

First Supplement to Memorandum 2018-33

**Revocable Transfer on Death Deed: Follow-Up Study
(Public Comment)**

The Commission¹ has received a letter from Craig Page, on behalf of the California Land Title Association (“CLTA”), commenting on some of the issues discussed in Memorandum 2018-33. The staff greatly appreciates the input.

GENERAL COMMENT

In the letter, CLTA renews and expands on some of its general concerns about the risks associated with use of a revocable transfer on death deed (“RTODD”), which it believes may outweigh the benefits.²

On that issue, the staff believes it would be helpful to make a general disclaimer. Nothing in the staff’s analysis of individual issues relating to RTODDs should be read as implying that the Commission will ultimately recommend the continuation of the RTODD statute after its sunset date. The Commission will reserve judgment on that ultimate question until after it has considered all of the subsidiary issues.

COMMENT ON ISSUES RAISED IN MEMORANDUM

CLTA’s specific comments on issues raised in Memorandum 2018-33 are cataloged briefly below.

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). 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. See Exhibit pp. 1-2, 6.

Residential Property Limitation

CLTA makes the following points regarding the residential property limitations in Probate Code Section 5610 (which defines the kinds of “real property” that are subject to transfer by an RTODD):

- The terminology in Section 5610 should be standardized and should refer to facts that can be determined from title records.³
- Section 5610 should not encompass all forms of common interest developments. Stock cooperatives may have restrictions on transfer that could conflict with an RTODD.⁴
- The character of property subject to an RTODD should be evaluated at the time of execution, rather than the time of operation.⁵
- Section 5610 should not encompass commercial property. Commercial property will often be much more valuable than residential property and may be subject to a higher level of government regulation. Such transactions should not be completed without advice of counsel. Also, any problems that exist for RTODDs would be greater for higher value property.⁶

Natural Person Limitation

CLTA makes the following points about whether to permit an RTODD to name a legal entity as beneficiary:

- The trustee of a trust should not be eligible to be named as beneficiary of an RTODD. “Testamentary trusts are governed through probate courts. Allowing a trustee of a trust to be named a beneficiary only allows opportunity for fraud under the pretense of formality and creates a potential conflict with well-established existing law.”⁷ **The staff will ask for further explanation of that concern.**
- Naming a corporation as a beneficiary could cause problems. The corporation may not have authority to accept the gift or it may be disadvantageous to do so.⁸
- Existing law “requires a declaration from governmental entities consenting to conveyance as a beneficiary.”⁹ **The staff will need to research the specifics of that point before the Commission makes any decision about government entities as beneficiaries.**

3. *Id.* at 2.

4. *Id.*

5. *Id.* at 3.

6. *Id.*

7. *Id.*

8. *Id.* at 4.

9. See Exhibit p. 4.

- The character of a legal entity could change over time, which might affect the transferor’s intentions in a way that the RTODD does not reflect.¹⁰

Return of Property to Estate for Payment of Creditor Claims

Finally, CLTA addresses the discussion of Probate Code Section 5676, which can require the return of transferred property to the estate for the payment of creditor claims:

- The first of the reforms proposed by the staff, clarification of how Section 5676 would affect purchasers and encumbrancers of transferred property, would be a “potential improvement.”¹¹
- A beneficiary of an RTODD could dissipate all of the value of transferred property, becoming insolvent and “likely resulting in [creditors] arguing that the RTODD is void.”¹²
- CLTA also makes a point about fraud and forgery laws, which the staff does not fully understand.¹³ **The staff will ask for further explanation.**

GENERAL OBSERVATIONS

CLTA closes its letter with two general observations. First, CLTA notes that the risk that an RTODD will be challenged is greater in some situations than in others.¹⁴

Finally, CLTA notes that all of the potential risks of an RTODD could fall on a person who purchases RTODD-transferred property from a beneficiary without obtaining title insurance (e.g., an all-cash purchase). In that situation, the person would not have the benefit of the title insurer’s research to identify potential problems with the title.¹⁵

Respectfully submitted,

Brian Hebert
Executive Director

10. *Id.*

11. *Id.*

12. *Id.* at 4-5.

