

First Supplement to Memorandum 2019-55

Revocable Transfer on Death Deed: Follow-Up Study (TEXCOM Comments)

Memorandum 2019-55 presented a staff draft of a recommendation on the revocable transfer on death deed (“RTODD”).¹

The Commission has received a letter commenting on that draft from Mason L. Brawley, writing on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”). It is attached to this memorandum as an Exhibit.² This new input from TEXCOM is discussed below.

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

OVERVIEW

Scope

In its new letter, TEXCOM has only commented on changes that were made to the Commission’s tentative recommendation at its September meeting. Those comments are the focus of this memorandum.

However, TEXCOM expressly reiterates the comments that it made in its September 4, 2019, letter to the Commission “particularly the comments regarding naming trusts as beneficiaries of an RTODD.”³ For ease of reference, TEXCOM’s September 4 letter has also been reproduced in the Exhibit.⁴

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. 1-4.

3. See Exhibit p. 1.

4. See Exhibit pp. 5-8.

The staff does not intend to present any of the matters raised in the September letter, but Commissioners and members of the public should feel free to do so.

Subject Matter

Before addressing the specific points made by TEXCOM, it might be helpful to briefly comment on the general subject that they address — protection against fraud.

All of TEXCOM's comments in the latest letter address reforms that the Commission has proposed in order to reduce the risk of fraud when an RTODD is used.

TEXCOM raises some technical concerns about the proposed reforms. Those can be addressed individually, on their merits.

Perhaps more importantly, TEXCOM also questions the relative value of the reforms, as compared to the burdens that they would impose.

That concern goes to the heart of one of the main points of debate surrounding the RTODD. From the first attempt to enact the Commission's original recommendation on RTODDs (in 2007),⁵ important stakeholder groups and members of the Legislature have expressed concern about the risk of fraud presented by the RTODD.

In this study, the Commission did not find evidence suggesting that an RTODD is any more prone to fraud than any other type of estate planning instrument (or inter vivos deed). Despite that, some groups continue to believe that the risk of fraud associated with the RTODD outweighs its benefit as a simplified estate planning tool.

The Commission took that concern seriously and looked for ways to minimize the risk of fraud. It settled on two new requirements, both modeled after existing protections that govern other types of estate planning instruments:

- (1) A requirement that an RTODD be witnessed, borrowing concepts from the law of wills.
- (2) A requirement that the transferor give notice to heirs when an RTODD operates (on the transferor's death), borrowing concepts from the law of trusts. The transferor would also need to publish the notice in a newspaper of general circulation in the county where the property at issue is located.

5. See AB 250 (DeVore) (2007).

In addition to considering TEXCOM's specific technical concerns, the Commission should give serious consideration to the broader question, whether the Commission has overshot the mark by recommending fraud protections that would be more burdensome than beneficial. Recall that the witnessing requirement and the notice publication requirement were first raised at the September meeting. The Commission specifically invited further comment on the merits of those proposed reforms, with the intention of considering such input at the November meeting.

In thinking about the relative value of the proposed fraud protections, the Commission should recall that the notice requirement was proposed before the Commission decided to include the witnessing requirement. It may be that the "belt and suspenders" approach of including both a witnessing requirement and a notice requirement would create a cumulative burden that is too great. If that seems to be the case, the Commission could decide to keep just one of the two protections.

WITNESSING IN LIEU OF NOTARIZATION

Under existing law, an RTODD must be notarized. That provides some degree of protection against fraud, as the notary will confirm the identity of the person who executes an RTODD.

At its September meeting, the Commission decided to replace the existing notarization requirement with a witnessing requirement.

TEXCOM acknowledges the benefits of witnessing, but has two concerns about the proposed change. They are discussed below.

