

Second Supplement to Memorandum 2019-16

Revocable Transfer on Death Deed: Follow-Up Study — Conflicting Instruments and Forms of Ownership

This supplement addresses issues raised by the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”) in a letter that is attached to Memorandum 2019-16.¹ The issues discussed here involve the resolution of conflicts between a revocable transfer on death deed (“RTODD”) and other instruments that purport to transfer the same property as the RTODD. It also discusses a similar issue that could arise if property to be transferred by RTODD is titled as joint tenancy.

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

CONFLICTING DISPOSITIVE INSTRUMENTS

Section 5660 establishes rules to resolve a conflict between an RTODD and any other instrument that purports to distribute the same property on the transferor’s death:

5660. If a revocable transfer on death deed recorded on or before 60 days after the date it was executed 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

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,

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.

other instrument and not the revocable transfer on death deed is the operative instrument.

TEXCOM believes that Section 5660 is not sufficiently clear:

Section 5660 relating to conflicting dispositive instruments is confusing and ambiguous. The meaning of an instrument [that] makes a revocable disposition of the property is unclear and should be clarified.²

The staff is not sure what it is about Section 5660 that TEXCOM finds confusing and unclear. **Further explanation on that point would be helpful.**

The problem may be that the phrase “revocable disposition of property” is confusing or inapt when it is used in a statute like Section 5660, *which only operates after the transferor has died*. An instrument that was revocable during life typically becomes irrevocable after the transferor’s death. For the purposes of Section 5660, would such an instrument be considered *revocable* or *irrevocable*?

If that is the concern, it could perhaps be addressed by revising Section 5660 to make clear that the test depends on revocability during the transferor’s life:

5660. If a revocable transfer on death deed recorded on or before 60 days after the date it was executed 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 provision of the other instrument that purports to transfer the property was revocable during the transferor’s life, 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 provision of the other instrument that purports to transfer the property was not revocable during the transferor’s life, the other instrument and not the revocable transfer on death deed is the operative instrument.

Comment. Section 5660 is amended to make clear that subdivisions (b) and (c) depend on the revocability of a dispositive provision during the transferor’s life. The fact that a provision may become irrevocable on the transferor’s death is not relevant to the operation of the section.

2. See Memorandum 2019-16, Exhibit p. 5.

That language could be expressed more simply, by referring to the revocability of the “other instrument” rather than “the provision of the other instrument that purports to transfer the property.” The staff used the more complicated phrasing to address the possibility that a single instrument might include both revocable and irrevocable provisions (rather than the entire instrument being revocable or irrevocable).

As noted, the staff is not sure whether the issue addressed above is the issue that caused TEXCOM’s concern. If not, then the matter can be revisited after TEXCOM’s position is better understood. **If the staff has correctly identified TEXCOM’s concern (or the staff’s discussion of the issue has created a new concern), then the Commission will need to decide whether the proposed revisions are an appropriate way to resolve the matter.**

JOINT TENANCY

One of the issues considered by the Commission in its study of RTODDs was how to address the application of an RTODD to property that is held in joint tenancy. When a joint tenant dies, that person’s interest in the joint tenancy property terminates. That would leave nothing for the deceased joint tenant to transfer on death by other means (including an RTODD). This creates a conflict between the operation of joint tenancy survivorship and the RTODD.

In its 2006 recommendation, the Commission proposed, as a statutory default rule, that such a conflict be resolved in favor of the RTODD. Proposed Section 5664 would have provided as follows:

5664. Unless the deed otherwise provides, if an owner of property held in joint tenancy makes a revocable transfer on death deed of the property:

(a) The death of the transferor severs the joint tenancy as to the interest of the transferor.

(b) The interest of the transferor passes pursuant to the revocable transfer on death deed and not by right of survivorship pursuant to the joint tenancy.