13. *Id.*

14. See Exhibit p. 5.

15. See Exhibit pp. 5-6.



August 16, 2018

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RE: Comments from CLTA on CLRC Study L-3032.1 Memorandum 2018-33
(Revocable Transfer on Death Deed: Follow-Up Study, Aug. 6, 2018)

Dear Mr. Hebert:

Thank you for soliciting comments from the California Land Title Association ("CLTA") regarding specific provisions of the revocable transfer on death deed ("RTODD") law enacted by Assembly Bill 139 of 2015 (Stats. 2015, Ch. 293). CLTA's industry members have substantial experience in dealing with matters of trusts and estates as they relate to real property and are well-positioned to provide a "real-world" perspective on non-probate transfers such as those attempted through the use of RTODDs.

We remain concerned about the negative impact of RTODDs on consumers:

As you know, CLTA has long viewed the implementation of RTODDs in California with concern given that there is not always a simple fix for the transfer of real property. We appreciate and understand the goal of wanting to provide individuals a less expensive and (theoretically) less complicated mechanism by which they can transfer their real property at death. However, we maintain that RTODDs, as enacted, continue to pose risks for transferors and beneficiaries, as they could:

- a) potentially encourage the exploitation of at-risk individuals through fraud and abuse;
- b) result in unmarketable title and curative work to remove the clouds on title of real property attempted to be transferred via RTODD;
- c) trigger lengthy litigation required to determine the validity of RTODDs, often in a probate court arena that ironically was supposed to be avoided through the use of RTODDs, and;
- d) confer an unexpected and unwelcome liability, through a debt owed to creditors and/or the decedent's estate, on beneficiaries of property conveyed by RTODD.

In response to a request from the CLRC for title insurance industry feedback, we are respectfully providing comments on several specific issues relating to RTODDs but want to make clear that we remain skeptical about their long-term use in California.

We believe this is especially true when consumers –without benefit of counsel—fill out and execute a RTODD without fully understanding the unintended consequences these “simple” forms can sometimes create to the detriment of the intended beneficiaries and surviving family members.

Residential Property Limitation:

In a recent memo¹, CLRC staff examined at length the effect of the “residential property limitation” on the applicability of RTODDs. Within the scope of this evaluation, CLRC staff explored several issues, a number of which we have enumerated and responded to as follows.

1. *Standardizing the Terminology of Probate Code Section 5610*

In an examination of Probate Code Section 5610, CLRC staff identified that, as currently enacted, the terms within the Section are not entirely “based on facts that can be determined from the record”, and that this negatively affects a title insurer’s ability to “assess the validity of an RTODD solely from the information that is in official public records.”²

We agree with the CLRC staff’s assessment and recommendation that the terminology of Probate Code Section 5610 should be standardized to be based on facts determinable from a search of public records.

2. *Expanding RTODDs to Provide for Transfer of All Types of Common Interest Developments (“CIDs”)*

As identified by CLRC staff, the language in Probate Code Section 5610(b) expressly provides for a single type of CID – condominiums – within the definition of “real property”, “impliedly [precluding] the use of an RTODD to transfer other types of CID property.”³ In addition, the statutory RTODD Frequently Asked Questions (“FAQ”), in an enumeration of the only types of property that can be transferred via RTODD, the only type of CID listed is a “condominium unit”,⁴ supporting the intent of the statute.

Though CLRC staff opine that there is “no good justification for the condominium limitation”,⁵ we respectfully disagree, and believe that the limitation should remain in place.

Other types of CIDs, such as cooperatives, can have restrictions on property ownership and a co-op could argue with a straight face that the transfer of a non-condominium CID via RTODD is void because of restrictions on transfers. Such a situation would prove much more problematic than conveyance via will or trust, wherein if a co-op board were to disapprove the beneficiary the estate or trustee would simply sell the property.

Thus, CLTA believes that amending the law to allow the use of RTODDs to transfer other types of CIDs is a bad idea.

¹ CLRC Memorandum 2018-33

² *Id.* at 4.

³ *Id.* at 5.

⁴ Prob. Code § 5642(b).

⁵ CLRC Memorandum 2018-33, p. 5.