Recordation

TEXCOM points out a technical problem with the proposed law. Government Code Section 27287 broadly prohibits the recordation of certain documents if they have not been acknowledged:

Quitclaim deeds, grant deeds, or any other documents affecting real property cannot be proven by a subscribing witness and must be notarized in order to be recorded. (Government Code § 27287). Accordingly, if the RTODD will be exempt from the notarization requirement, additional statutory changes will be required.

TEXCOM recommends that the notarization requirement not be eliminated.⁶

The problem that TEXCOM describes could probably be addressed by a technical revision of Section 27287 along the following lines:

27287. Unless it belongs to the class provided for in either Sections 27282 to 27286, inclusive, or Section 1202 or 1203, of the Civil Code, or is a fictitious mortgage or deed of trust as provided in Section 2952 or 2963 of the Civil Code, or is a fictitious oil and gas lease as provided in Section 1219 of the Civil Code, or is a claim of lien under Section 8416 of the Civil Code or a notice of completion under Section 8182 or 9204 of the Civil Code, or a revocable transfer on death deed under Part 4 (commencing with Section 5600) of Division 5 of the Probate Code, before an instrument can be recorded its execution shall be acknowledged by the person executing it, or if executed by a corporation, by its president or secretary or other person executing it on behalf of the corporation, or, except for any power of attorney, quitclaim deed, grant deed, mortgage, deed of trust, security agreement, or other document affecting real property, proved by subscribing witness or as provided in Sections 1198 and 1199 of the Civil Code, and the acknowledgment or proof certified as prescribed by law. This section shall not apply to a trustee's deed resulting from a decree of foreclosure, or a nonjudicial foreclosure pursuant to Section 2924 of the Civil Code, or to a deed of reconveyance.

Comment. Section 27287 is amended to provide that a revocable transfer on death deed need not be acknowledged in order for it to be recorded.

The staff is not sure at this point whether there are other coordinating changes that would also need to be made. We will research the matter further before the November meeting.

Burdens Imposed by Witnessing Requirement

TEXCOM generally objects to the additional burden that would be placed on transferors if the law were to require that an RTODD be witnessed:

[M]any on TEXCOM expressed concern that the witness requirement will add another layer of complexity to RTODDs. Those members pointed out that other methods of holding title which transfer property upon death of a property owner (e.g., joint tenancy or community property with right of survivorship) do not require witnesses. Presumably, the same concerns about fraud,

6. See Exhibit p. 2 (emphasis in original).

undue influence, and post-death testimony exist with those deeds as well. If so, why add the burden of witness to RTODDs.⁷

This raises the balancing question that the staff discussed above — is the value of witnessing as a fraud protection great enough to justify the associated burdens?

Answering that question requires an assessment of the burden that would be imposed by the witnessing requirement. The only significant burden that the staff can see is the need for the transferor to find two competent adults who are willing to serve as witnesses, and get them together at the same time. That might be difficult for a person who has few acquaintances and limited mobility.

However, the same burden already applies to a person who executes a will. Presumably, the burden of witnessing is considered appropriate in that context. It is not clear why it would be inappropriate for an RTODD.

Note also that the proposed law would replace the existing notarization requirement with the witnessing requirement. In many cases, gathering two witnesses would be easier (and less expensive) than hiring a notary.

NOTICE

As noted above, the proposed law would require that a transferor give notice to heirs when an RTODD operates, on the transferor's death. That proposal was included in the tentative recommendation that the Commission circulated. It was refined and expanded (by adding a newspaper publication requirement) at the November meeting.

TEXCOM had concerns about the notice requirement in the tentative recommendation and they continue to have concerns about the revised version in the attached draft.

