

## First Supplement to Memorandum 2021-62

**Stock Cooperatives and Revocable Transfer on Death Deeds:  
(Staff Draft Recommendation)**

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Memorandum 2021-62 presented three alternative ways to address an issue that should be considered before approving a final recommendation in this study.<sup>1</sup> The proposed alternatives are as follows:

- (1) Revise Probate Code Section 5652(b) to create an exception for stock cooperatives.
- (2) Revise Section 5652 to delete subdivision (b).
- (3) Revise Section 5652 to replace subdivision (b) with an express disclaimer that the transfer of property by revocable transfer on death deed has no effect on existing law that governs the enforcement of interests in that property, whether recorded or unrecorded.

A staff draft recommendation is attached to this supplement. It does not implement any of the changes listed above.<sup>2</sup> **If the Commission decides against making any change on this point, it could approve the attached draft as a final recommendation.**

However, if the Commission decides to make one of the listed changes, it will need to revise both the narrative explanation and the proposed legislation in the attached draft. Draft language that could be used for that purpose is set out below.

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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. Except for the dates, the attached draft is the same as the draft that was attached to Memorandum 2021-55.

## ALTERNATIVE (1) — STOCK COOPERATIVE EXCEPTION

### Revision of Explanatory Narrative

If the Commission decides to adopt Alternative (1), changes along the following lines could be made to the draft recommendation, to conform the narrative explanation to the revised version of the proposed legislation.

- On page 2, delete lines 31 and 32.
- On page 3, delete lines 1 through 15, inclusive, and insert language along the following lines:

“Such restrictions are typically not recorded. Instead, they are expressed in the stock cooperative’s governing documents (e.g., articles of incorporation, bylaws) or in an agreement between the stock cooperative and the owner of the separate interest (e.g., proprietary lease, occupancy agreement).

That could lead to serious problems if the existing RTODD statute is applied to stock cooperatives. Existing Probate Code Section 5652(b) provides that an unrecorded restriction is not enforceable against property transferred by RTODD. Under that rule, important restrictions on the use of property in a stock cooperative could be rendered unenforceable by using an RTODD to transfer the property. In order to avoid that problematic result, the stock cooperative would need to record a restriction in the time period provided in Section 5652(b) (120 days after the beneficiary of the RTODD gives notice to the transferor’s heirs, a precondition to the effective operation of the RTODD). If the stock cooperative does not record the restriction in time, it would become unenforceable.

The Commission believes the risk of such a result is serious enough to outweigh other considerations. It therefore recommends that an express exception be added to Section 5652, to provide that a restriction expressed in a stock cooperative’s governing documents or an agreement between the stock cooperative and the transferor would remain enforceable against property transferred by RTODD, regardless of whether the restriction has been recorded. [fn. See proposed Prob. Code § 5652(c) *infra*.]

The Commission also recommends that Section 5652 be revised to provide guidance on how a reserved right to repurchase an interest in a stock cooperative would affect an RTODD that transfers the interest. [fn. See proposed Prob. Code § 5652(d) *infra*.]”

### Revision of Proposed Legislation

- On page 10, delete lines 12 to 24, inclusive.

- On page 11, delete lines 1 to 12, inclusive, and insert the following (i.e., existing law):

“(b) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor’s interest that is of record at the transferor’s death or that is recorded no later than 120 days after the affidavit required by subdivision (c) of Section 5682 is recorded, including, but not limited to, a lien, encumbrance, easement, lease, or other instrument affecting the transferor’s interest, whether recorded before or after recordation of the revocable transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed. An enforceable restriction on the use of the transferred property does not affect the transfer of title to the property by a revocable transfer on death deed.”

- On page 11, line 13, after “(c)” insert the following:

“Notwithstanding subdivision (b), an interest in a stock cooperative is transferred by a revocable transfer on death deed subject to any limitation on the transferor’s interest that is expressed in the governing documents of the stock cooperative or in an agreement between the stock cooperative and the transferor, without regard for whether those instruments are recorded.

(d)”

- On page 11, line 21, delete “(d)” and insert “(e)”.
- On page 11, delete lines 23 and 24 and insert the following:  
**“Comment.** Subdivision (c) is added to Section 5652 to create an express exception for certain property restrictions in a stock cooperative. Such restrictions need not be recorded in order to remain enforceable against an interest that is transferred by revocable transfer on death deed.”
- On page 11, line 25, delete “(c)” and insert “(d)”.
- On page 12, delete lines 13 to 42, inclusive; on page 13, delete lines 1 to 17, inclusive.

#### ALTERNATIVE (2) — DELETE SUBDIVISION (B)

Before setting out changes to implement this approach, the staff should note that entirely deleting subdivision (b) would cut too deeply. The last sentence of that provision was added on the Commission’s recommendation in 2021.<sup>3</sup> It reads:

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3. See 2021 Cal. Stat. ch. 215.

