

Memorandum 2019-17

**Revocable Transfer on Death Deed: Follow-Up Study —
Issues Identified by the Commission**

In 2006, the Commission¹ recommended that California authorize the use of a revocable transfer on death deed (“RTODD”) to transfer real property on death, outside of probate.²

In 2015, Assembly Bill 139 (Gatto) was enacted to implement the Commission’s recommendation (with some significant changes).³ Among other things, the Legislature added a “sunset” provision, which will repeal the RTODD statute on January 1, 2021 (unless the sunset is extended or repealed before it operates).⁴ In addition, the law requires the Commission to conduct a follow-up study of the efficacy of the RTODD statute, and make recommendations for the improvement or repeal of that law.⁵ The deadline for completion of that study is January 1, 2020.⁶

Over the course of the study, the Commission identified a number of issues, which it decided to consider at a later date. This memorandum considers two of them:

- The effect of an RTODD on a mobilehome.
- Whether the law governing Medi-Cal recovery liability should be revised to reflect the current state of the law.

A few other Commission-identified issues will be discussed in supplements to this memorandum or in future memoranda.

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

3. AB 139 (Gatto), 2015 Cal. Stat. ch. 293; Prob. Code §§ 5600-5696.

4. Prob. Code § 5600(c).

5. 2015 Cal. Stat. ch. 293, § 21. See also 2016 Cal. Stat. ch. 179.

6. *Id.*

RTODD EFFECT ON MOBILEHOMES

In 2016, the Commission decided that it would consider the following issue:

Whether the law should be clarified regarding the effect of an RTODD on a mobilehome that is located on real property transferred by the RTODD.⁷

The effect of an RTODD on a mobilehome would depend on whether the mobilehome is considered to be personal property or is instead a fixture or an improvement of real property.

As a general matter, personal property is not considered to be appurtenant to real property, even if it is attached to the real property. “The item may be conveyed, encumbered, or leased separate from the real property.”⁸

However, if the item attached to real property is considered to be a “fixture,” then it is treated as an appurtenance if the real property is transferred. “On a conveyance of the real property, the fixtures are transferred to the grantee even though not expressly mentioned in the contract or deed.”⁹

Thus, if a mobilehome is personal property, conveyance of the real property on which it is located would not affect ownership of the mobilehome. But if the mobilehome is a fixture, then conveyance of the real property would also convey ownership of the mobilehome.

With regard to determining when a mobilehome is a fixture, the common was preempted by statute on January 1, 2014.¹⁰ Under the controlling statutory scheme, a mobilehome is considered to be personal property unless it has been installed on a foundation system of a specified type *and* other specific procedural steps have been taken.¹¹ Attachment of a mobilehome to a foundation is not, by itself, sufficient to make the mobilehome a fixture. The extra procedural steps that must be taken to convert a mobilehome to a fixture include obtaining a building permit and canceling title and registration of the mobilehome as personal property.¹² In addition, the appropriate enforcement agency must

7. Minutes (July 2016), p. 5.

8. Miller & Starr, California Real Estate, *Transferable Property Interests; Fixtures* § 9:41, at 170-71 (4th ed. 2015) (citations omitted).

9. *Id.* at 170.

10. *Id.* § 9:72, at 277.

11. Health & Safety Code § 18551.

12. Health & Safety Code § 18551(a).

record notice that a mobilehome was attached to a foundation system on the real property at issue.¹³

Under those rules, the status of a mobilehome as either personal property or a fixture to real property should be unambiguous and determinable from real property title records. Thus, there should be no legal problem determining the effect of an RTODD on a mobilehome. If the title records show that the mobilehome is a fixture, then the RTODD will convey ownership of the mobilehome along with the real property to which it is affixed. If the title records do not include notice that the mobilehome is a fixture, then the RTODD will not affect ownership of the mobilehome, because the mobilehome is personal property.

Existing law provides a transfer-on-death registration option for a mobilehome that is personal property. If a TOD beneficiary is named in the registration records, then ownership will transfer to the beneficiary on the transferor's death, outside of probate.¹⁴ Even if a TOD beneficiary has not been named (or the named beneficiary does not survive the owner of the mobilehome), there is a nonprobate process by which title to a personal property mobilehome can transfer to an heir or devisee.¹⁵

In sum, the staff does not see any potential legal problems with the application of an RTODD to property where a mobilehome is located. The result should be clear and determinable from title records.