General Concern

TEXCOM is generally concerned about the burdens that the notice requirement would impose on an RTODD transferor. In particular, TEXCOM raises objections to the proposed publication requirement:

As stated in our September 4, 2019 letter, despite the changes made to the RTODD statute, TEXCOM continues to have reservations regarding RTODDs and their efficacy and we continue to believe that the potential issues raised by RTODDs outweigh the

7. *Id.*

benefits. In its letter to the Commission dated June 1, 2017, TEXCOM expressed its concern that the fundamental issue with RTODDs is that the practical pitfalls undermine its effectiveness. As the Commission worked through its follow-up studies and gathered public comments, revisions have been proposed and made to the RTODD statutes to reduce the risk of fraud, abuse and undue influence. Those revisions have come at a cost — what may have started as a simple method for nonprobate transfers of real property, has become much more complicated.

In TEXCOM's view, the most recent proposal to add a publication requirement to RTODDs tips the scale. Setting aside the practical issues of the proposed publication requirement, the complexity and cost it will add undermine the RTODD benefits.⁸

Lack of Form Notice

TEXCOM points out that the only at-death transfer that requires publication of a notice is court-supervised probate. The form of notice used in probate is standardized by requirements that specific Judicial Council forms be used.⁹

TEXCOM has concerns about the lack of such standardized form requirements in the proposed law:

RTODDs are designed to be used by individuals without the need for legal counsel, but absence of mandated and readily available forms with respect to RTODDs will complicate the notice and publication process. In particular, the language in the proposed RTODD publication statute is not comprehensive and TEXCOM is concerned that this will lead to inconsistencies and confusion with respect to the publication.¹⁰

While the staff understands that concern, it is not clear that the proposed law would leave much scope for inconsistency or confusion. The statement that must be published would be expressly spelled out by statute.¹¹ It would read as follows:

REVOCABLE TRANSFER ON DEATH DEED

A revocable transfer on death deed, created by [name of deceased transferor], affecting [description of property used on revocable transfer on death deed], named [name(s) of beneficiary(ies)] as the beneficiary(ies) of the deed. As a result of

8. See Exhibit p. 3.

9. *Id.*

10. *Id.*

11. Section 5681(a)(2).

the death of [name of deceased transferor], the property will transfer.¹²

Cloud on Title

TEXCOM is also concerned that the adequacy of notices given by laypeople without any outside validation may create a cloud on title:

As TEXCOM has previously commented, the RTODD statutes have created uncertainty with respect to how third parties (e.g., banks, lenders, title companies) will treat RTODDs. The proposed publication requirement will exacerbate that issue because, unlike probate, there will be no court order confirming that the publication was properly made.

In probate, third parties require Letters Testamentary/Letters of Administration ("Letters") (Judicial Council Form DE-150) when dealing with a personal representative. Letters give third parties assurance that the personal representative is authorized to act on behalf of the estate. In order to obtain Letters, the personal representative must have obtained an Order for Probate (Judicial Council Form DE-140). The Order for Probate expressly confirms that all notices (including the Published Notice) have been properly given. With RTODDs, third parties will not have a court order that the notice/publication was properly made, they will simply have an affidavit that the required notices have been made. It is not clear what impact this will have on title and, if there was an error with the notice or publication, when that error would be discovered.¹³

The question of third party reliance on title transferred by RTODD has been a central concern in this study. As noted many times, the success of the RTODD depends on the ability of title insurers to assess the validity of the RTODD entirely from title records. If the validity of an RTODD depends on off-record information, the transferee might not be able to obtain title insurance and might need to go to court to perfect title.

That is why the proposed law does not condition the validity of the RTODD on the transferee having fully complied with the notice and publication requirements. Instead, it expressly provides that third parties (i.e., title insurers, lenders, prospective purchasers) are protected if the transferee records an affidavit that merely asserts compliance: "I, [name of beneficiary], delivered and published the notice required by Probate Code Section 5681."¹⁴

12. See proposed Section 5681(b)(3).

13. See Exhibit pp. 3-4.

14. See proposed Section 5682(c).

With that law in place, the recordation of the required affidavit should be sufficient to assure third parties that their rights will be protected if they acquire an interest in the transferred property.