“An enforceable restriction on the use of the transferred property does not affect the transfer of title to the revocable transfer on death deed.” The purpose of that language was to make clear that a *use restriction* would not prevent the *transfer of title* by RTODD. Even if a beneficiary cannot use the property (e.g., the beneficiary is too young to live in age-restricted property), the beneficiary would still receive title. This would allow the beneficiary to sell the property and realize the monetary value of the gift. That important clarification should be retained. In other words, Alternative (2) would delete all of subdivision (b) *except* its last sentence.

### **Revision of Explanatory Narrative**

If the Commission decides to adopt Alternative (2), changes along the following lines should be made to the draft recommendation, to conform the narrative explanation to the revised version of the proposed legislation.

- In the “Summary of Recommendation” page that follows the cover page, delete the next-to-last paragraph and insert language along the following lines:

“The Commission also recommends two substantive improvements to the existing revocable transfer on death deed statute, removing rules that require that certain instruments be recorded in order to affect property transferred by a revocable transfer on death deed.”

- On page two, delete lines 3 through 6, inclusive, and insert language along the following lines:

“In the course of its study, the Commission also discovered two ways in which the existing RTODD statute could be improved. Those reforms are also recommended and explained below.

- On page 2, delete lines 31 and 32.
- On page 3, delete lines 1 through 15, inclusive, and insert language along the following lines:

“Such restrictions are typically not recorded. Instead, they are expressed in the stock cooperative’s governing documents (e.g., the articles of incorporation or bylaws) or in an agreement between the stock cooperative and the owner of the separate interest (e.g., a proprietary lease or occupancy agreement).

That could lead to serious problems if the existing RTODD statute is applied to stock cooperatives. Existing Probate Code Section 5652(b) provides that an unrecorded restriction is not enforceable against property transferred by RTODD. Under that rule, important restrictions on the use of property in a stock cooperative could be rendered unenforceable by using an RTODD to transfer the property. In order to avoid that problematic result,

the stock cooperative would need to record a restriction in the time period provided in Section 5652(b) (120 days after the beneficiary of the RTODD gives notice to the transferor's heirs, a precondition to the effective operation of the RTODD). If the stock cooperative does not record a restriction in time, it would become unenforceable.

The Commission believes the risk of such a result is serious enough to outweigh other considerations. It therefore recommends eliminating the existing requirement that a property restriction be recorded in order to remain enforceable against property that is transferred by RTODD [fn. See proposed Prob. Code § 5652(b) *infra*.] As discussed further *infra*, the Commission recommends that the change be made applicable to any property that is transferred by RTODD, not just an interest in a stock cooperative.

The Commission also recommends that Section 5652 be revised to provide guidance on how a reserved right to repurchase an interest in a stock cooperative would affect an RTODD that transfers the interest. [fn. See proposed Prob. Code § 5652(c) *infra*.]"

- On page 3, delete line 21 and insert the following headings:

#### “IMPROVEMENTS TO EXISTING RTODD STATUTE

##### **Treatment of Conflicting Dispositive Instruments”**

- On page 5, after line 11, insert language along the following lines:

##### **“Treatment of Interests in Transferred Property**

Existing Probate Code Section 5652(b) provides that a pre-existing interest in property that is transferred by an RTODD must be recorded within a specified period or it may not be enforced against the transferred property. That rule is stricter than general law in two ways:

- (1) *Timing*. Under general law, there is no fixed time during which an interest must be recorded in order to remain effective. The interest need only be recorded before a subsequent purchase or encumbrance in order to be enforceable against the purchaser or encumbrancer. [fn. See 4 Cal. Real Est. § 10:52 (4th ed.) (notice defeats bona fide status); 4 Cal. Real Est. § 10:60 (4th ed.) (recordation as constructive notice).]
- (2) *Notice*. Under general law, an unrecorded interest is enforceable against a purchaser or encumbrancer who has notice of the interest. [fn. See 4 Cal. Real Est. § 10:52 (4th ed.) (“An interest or a lien on real property that is not recorded is enforceable between the parties and against any third party who acquires a subsequent interest or lien with knowledge or notice of the prior interest and is therefore not a bona fide purchaser or

encumbrancer.”) See also Civ. Code § 1217 (“An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.”); 4 Cal. Real Est. § 10:2 (4th ed.) (“An unrecorded instrument is also valid and enforceable against any party who subsequently acquires an interest in the property, who has notice of the prior unrecorded interest”).]

Having studied the matter further, the Commission believes that Section 5652(b) is stricter than is necessary for the operation of the statute and for fairness to subsequent purchasers and encumbrancers. The Commission sees no disadvantage to removing the special recordation requirement and allowing general law on the priority of interests to govern property transferred by RTODD. The proposed law would make that change. [fn. See proposed Section 5652(b) *infra*.]

This should not create any problems for the operation of the RTODD statute. It should not interfere with the availability of title insurance; nor would it impair the marketability of property transferred by RTODD.