3. *Timing Clarifications*

In addition, CLRC staff also explored the question of when it is best to evaluate the validity of an RTODD – whether at the time of execution or operation of the RTODD. We agree with CLRC staff’s assertion that RTODDs should be evaluated for meeting the standard of “real property” under the law at the time of execution of the RTODD.⁶

4. *Elimination of Residential Property Limitation*

Lastly, CLRC staff recommend that the residential property limitation on RTODDs be eliminated, asserting that the restriction “might have made sense as a way to narrow the scope of a pilot project”, and inviting policy arguments to the contrary.⁷

We respectfully disagree with CLRC staff’s provisional recommendation. In many cases, the value of commercial properties is much higher than residential properties and the sophistication of the parties usually translates into the parties using traditional estate planning documents with the advice of counsel, as well as being subject to more rigorous regulations and statutory requirements.

Thus, assuming that the RTODDs are flawed at a more fundamental level, it makes no sense to the title industry that the method of transfer be expanded for use by individuals who are already using traditional methods of conveying real property. Expanding the use of RTODDs to higher value properties only compounds the existing potential for fraud and abuse, litigation, and loss of title marketability, but in this case the dollar amounts will be substantially larger.

In short, if the RTODDs are already problematic for “simpler” and less costly transfers, where is the logic in expanding the use of RTODDs in higher cost –and more complicated—transactions?

For these reasons, we assert that RTODDs should remain limited to residential properties.

Natural Person Limitation:

In its August 6th memo, CLRC staff also requested comments on whether the law “should permit a legal entity to be named as a beneficiary of an RTODD” and “whether there are any...problems that would result from allowing that practice.”⁸ In consideration of this question, we have identified several issues that could arise from reforming the law so as to allow legal entities to be named as beneficiaries of RTODDs.

- *Trustee of a trust:* Testamentary trusts are governed through probate courts. Allowing a trustee of a trust to be named a beneficiary only allows opportunity for fraud under the pretense of formality and creates a potential conflict with well-established existing law.

⁶ *Id.* at 9.

⁷ *Ibid.*

⁸ *Id.* at 15.

- *Corporations*: There are multiple problems that would need to be considered in the context of allowing a corporation to be named as a beneficiary to an RTODD. Such problems include a limited liability corporation or other corporation being granted property that had not been addressed or approved in operating agreements, minutes, etc., or legal issues with the property that could be inherited such as abatement items, environmental concerns, etc.
- *Governmental entities*: Current law requires a declaration from governmental entities consenting to conveyance as a beneficiary; however, RTODDs do not need to be consented to by, or delivered to, the beneficiary to operate.
- *Other issues in general*: In addition, other considerations with respect to legal entities include the constitution of a legal entity changing over time in the context of the transferor's original intent, or the conveyed property transferring despite a legal entity's established vetting process that would have otherwise rejected the transfer.

For these reasons, we have serious reservations over the expansion of RTODDs to include legal entities as beneficiaries, and strongly believe that – were such an expansion to take place– the trustee of a trust continue to be excluded.

As stated earlier, if the RTODDs are already problematic when used on “simpler” and lower-dollar real estate transfers, where is the logic in expanding the use of RTODDs to these new applications that have higher risk and statutory requirements that conflict with the recommended changes to the law?

Return of Property Transferred by RTODD for Creditor's Claims:

Lastly, CLRC staff requested comment on possible reforms to Probate Code Section 5676, including whether the property restitution remedy should be eliminated, thereby making the beneficiary's liability for decedent debts personal only.⁹

Specifically, CLRC staff examined two potential avenues for reform, including:

1. *Clarifying How Enforcement of Section 5676 Affects Purchasers or Encumbrancers*
2. *Revising Section 5676 to Only Impose Personal Liability on a Beneficiary*

While we view the first of the two proposals as a potential improvement over current law, we remain unconvinced that either option would be a “silver bullet” in addressing all potential liability for bona fide purchasers that we insure.

State law already gives bona fide purchaser and bona fide encumbrancer protections if past the 120 days. However, the statute doesn't, nor do we think it should, get rid of the application of general fraud or forgery law – which has a longer statute of limitation of three years.

If an estate goes through probate or is administered by a trust, then the administrator or trustee has a duty to pay the estate's liabilities before distributing to beneficiaries. The inherent problem with RTODDs is that the property

⁹ *Id.* at pp. 15-23.

transfers to the beneficiary *prior* to any confirmation that the estate liabilities have been paid. This presents a problem when the beneficiary doesn't have the property anymore or has used up all the equity before a probate court has determined liability. In those instances, it is entirely possible that holding the beneficiary personally liable will not amount to anything for the creditors, likely resulting in them arguing that the RTODD is void.