While that may be true as a matter of law, experience with the RTODD in California suggests that many third parties are uneasy about the possibility that title conveyed by an RTODD will somehow be invalidated, leaving the third party holding the bag. That perception, correct or not, may itself be a problem. The Commission should consider whether it seems practical to expect third parties to rely on a transferee affidavit that merely asserts compliance with the notice requirement.

Publication Duplicative

TEXCOM questions the value of requiring publication of notice in addition to requiring direct notice to the transferor's heirs.¹⁵ TEXCOM also questions whether a published legal notice, in the county where the property is located, is a realistic way to communicate with a transferor's heirs. Unlike institutional creditors who routinely scan legal notices, laypeople are unlikely do so.¹⁶

Cost of Publication

TEXCOM also expresses concern that the cost of publishing a legal notice can be high, which could be a significant problem for a transferee of limited means. "Some TEXCOM members have experienced publication fees of over one thousand dollars, especially in rural areas."¹⁷

Content of Published Notice

If the Commission decides to include the publication requirement in its recommendation, TEXCOM believes that the required content of the notice should be broadened to include additional information:

The published statement might be more helpful to a potential contestant if it included more information, such as the transferor's date of death, the date of the RTODD as well as the address and other information to specifically identify the property.¹⁸

15. See Exhibit p. 4.

16. *Id.*

17. *Id.*

18. *Id.*

The proposed law would already require that the published statement describe the property affected by the RTODD. It would be possible to also require that the date of the transferor's death and the date of execution of the RTODD be included in the statement. Such changes would be modest and might be helpful in some cases.

Warning

TEXCOM also suggests that any notice to heirs include a warning to alert the heir of the consequences of failing to bring a timely action to contest the RTODD. As an example, TEXCOM points to Section 16061.7(h) (which governs trusts). That provision requires that the following language be included in a notice:

You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is delivered to you during that 120-day period, whichever is later.

As a general matter, that could be done and it would probably be helpful to alert heirs of the applicable time limits. However, the time limits in the RTODD statute are more complicated than those that govern trusts. Any warning for RTODDs would need to be drafted carefully.

CONCLUSION

The deadline for submission of the attached report is January 1, 2020. The November meeting is the last scheduled meeting before that deadline.

Unless it wishes to schedule another meeting before the end of the year, the Commission needs to approve a final recommendation in this study at the November meeting.

TEXCOM suggests that a number of provisions should be removed from the proposed law (or adjusted). The Commission should decide how it wishes to address each of the provisions discussed by TEXCOM. **Specifically, the Commission needs to answer all of the following questions:**

- (1) Should the witnessing requirement be included in the proposed law, in lieu of acknowledgement by a notary?
- (2) If so, should the law be revised to more clearly provide that a witnessed RTODD can be recorded?

- (3) Should the notice to heirs requirement be included in the proposed law?
- (4) If so, should the notice include a warning of the time period for contesting an RTODD?
- (5) Should the notice publication requirement be included in the proposed law?
- (6) If so, should the law require that the notice include the date of the decedent's death, the date of execution of the RTODD, and the street address of the property at issue?

Implementation of some decisions would require further drafting. **If that is the case, the staff recommends that the Commission approve a final recommendation now, with specific guidance regarding its content, and then delegate the drafting to the staff, subject to the final approval of the Chair.** That is a practice that the Commission has used many times in the past, when time is of the essence.

Respectfully submitted,

Brian Hebert
Executive Director

TRUSTS AND ESTATES

CALIFORNIA
LAWYERS
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November 12, 2019

VIA E-MAIL AND U.S. MAIL

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Re: Tentative Recommendation - Revocable Transfer on Death Deed: Follow-Up Study

Dear Commissioners:

This letter addresses the November 2019 Staff Draft Recommendation (the “November 2019 Recommendation”) regarding revocable transfer on death deeds (“RTODDs”) on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”).