That is because standard title insurance policies already include an exception for an off-record interest that can be ascertained by inspection or inquiry. [fn. See 3 Cal. Real Est. § 7:61 (4th ed.) (California Land Title Association policy); 3 Cal. Real Est. § 7:59 (4th ed.) (American Land Title Association policy).] Therefore, allowing the possibility of enforcement of such an interest should not create any new liability for title insurers.

If an off-record interest cannot be ascertained by inspection or inquiry, then it would not be enforceable against a subsequent purchaser or encumbrancer for value who lacks notice of the interest. [fn. See 4 Cal. Real Est. § 10:50 (4th ed.) (“Bona fide purchaser takes priority over prior unrecorded interests of which he or she has no notice, actual or constructive.”). See, e.g., *Vasquez v. LBS Fin. Credit Union* (2020) 52 Cal.App.5th 97, 107 (“It is ‘black-letter law’ that a bona fide purchaser for value who acquires his or her interest in real property without knowledge or notice of another’s prior rights or interest in the property takes the property free of such unknown interests.”).] The existence of such an interest should not create liability for title insurers (because the insured would face no liability).

Allowing general law to control these situations would strike a better balance of policy interests than existing law. There would be no significant disadvantage to title insurers and subsequent purchasers or encumbrancers. However, there would be a significant improvement to the situation of those who hold interests in property transferred by an RTODD. Under the proposed law, their interests would remain enforceable if recorded before a

subsequent purchase or encumbrance, or if the subsequent purchaser or encumbrancer has other notice of the interest.”

### Revision of Proposed Legislation

- On page 10, delete lines 12 to 24, inclusive.
- On page 11, delete lines 1 to 12, inclusive, and insert the following:

~~“(b) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor’s interest that is of record at the transferor’s death or that is recorded no later than 120 days after the affidavit required by subdivision (c) of Section 5682 is recorded, including, but not limited to, a lien, encumbrance, easement, lease, or other instrument affecting the transferor’s interest, whether recorded before or after recordation of the revocable transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed. An enforceable restriction on the use of the transferred property does not affect the transfer of title to the property by a revocable transfer on death deed.”~~

- On page 11, delete lines 23 and 24 and insert the following:  
“**Comment.** Subdivision (b) of Section 5652 is amended to delete a requirement that an interest in real property be recorded in order to remain enforceable after a transfer of that property by revocable transfer on death deed. This means that the validity, priority, and effect of the interest is governed by general law. See, e.g., 4 Cal. Real Est. § 10:50 (4th ed.) (“Bona fide purchaser takes priority over prior unrecorded interests of which he or she has no notice, actual or constructive.”). But see Civil Code § 1217 (“An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.”); 4 Cal. Real Est. § 10:2 (4th ed.) (“An unrecorded instrument is also valid and enforceable against any party who subsequently acquires an interest in the property, who has notice of the prior unrecorded interest”).”
- On page 12, delete lines 13 to 42, inclusive; on page 13, delete lines 1 to 17, inclusive.

### ALTERNATIVE (3) — REPLACE SUBDIVISION (B) WITH DISCLAIMER

For the reasons discussed above, Alternative (3) should not delete the last sentence of subdivision (b). The language below reflects that.

## Revision of Explanatory Narrative

If the Commission decides to adopt the Alternative (3), the proposed revisions to the narrative part of the draft recommendation would be the same as those shown above for Alternative (2).

## Revision of Proposed Legislation

- On page 10, delete lines 12 to 24, inclusive.
- On page 11, delete lines 1 to 12, inclusive, and insert the following:

~~“(b) Property is transferred by a revocable transfer on death deed subject to any limitation on the transferor’s interest that is of record at the transferor’s death or that is recorded no later than 120 days after the affidavit required by subdivision (c) of Section 5682 is recorded, including, but not limited to, a lien, encumbrance, easement, lease, or other instrument affecting the transferor’s interest, whether recorded before or after recordation of the revocable transfer on death deed. The holder of rights under that instrument may enforce those rights against the property notwithstanding its transfer by the revocable transfer on death deed. The transfer of property by revocable transfer on death deed has no effect on an interest in the property that existed at the time of the transferor’s death. An enforceable restriction on the use of the transferred property does not affect the transfer of title to the property by a revocable transfer on death deed.”~~

- On page 11, delete lines 23 and 24 and insert the following:  
“**Comment.** Subdivision (b) of Section 5652 is amended to delete a requirement that an interest in real property be recorded in order to remain enforceable after a transfer of that property by revocable transfer on death deed. It was replaced with an express statement that a transfer of property by revocable transfer on death deed has no effect on such an interest. This means that the priority, validity, and effect of the interest is governed by general law. See, e.g., 4 Cal. Real Est. § 10:50 (4th ed.) (“Bona fide purchaser takes priority over prior unrecorded interests of which he or she has no notice, actual or constructive.”). But see Civil Code § 1217 (“An unrecorded instrument is valid as between the parties thereto and those who have notice thereof.”); 4 Cal. Real Est. § 10:2 (4th ed.) (“An unrecorded instrument is also valid and enforceable against any party who subsequently acquires an interest in the property, who has notice of the prior unrecorded interest”).