The benefit of RTODDs does not outweigh general fraud or forgery law, and it is all the more critical that the RTODD statutes *not* get rid of the application of general fraud and forgery law because RTODDs are, by their nature, prone to fraud and forgery. As such we can't envision a way to draft legislation that reduces the risk associated with the three-year enforcement period without beneficiaries being able to show the estate liabilities are zero or have been paid in full.

Not all transactions are of equal risk:

It is important that an evaluation of RTODDs take into consideration that *the feasibility of the RTODD as a conveyancing instrument will vary from transaction to transaction*. For example, the following factors can greatly increase the risk associated with a RTODD:

- How close to the transferor's death was the RTODD recorded?
- What is the relationship of the beneficiary to the transferor? Was the transferor elderly and the beneficiary a caregiver?
- If surviving siblings in a family are specifically excluded from the RTODD, can interested parties truly rely on the RTODD as being dispositive of the grantor's wishes?
- Were multiple RTODDs recorded over a period of time on the affected real property? Do the multiple RTODDs indicate potential claims against the real property?
- Is there a surviving spouse living on the property and excluded as a beneficiary by the RTODD, potentially triggering community property concerns?

These are just a few quick examples that easily come to mind. In some cases, the potential claims to the real property will be nonexistent or easy to ascertain and the RTODD may be the appropriate instrument for conveyance. In other situations, the RTODD is a recipe for disaster and costly litigation.

We suggest that RTODDs also be evaluated based on their risk to good faith purchasers/consumers who are NOT covered by title policies:

In most cases, good faith purchasers/consumers will often enlist a title company to insure them and to conduct a title search as part of the underwriting process. In addition, a lender will often be providing a purchase money mortgage and also will be insured by a title company.

However, in some situations consumers will decide to purchase real property with cash from their savings and forgo purchasing a title policy to save money. In these instances, no independent title or escrow company expert will be conducting a title search or considering the potential risks associated with a RTODD. In interfamilial transfers or transfers between friends, such a situation is not all that unusual, despite the inherent risk.

In these situations, if an RTODD ends up being faulty or fraudulent and the consumer is insured by a title company, the insured's security interest in the real property will be protected under the terms of the policy. However, if no title policy exists, the defective or fraudulent RTODD could mean a total loss for the innocent good faith purchaser/consumer who unfortunately relied upon the RTODD as being a valid instrument of conveyance without risk.

While we realize there is "a provision that expressly protects a good faith purchaser of property transferred by an RTODD"¹⁰ in existing law, realistically this means the good faith purchaser must still hire – out-of-pocket – an attorney to assert this claim.

Elimination of the 2021 sunset provision is premature:

The reason that CLTA and other stakeholders requested a sunset date in the original RTODD legislation is to allow for all affected industries, estate planners, attorneys and consumer advocates to evaluate the value of the RTODDs and to create a track record associated with their use. Given that we are seeing some problems with RTODDs as stated above, we believe the wiser course of action is to leave the sunset provision in place as we monitor the use of RTODDs over the next two years. If the consensus of all affected parties at the end of that time is that the value of RTODDs exceeds the risk associated with their use, then the sunset provision in law could be more reasonably removed from the statute.

Conclusion:

CLTA agrees in principle with the CLRC's goal of a simplified estate planning process. However, despite efforts at reform, we continue to view the RTODD as a well-intended tool that nevertheless exposes transferors and beneficiaries to many unintended – and undesirable – consequences. Given that many individuals who utilize an RTODD are unlikely to be, or even assisted by, a capable estate attorney, we think it likely that an elevated risk of error is inherent to the process, notwithstanding the already discussed potential for fraud and abuse. Therefore, we continue to assert that individuals would be better served by seeking the services of the state's many qualified estate attorneys whom understand the other, better options for estate planning.

Thank you for your consideration of CLTA's comment on this matter. If you have any questions, please feel free to contact me via e-mail at cp@clta.org or phone at (916) 444-2647.

Respectfully,



Craig C. Page
Executive Vice President
and Counsel

¹⁰ *Id.* at 17.