TEXCOM provided comments on the prior tentative recommendation in its letter to the Commission dated September 4, 2019. It is our understanding that those comments, along with others, were considered at the Commission’s September 2019 meeting and that the Commission approved several changes to the tentative recommendation during that meeting. Those changes were then incorporated into the November 2019 Recommendation, on which the Commission has requested further public comment. This letter addresses only those changes from the prior tentative recommendation. TEXCOM reiterates the comments in its September 4 letter, particularly the comments regarding naming trusts as beneficiaries of an RTODD. However, for the sake of brevity, those comments are not repeated in this letter.

TEXCOM sees potential issues with three of the changes to the tentative recommendation: 1) the requirement that an RTODD be witnessed (and not notarized); 2) the form of the notice required to be made to the heirs of the RTODD transferor; and 3) the requirement that notice of death of the RTODD transferor be published in a newspaper of general circulation.

1. Witnessing Requirement

The November 2019 Recommendation eliminates the requirement that an RTODD be notarized and instead requires that it be witnessed. Eliminating the requirement for notarization of the RTODD would make it unrecordable under current law. Quitclaim deeds, grant deeds, or any other documents affecting real property cannot be proven by a subscribing witness and must be notarized in order to be recorded. (Government Code § 27287) Accordingly, if the RTODD will be exempt from the notarization requirement, additional statutory changes will be required. TEXCOM recommends that the notarization requirement not be eliminated.

As noted in the November 2019 Recommendation, adding a requirement that RTODDs be witnessed may help reduce the risk of fraud or undue influence. The witnesses may also be available after the transferor's death to provide testimony in a contest of the RTODD. TEXCOM appreciates those benefits. However, many on TEXCOM expressed concern that the witness requirement will add another layer of complexity to RTODDs. Those members pointed out that other methods of holding title which transfer property upon death of a property owner (e.g., joint tenancy or community property with right of survivorship) do not require witnesses. Presumably, the same concerns about fraud, undue influence, and post-death testimony exist with those deeds as well. If so, why add the burden of witnesses to RTODDs?

2. Notice Requirement

The November 2019 Recommendation provides a form for the notification to the heirs of an RTODD transferor. If the Commission recommends a notice requirement for RTODDs, TEXCOM reiterates its suggestion that the notification should also include a warning similar to the one set forth in Probate Code § 16061.7(h) (in the context of trusts), which would alert the heir of the consequences of failing to timely bring an action to contest the RTODD. For reference, Probate Code § 16061.7(h) provides the following:

(h) If the notification by the trustee is served because a revocable trust or any portion of it has become irrevocable because of the death of one or more settlors of the trust, or because, by the express terms of the trust, the trust becomes irrevocable within one year of the death of a settlor because of a contingency related to the death of one or more of the settlors of the trust, the notification by the trustee shall also include a warning, set out in a separate paragraph in not less than 10-point boldface type, or a reasonable equivalent thereof, that states as follows:

“You may not bring an action to contest the trust more than 120 days from the date this notification by the trustee is served upon you or 60 days from the date on which a copy of the terms of the trust is delivered to you during that 120-day period, whichever is later.”

3. Publication Requirement

In addition to the requirement that the RTODD beneficiary notify the transferor's heirs upon the transferor's death, the November 2019 Recommendation also includes a requirement that the beneficiary of an RTODD publish notice in a newspaper of general circulation in the county where the property is located. TEXCOM strongly recommends that the publication requirement be eliminated.

As stated in our September 4, 2019 letter, despite the changes made to the RTODD statute, TEXCOM continues to have reservations regarding RTODDs and their efficacy and we continue to believe that the potential issues raised by RTODDs outweigh the benefits. In its letter to the Commission dated June 1, 2017, TEXCOM expressed its concern that the fundamental issue with RTODDs is that the practical pitfalls undermine its effectiveness. As the Commission worked through its follow-up studies and gathered public comments, revisions have been proposed and made to the RTODD statutes to reduce the risk of fraud, abuse and undue influence. Those revisions have come at a cost – what may have started as a simple method for nonprobate transfers of real property, has become much more complicated.