- On page 12, delete lines 13 to 42, inclusive; on page 13, delete lines 1 to 17, inclusive.

Respectfully submitted,

Brian Hebert  
Executive Director



#L-3032.5, H-850

STATE OF CALIFORNIA

# **CALIFORNIA LAW REVISION COMMISSION**

**STAFF DRAFT**

RECOMMENDATION

Stock Cooperatives and  
Revocable Transfer on Death Deeds

December 2021

California Law Revision Commission  
c/o UC Davis School of Law  
Davis, CA 95616  
<commission@clrc.ca.gov>



## SUMMARY OF RECOMMENDATION

In 2019, the Commission recommended that the revocable transfer on death deed statute not be made applicable to an interest in a stock cooperative (a type of common interest development where all of the real property is owned by a corporation and the separate interests consist of a share of stock in the corporation that creates an exclusive right to occupy a particular unit). The reason for that recommendation was purely technical. The Commission was unsure about the implications of using a deed to transfer a share of stock. Further study was required to determine whether a simple process could be created to transfer an interest in a stock cooperative on the owner's death, without probate administration.

The Commission has completed that study and recommends minor changes to the revocable transfer on death deed statute to make it applicable to an interest in a stock cooperative.

The Commission also recommends a substantive improvement to the revocable transfer on death deed statute generally, relating to the rules for resolving the effect of a conflicting dispositive instrument.

This recommendation was prepared pursuant to Resolution Chapter 108 of the Statutes of 2021.



1                   STOCK COOPERATIVES AND REVOCABLE  
2                   TRANSFER ON DEATH DEEDS

3       In 2019, the Commission recommended against authorizing the use of a revocable  
4 transfer on death deed (“RTODD”) to transfer an interest in a stock cooperative. That  
5 recommendation was based on technical concerns rather than substantive policy. The  
6 Commission sees no policy reason to deny the owners of interests in stock cooperatives a  
7 simple way to transfer their property on death, without probate administration. The  
8 question addressed in this study is whether and how that result could be achieved.

9       As the Commission explained:

10           A stock cooperative is a kind of common interest development where the  
11 entirety of the development is owned by a corporation formed for that purpose.  
12 The owners of separate interests hold shares in the corporation, which entitle them  
13 to the exclusive right to occupy a specified apartment. Owners do not hold title to  
14 any part of the development.

15           As a result, ownership of a separate interest in a stock cooperative is not  
16 evidenced or conveyed by deed. Instead, it is conveyed by the sale of a share of  
17 stock. For that reason, a deed would not be an appropriate instrument to use to  
18 transfer ownership of a separate interest in a stock cooperative. A deed conveys  
19 title to real property, not the ownership of a share of stock.

20           To avoid any confusion or legal problems that would result from the mismatch  
21 between the use of a deed and the form of ownership in a stock cooperative, the  
22 Commission recommends that stock cooperatives continue to be excluded from  
23 the definition of “real property” that is used in the RTODD statute.

24           That approach would deny owners in stock cooperatives the benefits of using  
25 an RTODD. However, it is possible that a share of ownership in a stock  
26 cooperative could be transferred on death, outside of probate, under the existing  
27 Uniform TOD Security Registration Act. The Commission plans to conduct a  
28 separate study of that possibility, under its general authority to study the Probate  
29 Code.<sup>1</sup>

30       Having completed that study, the Commission decided against adapting the Uniform  
31 TOD Security Registration Act for use in transferring a share of ownership in a stock  
32 cooperative. There are significant substantive differences between the transfer of a  
33 security generally and the transfer of a security that conveys an appurtenant interest in  
34 real property. Properly accounting for those differences would have required adding  
35 numerous provisions to the Uniform Act, which would have undermined its value as a  
36 uniform statute.

37       Instead, the Commission concluded that the best way to address the substantive issues  
38 that are involved in the transfer of an interest of real property would be to use the existing  
39 RTODD statute, which already has the necessary provisions. After examining that  
40 possibility, the Commission found that only a few adjustments to the existing statute

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1. See *Revocable Transfer on Death Deed: Follow-Up Study*, 46 Cal. L. Revision Comm’n Reports 135, 157 (2019) (footnotes omitted).

1 would be required. This recommendation proposes those changes. They are explained  
2 below.

3 In the course of its study, the Commission also discovered a way to simplify and  
4 improve the existing RTODD statute’s treatment of conflicting dispositive instruments (a  
5 will, trust, or other instrument that purports to dispose of property that is governed by an  
6 RTODD). That general reform is also recommended and explained below.

