are seeing RTODDs used to perpetrate fraud.
- **Organizations that provide services to seniors** may have experience helping clients use RTODDs or may have clients who come to them for help regarding RTODD-related abuse.
- **County recorders** should know if RTODDs present any special problems with regard to the recordation process.

Any information provided by those groups would necessarily be anecdotal, but it could reveal specific defects in the operation of the law. This would help the Commission to develop corrective reforms.

**The staff recommends that the Commission write to organizations representing the groups described above and formally request their assistance in collecting information from their members about the use and abuse of the RTODD in California.** The staff believes that this would be the best way to collect practical information in the short time available to us.

## Research Appellate Law from Other Jurisdictions

While it is unlikely that there will be any California appellate decisions concerning RTODDs published within the next few years, there are at least 27 other states that authorize some form of transfer on death deed. Several states have had statutes in effect long enough that there might be RTODD-related appellate cases. In order of enactment those states are:

Missouri (1989)<sup>9</sup>  
Kansas (1997)<sup>10</sup>  
Ohio (2000)<sup>11</sup>  
Arizona (2001)<sup>12</sup>  
New Mexico (2001)<sup>13</sup>  
Nevada (2003)<sup>14</sup>  
Colorado (2004)<sup>15</sup>  
Arkansas (2005)<sup>16</sup>  
Wisconsin (2005)<sup>17</sup>

**The staff intends to search the appellate law in those states for any cases involving RTODDs.** While California's RTODD statute is not identical to the RTODD laws in other states, the core concepts are the same. If those core concepts are causing problems in other states, then it is likely that similar problems could arise in California.

## CONCLUSION

The relatively short four-year deadline for completion of this study will make it difficult to find any case law involving the use of the RTODD in California.

In light of that difficulty, the staff recommends that the Commission concentrate on collecting practice information from affected groups within California and researching the case law in states that have had longer experience with RTODDs. That is not an ideal solution, but it may be the best that can be achieved within the constraints of the assignment.

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9. Mo. Rev. Stat. § 461.025.  
10. Kan. Stat. Ann. § 59-3501.  
11. Ohio Rev. Code Ann. § 5302.22.  
12. Ariz. Rev. Stat. § 33-405.  
13. N.M. Stat. Ann. § 45-6-401.  
14. Nev. Rev. Stat. § 111.109.  
15. Colo. Rev. Stat. § 15-15-401.  
16. Ark. Code Ann. §18-12-608.  
17. Wisc. Stat. § 705.15.

If we proceed in this way, the staff would send letters to the relevant groups immediately, and ask that they start collecting information right away. We will periodically renew the request (perhaps annually). That way, we will have a few years in which to collect any information that might be available. We would postpone researching the case law in other jurisdictions until later (perhaps 2019). There is no urgency to that work, and it would probably be most efficient to do all of the appellate research at once, rather than doing it early and needing to update it later.

The staff is open to other suggestions. **How would the Commission like to proceed?**

Respectfully submitted,

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Executive Director