In TEXCOM's view, the most recent proposal to add a publication requirement to RTODDs tips the scale. Setting aside the practical issues of the proposed publication requirement, the complexity and cost it will add undermine the RTODD benefits.

A. Lack of Forms Will Make Publication Inconsistent and More Difficult

Notably, in California there is no nonprobate transfer of property which requires publication. With respect to at-death transfers, publication is reserved for court-supervised probates. In probate, nearly all documents and court filings are completed on judicial council forms. The use of judicial council forms is mandated and the forms are made accessible to the public. Judicial council forms help simplify the probate process by creating a uniform set of documents that a person, even if not assisted by an attorney, can more easily complete.

When the initial pleading is filed to commence a probate, notice is required to be given to a decedent's heirs and beneficiaries of the estate ("Notice of Petition to Administer Estate"). (Probate Code § 8100, Judicial Council Form DE-121) In addition, the Probate Code also requires that notice of the probate proceeding be published in a newspaper of general circulation ("Published Notice"). (Probate Code § 8120 et seq.)

RTODDs are designed to be used by individuals without the need for legal counsel, but absence of mandated and readily available forms with respect to RTODDs will complicate the notice and publication process. In particular, the language in the proposed RTODD publication statute is not comprehensive and TEXCOM is concerned that this will lead to inconsistencies and confusion with respect to the publication.

B. Lack of a Court Order Regarding Notice and Publication Will Lead to Uncertainty

As TEXCOM has previously commented, the RTODD statutes have created uncertainty with respect to how third parties (e.g., banks, lenders, title companies) will treat RTODDs. The proposed publication requirement will exacerbate that issue because, unlike probate, there will be no court order confirming that the publication was properly made.

In probate, third parties require Letters Testamentary/Letters of Administration ("Letters") (Judicial Council Form DE-150) when dealing with a personal representative. Letters give third parties assurance that the personal representative is authorized to act on behalf of the estate. In order to obtain Letters, the personal representative must have obtained an Order for Probate (Judicial Council Form DE-140). The Order for Probate expressly confirms that all notices (including the Published Notice) have been properly given. With RTODDs, third parties will not

have a court order that the notice/publication was properly made, they will simply have an affidavit that the required notices have been made. It is not clear what impact this will have on title and, if there was an error with the notice or publication, when that error would be discovered.

C. Publication is Duplicative

TEXCOM's impression is that the Commission's aim with respect to the RTODD publication is to alert heirs and potential objectors to the RTODD. In that sense, the publication requirement is duplicative since the RTODD beneficiary is already required to provide notice to the transferor's heirs under the proposed Probate Code section 5681(a)(1). Granted, in probate, a notification of heirs *and* a publication are required. However, in probate, a primary purpose of the publication in probate is to alert potential creditors of the estate. In fact, a large portion of the Published Notice is directed specifically to creditors. Unless notifying creditors of the RTODD is the purpose of the proposed publication requirement, TEXCOM believes that the proposed RTODD notice requirement will sufficiently notice the RTODD transferor's heirs and potential objectors. Other practical concerns with the publication requirement are that 1) it is only effective for heirs or potential objectors who happen to live in the county where the property is located and 2) unlike creditors, such as financial institutions and collection agencies, which are accustomed to scanning the legal notices section of newspapers, laypersons are unlikely to check the legal notices section of their local newspaper for RTODD transfers.

D. Costs of Publication May be High

Many TEXCOM members expressed concern regarding the cost of publication. In probate, Published Notice typically costs several hundred dollars. Some TEXCOM members have experienced publication fees of over one thousand dollars, especially in rural areas. We would anticipate the costs of publication for an RTODD notice to be similar. This seems too onerous and, again, goes against the purpose of providing a cost-effective way to transfer the property at death.