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### USE OF RTODD TO TRANSFER INTEREST IN STOCK COOPERATIVE

9 One potential problem with use of the RTODD statute to transfer an interest in a stock  
10 cooperative is the apparent mismatch between the use of a “deed” to transfer an interest  
11 that is not ordinarily evidenced or conveyed by a deed. As explained, an interest in a  
12 stock cooperative is grounded in ownership of a share of the stock of the cooperative.  
13 Having considered that problem, the Commission concluded that it could be solved by  
14 adding language to affirmatively address the issue. The proposed law would revise the  
15 definition of “revocable transfer on death deed” to expressly state:

16       A revocable transfer on death deed may be used to transfer real property even if  
17       ownership of the property is not typically evidenced or transferred by use of a  
18       deed.<sup>2</sup>

19 The Commission’s Comment to that provision would specifically state its application  
20 to a stock cooperative.<sup>3</sup> In addition, the “Common Questions” text on the statutory  
21 RTODD form would be revised to explain the use of the form to transfer property in a  
22 stock cooperative.<sup>4</sup> Those changes should provide sufficient guidance to avoid any  
23 problematic uncertainty on this fundamental point.

24 Another issue that must be addressed is the treatment of property use restrictions.  
25 Many stock cooperatives place significant restrictions on the use of their separate  
26 interests. Most notably, cooperatives may do one or more of the following:

- 27       • Require board approval of any new occupant.
- 28       • Reserve a right to repurchase a separate interest on the owner’s death.
- 29       • Restrict the purchase and sale price in order to provide affordable housing.<sup>5</sup>
- 30       • Restrict the development to providing housing for seniors.<sup>6</sup>

31 The existing RTODD statute already provides that property transferred by RTODD  
32 remains subject to any burdens or restrictions that are recorded within 120 days after the

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2. See proposed Prob. Code § 5614 *infra*.

3. *Id.*

4. See proposed Prob. Code § 5642 *infra*.

5. See Civ. Code § 817 (limited equity housing development).

6. See Civ. Code § 51.3 (senior housing).

1 beneficiary gives notice to heirs that the RTODD exists and is about to operate.<sup>7</sup> This  
2 should be legally sufficient to protect the kinds of use restrictions that are common in  
3 stock cooperatives. Nonetheless, the Commission recommends three reforms to improve  
4 the effectiveness of that provision:

- 5 (1) The law should be revised to add nonexclusive examples of the kinds of  
6 restrictions that are governed by the existing rule, to illustrate its application  
7 to the kinds of restrictions that are common in stock cooperatives.<sup>8</sup>
- 8 (2) Language should be added to explain how the RTODD would affect a  
9 reserved right to repurchase a transferred interest.<sup>9</sup>
- 10 (3) The rule requiring notice to a transferor's heirs before an RTODD will  
11 operate should be revised to also require notice to a stock cooperative (if  
12 any). This will ensure that the stock cooperative has time to record any  
13 restrictions in order to preserve their application.<sup>10</sup>

14 With those changes, the use of an RTODD to transfer an interest in a stock cooperative  
15 should not unduly interfere with any use restrictions imposed by a stock cooperative.

16 The Commission recommends all of the changes described above. Importantly, it also  
17 recommends that the existing RTODD statute's definition of "real property" be revised so  
18 that it would include stock cooperatives.<sup>11</sup> Taken together, those reforms would ensure  
19 that the RTODD statute would apply to stock cooperatives without causing any new  
20 operational problems.

## 21 TREATMENT OF CONFLICTING DISPOSITIVE INSTRUMENTS

22 Existing Probate Code Section 5660 provides rules for determining the effect of an  
23 RTODD when another instrument purports to dispose of the same property.<sup>12</sup> That  
24 section establishes the following priorities:

- 25 (1) If the other instrument is not recorded within 120 days after the beneficiary  
26 gives notice of the RTODD, the other instrument does not operate.
- 27 (2) If the other instrument is recorded within 120 days after the beneficiary  
28 gives notice, and the other instrument is irrevocable, the other instrument  
29 operates and the RTODD does not.

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7. See Prob. Code § 5652(b) (as amended by 2021 Cal. Stat. ch. 215). Notice to heirs is a statutory precondition to the operation of the RTODD. See Prob. Code § 5681 (as added by 2021 Cal. Stat. ch. 215).

8. See proposed Prob. Code § 5652(b) *infra*.

9. See proposed Prob. Code § 5652(c) *infra*.

10. See proposed Prob. Code 5681 *infra*. Such notice is not required in other types of property developments, because in general a title restriction must be recorded in order to be enforceable. See Civ. Code § 1468(d) (instrument creating covenant that runs with the land must be recorded). See also Civ. Code §§ 4200 (recordation of declaration required in common interest development), 4250 (enforceable equitable servitudes must be expressed in declaration).

11. See proposed Prob. Code § 5610 *infra*.

12. The discussion that follows describes Probate Code Section 5660 as amended by 2021 Cal. Stat. ch. 215.

- 1 (3) If the other instrument is recorded within 120 days after the beneficiary  
2 gives notice, and the other instrument is revocable, the later executed of the  
3 two instruments operates and the earlier-executed instrument does not.