However, the application of an RTODD to a mobilehome could be confusing for a layperson who does not know the rules described above, or misunderstands their application to specific property. For example, a person who leases real property on which a mobilehome is located may mistakenly believe that an RTODD can be used to transfer ownership of the mobilehome on death. Or a person who owns the real property on which a personal property mobilehome is located may mistakenly believe that an RTODD would transfer ownership of the mobilehome along with the underlying real property.

That problem could perhaps be minimized by revising the statutory FAQ to provide guidance about the effect of an RTODD on a mobilehome. **If the Commission wishes to pursue that option, the staff will draft language for the**

13. Health & Safety Code § 18551(a)(2).

14. Health & Safety Code § 18102.2. However, the mobilehome can be recovered by the estate if it is required in order to pay the decedent's unsecured debts. See Health & Safety Code § 18102.2(h); Prob. Code § 9653.

15. Health & Safety Code § 18102.

Commission’s consideration at a future meeting. The Commission should also consider whether there are any other changes to RTODD law that should be made with respect to mobilehomes.

MEDI-CAL ESTATE RECOVERY

With certain exceptions, the estate of a deceased person is liable to the state for reimbursement of any Medi-Cal benefits that the person received during life.¹⁶ The Commission recommended that the RTODD statute include a provision expressly stating that property transferred by RTODD is part of the decedent’s “estate” for the purposes of Medi-Cal estate recovery:

5654. (a) ...

(b) For the purpose of a claim of the Department of Health Care Services under Section 14009.5 of the Welfare and Institutions Code, property transferred by a revocable transfer on death deed is a part of the estate of the decedent, and the beneficiary is a recipient of the property by distribution or survival.

Comment. ...

Subdivision (b) is consistent with case law interpretation of the meaning and purpose of Welfare and Institutions Code Section 14009.5, providing for reimbursement to the state for Medi-Cal payments made during the decedent’s life. See *Bonta v. Burke*, 98 Cal. App. 4th 788, 120 Cal. Rptr. 2d 72 (2002).¹⁷

When the Legislature enacted the RTODD statute, it softened that provision. As enacted, Section 5654(b) simply provides that property transferred by RTODD “is subject to claims of the State Department of Health Care Services to the extent authorized by law.”¹⁸ It does not state any positive rule for when such liability exists; it simply notes the possibility of liability.

That softer language was designed to avoid a conflict with then-pending SB 33 (Hernandez) which, if enacted, would have made property transferred by RTODD immune from Medi-Cal estate recovery.¹⁹

SB 33 was not enacted that year. Nonetheless, Section 5654(b) was left in its amended form. The softer language was not replaced with the language that the

16. See Welf. & Inst. Code § 14009.5.

17. See *Revocable Transfer on Death (TOD) Deed*, 36 Cal. L. Revision Comm’n Reports 103, 234-35 (2006).

18. Section 5654(b).

19. See Memorandum 2015-27, p. 4; SB 33 (Hernandez) (2015).

Commission had originally recommended. That may not have been the best outcome at that time, but it was acceptable.

The issue of whether to revise Section 5654(b) to revert to the Commission's originally recommended language was raised in Memorandum 2016-36.

However, that possibility has been overtaken by further change in the law on Medi-Cal estate recovery. In 2016, the law was revised to limit estate recovery to the minimum permitted under federal law.²⁰ With that change, it appears that RTODD property would *not* be liable (because it would not be part of the decedent's probate estate).²¹

Given that change, the Commission's original language would no longer be correct. The existing language used in Section 5654 is not particularly helpful, but is not in conflict with the law. It might be possible to revise Section 5654 to more precisely codify the current state of the law. **But given the recent volatility of the state's Medi-Cal recovery rules, the staff recommends against doing so.** The existing language is broad enough that it should remain correct even if the law were to change again.

Respectfully submitted,

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20. See 2016 Cal. Stat. ch. 30, § 22.

21. See Welf. & Inst. Code § 14009.5(f)(3).