If the Commission is inclined to include a publication requirement, TEXCOM recommends that the form of the statement required to be published (Proposed Probate Code § 5681(b)(3)) be more specific. The notice required to be sent to the transferor's heirs will include the statement as well as a copy of the RTODD and the decedent's death certificate, but the published statement will not. The published statement might be more helpful to a potential contestant if it included more information, such as the transferor's date of death, the date of the RTODD as well as the address and other information to specifically identify the property.

Respectfully submitted,



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TRUSTS AND ESTATES

CALIFORNIA
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September 4, 2019

VIA E-MAIL AND U.S. MAIL

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Re: Tentative Recommendation - Revocable Transfer on Death Deed: Follow-Up Study

Dear Commissioners:

This letter contains comments on the tentative recommendation issued May 2019 regarding revocable transfer on death deeds (“RTODDs”) on behalf of the Executive Committee of the Trusts and Estates Section of the California Lawyers Association (“TEXCOM”).

First and foremost, TEXCOM is very appreciative of the effort that the Commission and its staff has put into the follow-up study.

The Commission has specifically requested comment on whether the RTODD statutes should continue after January 1, 2021. TEXCOM continues to have reservations regarding the RTODD statutes and their efficacy, and believes that the potential issues raised by RTODDs outweigh the benefits. We do not believe that RTODDs have existed in California long enough to fully evaluate the consequences (specifically, issues arising post-death).

Since their enactment, the RTODD statutes have evolved into a much more complicated process. The proposed amendments in the tentative recommendation appear to make the process more burdensome, with those burdens falling on the RTODD beneficiary. Beneficiaries may feel compelled to hire a lawyer to navigate and advise them, which undermines the stated purpose of making RTODDs a simple process. If RTODDs are going to provide a simple, cost-effective way to transfer real property, then they should be simple and cost effective from *both* the transferor’s side and the beneficiary’s side. If the Commission believes that there is a risk of fraud associated with RTODDs, then it should address that problem directly by building in safeguards at the time of the transfer, not by imposing more onerous requirements on beneficiaries.

In addition, TEXCOM has the following specific comments on the tentative recommendation:

1. Timing of Revocation of RTODD

TEXCOM has previously raised the issue that there is an inconsistency between Prob. Code § 5628 (which provides a subsequent RTODD revokes a prior RTODD and can be recorded after death) and Prob. Code § 5632 (which requires a revocation of an RTODD be recorded prior to transferor's death). We believe that this issue should be addressed and that the Commission should consider allowing the revocation of an RTODD to be recorded after the transferor's death.

2. Naming a Trust as a Beneficiary of an RTODD

TEXCOM continues to have significant concerns regarding allowing a transferor to name a trust as a beneficiary of an RTODD. Many on TEXCOM disagree with the tentative recommendation to expressly allow naming a trust as a beneficiary of an RTODD and believe that the statute should be amended to expressly disallow a transfer to a trust. Many of those concerns have been previously articulated to the Commission. Additional concerns are described below.

A. Mistakes in Naming, Subsequent Amendments or Revocation. Despite the proposed instructions, TEXCOM remains concerned that individuals may make mistakes in naming a trust as a beneficiary of an RTODD. It is not clear what the consequences of the mistake may be. Would the deed fail? In addition, trusts are often amendable and revocable. If an RTODD names a trust as beneficiary, would the property pass to the trust on the terms that existed on the date of the RTODD or as of the date of the transferor's death. What if the trust is revoked entirely? Will the deed fail?

B. Ambiguities Regarding Separate Property and Community Property. In addition, naming a trust as beneficiary of an RTODD may raise issues regarding the community property or separate property character of the real property transferred. For example, if a parent executes an RTODD in favor of their son and daughter-in-law's revocable living trust, when the property passes from the trust upon the death of the parent is it the separate property of the son or community property of both the son and daughter-in-law? If the parent had named the son as the beneficiary of the RTODD, the property would be his separate property. Transferors may not understand or appreciate the difference without consulting legal counsel.