4 Under that provision, recordation is the primary consideration. An RTODD will always  
5 prevail over an unrecorded instrument. The primacy of recordation reflects the  
6 importance of the recording system and title insurance as the means by which a transfer  
7 of property by RTODD will be effectuated. An effective transfer requires title insurance  
8 to guarantee that the RTODD is valid, which in turn requires that all information that  
9 might affect the validity of an RTODD be in the title records.

10 There is a significant disadvantage to that approach. An unrecorded conflicting  
11 instrument will always fail, leaving the beneficiary of the other instrument without a  
12 remedy. This is true even if the unrecorded instrument would otherwise have been given  
13 effect by a court as the best expression of the transferor's intentions. That is a policy  
14 compromise. The need for recordation as an operational matter is given priority over  
15 maximizing the likelihood of effectuating the transferor's intentions.

16 The Commission no longer believes that this compromise is necessary. There appears  
17 to be a fairly simple alternative approach that would provide sufficient record notice of a  
18 conflicting claim, without invalidating all unrecorded conflicting instruments.

19 The alternative would be to treat a claim based on a conflicting instrument in the same  
20 way as any other contest of an RTODD (e.g., a contest based on a claim of fraud,  
21 mistake, undue influence, or incapacity). Under those existing rules, the relief available  
22 for a successful contest will depend on whether the contestant recorded notice of the  
23 contest (*a lis pendens*) within the 120-day period specified in Probate Code Section 5694,  
24 or failing that, before the property is sold or encumbered. If the *lis pendens* is recorded in  
25 time, a successful contest will void the RTODD, without any protection of a bona fide  
26 purchaser or encumbrancer. If the *lis pendens* is not recorded in time, the RTODD will  
27 operate and the interests of the bona fide purchaser or encumbrancer will be protected.

28 Importantly, a contestant who fails to record a timely *lis pendens* will still have a  
29 meaningful alternative remedy — pecuniary recovery from the beneficiary. Even though  
30 the contestant cannot obtain title to the property that was transferred by the RTODD, the  
31 pecuniary value of the intended gift can still be realized.

32 The existing rules for treatment of a contest provide sufficient record notice of a  
33 competing claim. Under those rules, title insurers will know that the validity of an  
34 RTODD is uncertain during the time in which a *lis pendens* can be recorded. If no *lis*  
35 *pendens* is recorded in that time period, title insurers will know that a bona fide purchaser  
36 or encumbrancer will be protected against any subsequent contest that may be filed. That  
37 provides the necessary certainty for the issuance of title insurance, once the time for  
38 recording an effective *lis pendens* has run.

39 The Commission sees no reason why that system would be any less effective if applied  
40 to a contest that is based on a conflicting dispositive instrument.

41 Under existing law, the failure to record a conflicting dispositive instrument in the 120-  
42 day period specified in Section 5660 will invalidate the conflicting instrument, leaving  
43 the beneficiary of the conflicting instrument without a remedy. If the recording

1 requirements were removed from Section 5660 and a conflicting instrument were treated  
2 as just another kind of contest, that harsh result could be avoided. That would be a better  
3 result as a matter of policy, as it would more faithfully reflect the transferor's intentions.

4 That change in the treatment of conflicting instruments would not cause any new  
5 problems with regard to the availability of title insurance, because it would simply  
6 incorporate the treatment of conflicting instruments into the rules that already govern  
7 contests generally.

8 For the reasons discussed above, the Commission recommends that Section 5660 be  
9 revised to (1) remove the requirement that a conflicting instrument be recorded in order  
10 to be effective and (2) add language clarifying that a claim based on a conflicting  
11 instrument should be treated in the same way as any other contest.



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## PROPOSED LEGISLATION

### **Prob. Code § 5610 (amended). “Real property” defined**

SECTION 1. Section 5610 of the Probate Code, as added by Section 6 of Chapter 215 of the Statutes of 2021, is amended to read as follows:

5610. (a) Except as provided in subdivision (b), “real property” means either of the following:

(1) A parcel of land that is improved with one to four residential dwelling units.

(2) A residential separate interest and its appurtenant common area in a common interest development, regardless of the number of separate interests in the common interest development.

(b) “Real property” does not include ~~either of the following:~~

~~(1) A separate interest in a stock cooperative.~~

~~(2) A~~ a parcel of agricultural land that is greater than 40 acres in size. For the purposes of this ~~paragraph~~ subdivision, “agricultural land” means land that is designated for agricultural use by law or by a document that is recorded in the county in which the land is located.

(c) The definition of “real property” shall be construed pursuant to the circumstances that existed on the execution date shown on the revocable transfer on death deed.

**Comment.** Section 5610 is amended to include an interest in a stock cooperative within the meaning of “real property.”

### **Prob. Code § 5614 (amended). “Revocable transfer on death deed” defined**

SEC. 2. Section 5614 of the Probate Code is amended to read as follows.

(a) “Revocable transfer on death deed” means an instrument created pursuant to this part that does all of the following:

(1) Makes a donative transfer of real property to a named beneficiary.