Comment. Section 5664 addresses the conflict between a revocable TOD deed and an earlier joint tenancy in the property. In the case of a later joint tenancy in the property, the joint tenancy prevails. See Section 5660 (conflicting dispositive instruments).

Because a revocable TOD deed is revocable until the transferor’s death, execution and recordation of a revocable TOD deed does not sever a joint tenancy; severance only occurs when the transferor dies with the revocable TOD deed still in effect. If another joint

tenant who has not made a revocable TOD deed predeceases the transferor, the transferor takes the other joint tenant's interest by right of survivorship, and the combined interest passes pursuant to the transferor's revocable TOD deed. See Section 5652(a) (transferor's entire interest in property passes at death).

In the case of simultaneous death, Section 223 (joint tenants) controls. The proportionate interest of each joint tenant passes under the revocable TOD deed or other dispositive instrument of that joint tenant.

Section 5664 provides a default rule; joint tenants may provide a different result in the deed. For example, the deed may provide that on the death of a joint tenant, the property passes to the surviving joint tenant and, on the death of the surviving joint tenant, to the TOD beneficiary. In that circumstance, the TOD deed would remain revocable by the surviving joint tenant. See Sections 5630 (revocability), 5632 (revocation of deed).

The Legislature did not agree with that treatment of the issue. The first bill introduced to implement the Commission's recommendation³ was amended to reverse the Commission's proposed approach. That amendment persisted in the bill that finally resulted in enactment of the RTODD statute.⁴ As enacted, Section 5664 provides:

5664. If, at the time of the transferor's death, title to the property described in the revocable transfer on death deed is held in joint tenancy or as community property with right of survivorship, the revocable transfer on death deed is void. The transferor's interest in the property is governed by the right of survivorship and not by the revocable transfer on death deed.

TEXCOM asserts that the Commission's position on the issue was the superior approach, because it would be more consistent with a transferor's probable intentions when the transferor executes an RTODD for property that was previously titled as joint tenancy:

Section 5664 provides that, if at the time of the transferor's death, title to the property described in the RTODD is held in joint tenancy or as community property with right of survivorship, the revocable transfer on death deed is void, and the transferor's interest in the property is governed by the right of survivorship and not by the revocable transfer on death deed. This is contrary to the 2006 Recommendation, which proposed a rule whereby the death of the transferor severs the joint tenancy as to the interest of the transferor, and the interest of the transferor passes pursuant to

3. AB 250 (DeVore) (2007).

4. AB 139 (Gatto) (2015).

the RTODD. The Commission's recommendation in this regard seems superior and more consistent with the likely intentions of makers of RTODDs. Section 5664 should be revised accordingly.⁵

Obviously, this is an issue on which reasonable minds can differ. TEXCOM agrees with the Commission's original recommendation. The Legislature did not. It specifically acted to reverse the Commission's proposed treatment of the issue. It is also worth noting that when the Commission prepared its 2006 recommendation on RTODDs, it did not find any RTODD state that had taken the approach recommended by the Commission.

Arizona, Arkansas, and Colorado, for example, make clear that a joint tenant may execute a revocable TOD deed without approval of other joint tenants, but the revocable TOD deed is effective only if the transferor survives all other joint tenants.⁶

The Commission needs to decide whether to recommend that existing law on this point be reversed or left unchanged. This is a pure policy question, on which the Legislature has expressed a clear preference. That preference was enacted into law only three years ago. The staff generally recommends deference to clear legislative policy preferences, especially when enacted recently. But that generally deferential posture can be set aside if the Commission feels strongly that the Legislature has taken the wrong approach. **How would the Commission like to proceed on this point?**

Respectfully submitted,

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Executive Director

5. See Memorandum 2019-16, Exhibit p. 5.

6. *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm'n Reports 103, 152 (2006). See also Ariz. Rev. Stat. Ann. § 33-405(D); Ark. Code Ann. § 18-12-608(b); Colo. Rev. Stat. § 15-15-408.