C. Class Gifts and Contingent Beneficiaries. The RTODD statutes impose many limitations designed to minimize the risk of ambiguity or mistake (i.e., no class gifts, no unequal gifts, no conditional gifts, etc.). However, a transferor could easily circumvent those limitations by naming a trust that does all of those things as the beneficiary of an RTODD.

3. Notification by RTODD Beneficiary

The Commission proposes to add a notification requirement to the RTODD statutes. This would require a beneficiary of an RTODD to notify the transferor's heirs of the RTODD upon the death of the transferor – see proposed amendments to Prob. Code §§ 5680, 5682, and 5694. Specifically, the beneficiary is required to provide the heirs a copy of the RTODD and the transferor's death certificate. (see proposed Prob. Code § 5680(e)) This notice would be similar to the notice required by Probate Code 16061.7 in the context of a trust administration (commonly referred to as a "Notification by Trustee").

On the one hand, requiring the notification will provide an opportunity to the transferor's heirs (which might not otherwise be aware of the RTODD) to contest the RTODD. On the other hand, the notification requirement adds more complexity to the RTODD process and place a significant burden on the RTODD beneficiary. Some TEXCOM members believe that the notice requirement is too burdensome. They note that a similar notice is not required for any other type of deed.

If a notice requirement is added, TEXCOM recommends that the form of the notice and the required affidavit be expressly set forth in the statutes, so the procedure is clear.

The notice requirement raises several other potential issues: 1) whether the beneficiary will be able to correctly identify the "heirs" of the transferor; and 2) what the consequences of a defective notice are; and 3) whether the beneficiary's notice to the heirs will adequately alert them of their right to contest the RTODD as well as the consequences of failing to timely contest the RTODD.

With respect to the first issue, the Commission's tentative recommendation includes a proposed amendment to the RTODD FAQ's which states that determining who is an "heir" can be complicated and recommends that the beneficiary consider seeking professional advice to make that determination. TEXCOM agrees with that proposed amendment.

With respect to the second issue, many on TEXCOM have raised concerns that a beneficiary may not correctly provide the required notice. For example, the beneficiary may omit an heir of the transferor from the notice or send the notice to the wrong address. The consequences of a defective notice regarding an RTODD are not clear. With respect to a Notification by Trustee, a trustee can be held personally liable for damages associated with the failure to provide notice or providing defective notice. (see Probate Code 16061.9) Perhaps similar consequences should exist for the beneficiary of an RTODD.

On the third issue, in order to ensure the notice to the heirs will adequately alert them of their right to contest the RTODD, as well as the consequences of failing to timely contest the RTODD, TEXCOM recommends that the statutes include a form for the notification. The notification should include language akin to Probate Code § 16061.7(g), such as information about the property (address, parcel number, etc.), the identity of the transferor, and the identity of the beneficiaries (with contact information). The notification

should also include a warning like the one set forth in § 16061.7(h), which would alert the heir of the consequences of failing to timely bring an action to contest the RTODD.

The tentative recommendation provides that the beneficiary must record an affidavit stating that the notice requirements have been met. Again, TEXCOM recommends that the form for the affidavit required to be filed following the death of the RTODD transferor also be set forth in the statutes. Including forms for the notice and affidavit in the statutes would simplify the process and reduce mistakes.

Lastly, there appears to be a typographical error in the RTODD FAQ's "HOW DO I NAME BENEFICIARIES." It provides, "If a beneficiary is a public or public entity, . . ." Presumably this was intended to be "public or private." (see the tentative recommendation at page 35, line 6)

Again, TEXCOM commends the work of the Commission and its staff on this follow-up study and the tentative recommendation.

Respectfully submitted,



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