(2) Operates on the transferor’s death.

(3) Remains revocable until the transferor’s death.

(b) A revocable transfer on death deed may also be known as a “revocable TOD deed.”

(c) A revocable transfer on death deed may be used to transfer real property even if ownership of the property is not typically evidenced or transferred by use of a deed.

**Comment.** Section 5614 is amended to make clear that a revocable transfer on death deed can be used to transfer real property of a type that is not typically transferred by use of a deed (e.g., an interest in a stock cooperative).

### **Prob. Code § 5614.5 (added). “Stock cooperative” defined**

SEC. 3. Section 5614.5 is added to the Probate Code, to read:

5614.5. “Stock cooperative” has the meaning provided in Section 4190 of the Civil Code.

**Comment.** Section 5614.5 is new. It is added for drafting convenience.

1 **Prob. Code § 5642 (amended). Excerpt from Frequently Asked Questions**

2 SEC. 4. Section 5642 of the Probate Code, as amended by Section 13 of Chapter 215 of  
3 the Statutes of 2021, is amended to read as follows:

4 5642. ...

5 COMMON QUESTIONS ABOUT THE USE OF THIS FORM

6 ...

7 CAN I USE THIS DEED TO TRANSFER NONRESIDENTIAL PROPERTY? No.  
8 This deed can only be used to transfer residential property. Also, the deed cannot be used  
9 to transfer ~~a unit in a stock cooperative~~ or a parcel of agricultural land that is over 40  
10 acres in size.

11 ...

12 WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary  
13 must do all of the following: (1) RECORD evidence of your death (Prob. Code § 210).  
14 (2) File a change in ownership notice (Rev. & Tax. Code § 480). (3) Provide notice to  
15 your heirs that includes a copy of this deed and your death certificate (Prob. Code §  
16 5681). If the property is in a stock cooperative, the beneficiary must also give notice to  
17 the stock cooperative. Determining who is an “heir” can be complicated. Your  
18 beneficiary should consider seeking professional advice to make that determination. (4)  
19 RECORD an affidavit affirming that notice was sent to your heirs (and, if necessary, to a  
20 stock cooperative) (Prob. Code § 5682(c)). (5) If you received Medi-Cal benefits, your  
21 beneficiary must notify the State Department of Health Care Services of your death and  
22 provide a copy of your death certificate (Prob. Code § 215). Your beneficiary may wish  
23 to consult a professional for assistance with these requirements.

24 ...

25 **Comment.** Section 5642 is amended to reflect the fact that the revocable transfer on death deed  
26 can be used to transfer an interest in a stock cooperative. See Section 5614.5 (“stock cooperative”  
27 defined).

28 **Prob. Code § 5652 (amended). Effect of transfer**

29 SEC. 4. Section 5652 of the Probate Code, as amended by Section 15 of Chapter 215 of  
30 the Statutes of 2021, is amended to read as follows:

31 5652. (a) A revocable transfer on death deed transfers all of the transferor’s interest in  
32 the property on the transferor’s death according to the following rules:

33 (1) Subject to the beneficiary’s right to disclaim the transfer, the interest in the property  
34 is transferred to the beneficiary in accordance with the deed.

35 (2) The interest of a beneficiary is contingent on the beneficiary surviving the  
36 transferor. Notwithstanding Section 21110, the interest of a beneficiary that fails to  
37 survive the transferor lapses.

38 (3) Except as provided in paragraph (4), if there is more than one beneficiary, they take  
39 the property as tenants in common, in equal shares.

40 (4) If there is more than one beneficiary, the share of a beneficiary that lapses or fails  
41 for any reason is transferred to the others in equal shares.

1 (b) Property is transferred by a revocable transfer on death deed subject to any  
2 limitation on the transferor’s interest that is of record at the transferor’s death or that is  
3 recorded no later than 120 days after the affidavit required by subdivision (c) of Section  
4 5682 is recorded, ~~including, but~~ . Limitations on the transferor’s interest may include but  
5 are not limited to, a lien, encumbrance, easement, lease, restriction on occupancy, option  
6 to purchase the property on the transferor’s death, limitation on the transfer value in a  
7 limited equity housing cooperative, or other instrument affecting the transferor’s interest,  
8 whether recorded before or after recordation of the revocable transfer on death deed. The  
9 holder of rights under that instrument may enforce those rights against the property  
10 notwithstanding its transfer by the revocable transfer on death deed. An enforceable  
11 restriction on the use of the transferred property does not affect the transfer of title to the  
12 property by a revocable transfer on death deed.

13 (c) If a stock cooperative exercises an option to purchase property transferred by a  
14 revocable transfer on death deed on the transferor’s death, the result is as follows:

15 (1) The property is transferred to the stock cooperative rather than the beneficiary.

16 (2) The purchase price is paid to the beneficiary. Unless the law or the governing  
17 documents of the stock cooperative provide otherwise, the purchase price is the fair  
18 market value of the property, less the amount of any liens or encumbrances on the  
19 property at the time of the owner’s death and less any amount that the decedent owed the  
20 stock cooperative.

21 (d) A revocable transfer on death deed transfers the property without covenant or  
22 warranty of title.

23 **Comment.** Subdivision (b) of Section 5652 is amended to refer to types of limitations that may  
24 exist in a stock cooperative. Such limitations may also exist in other types of developments.

25 Subdivision (c) is added to provide guidance on the steps to be followed when a stock  
26 cooperative exercises an option to purchase an interest that was transferred by revocable transfer  
27 on death deed. Paragraph (2) makes clear that the price paid to purchase property in a stock  
28 cooperative may be limited by law or the governing documents of the stock cooperative. For  
29 example, in a limited equity housing cooperative, the amount paid will be based on a specified  
30 transfer value, rather than fair market value. See Civ. Code § 817. See also Section 5614.5  
31 (“stock cooperative” defined).

32 **Prob. Code § 5660 (amended). Conflicting instruments**

33 SEC. 6. Section 5660 of the Probate Code, as amended by Section 18 of Chapter 215 of  
34 the Statutes of 2021, is amended to read as follows:

35 5660. (a) If a revocable transfer on death deed recorded on or before 60 days after the  
36 date it was acknowledged before a notary public and another instrument both purport to  
37 dispose of the same property:

38 ~~(a) If the other instrument is not recorded within 120 days after the affidavit required~~  
39 ~~by subdivision (c) of Section 5682 is recorded, the revocable transfer on death deed is the~~  
40 ~~operative instrument.~~

41 ~~(b) If the other instrument is recorded within 120 days after the affidavit required by~~  
42 ~~subdivision (c) of Section 5682 is recorded and~~

1     (1) If the other instrument makes a revocable disposition of the property, the later  
2 executed of the revocable transfer on death deed or the other instrument is the operative  
3 instrument.

4     ~~(c) If the other instrument is recorded within 120 days after the affidavit required by~~  
5 ~~subdivision (c) of Section 5682 is recorded and~~

6     (2) If the other instrument makes an irrevocable disposition of the property, the other  
7 instrument and not the revocable transfer on death deed is the operative instrument.

8     (b) A claim that a revocable transfer on death deed is inoperative pursuant to this  
9 section is grounds for a contest under Chapter 5 (commencing with Section 5970).

10     **Comment.** Section 5660 is amended to remove the requirement that a conflicting instrument  
11 be recorded in order to be effective. The amendment also makes clear that claiming that a deed is  
12 invalid pursuant to this section is grounds for a contest.

13     **Prob. Code § 5681 (amended). Required notice**

14     SEC. 6. Section 5681 of the Probate Code, as added by Section 23 of Chapter 215 of  
15 the Statutes of 2021, is amended to read as follows:

16     5681. (a) After the death of the transferor, the beneficiary of a revocable transfer on  
17 death deed shall serve notice on the transferor’s heirs, along with a copy of the revocable  
18 transfer on death deed and a copy of the transferor’s death certificate. If the property  
19 governed by the revocable transfer on death deed is an interest in a stock cooperative, the  
20 beneficiary shall also serve those documents on the stock cooperative.

21     (b) The notice required by subdivision (a) shall be in substantially the following form:

22             “NOTICE OF REVOCABLE TRANSFER ON DEATH DEED

23     The enclosed revocable transfer on death deed was created by: [name of deceased  
24 transferor].

25     It affects the following property: [description of property used on revocable transfer on  
26 death deed].

27     It names the following beneficiaries: [beneficiary(ies) named on the revocable transfer  
28 on death deed].

29     As a result of the death of [name of deceased transferor], the deed will transfer the  
30 described property to the named beneficiaries, without probate administration.

31     If you believe that the revocable transfer on death deed is invalid and you wish to stop  
32 it from taking effect, you have only 120 days from the date of this notice to file a fully  
33 effective challenge. You should act promptly and may wish to consult an attorney.”

34     (c) For the purposes of this section, if the beneficiary has actual knowledge of a final  
35 judicial determination of heirship for the deceased transferor, the beneficiary shall rely on  
36 that determination. Otherwise, the beneficiary shall have discretion to make a good faith  
37 determination, by any reasonable means, of the heirs of the transferor.

38     (d) The beneficiary need not provide a copy of the notice to an heir who is either of the  
39 following:

40     (1) Known to the beneficiary but who cannot be located by the beneficiary after  
41 reasonable diligence.

42     (2) Unknown to the beneficiary.

1 (e) The notice shall be served by any of the methods described in Section 1215 to the  
2 last known address.

3 (f) If a revocable transfer on death deed names more than one beneficiary, only one of  
4 the beneficiaries is required to comply with this section.

5 (g)(1) A beneficiary who fails to serve the notification required by this section on an  
6 heir who is not a beneficiary and whose identity is known to the beneficiary shall be  
7 responsible for all damages caused to the heir by the failure, unless the beneficiary shows  
8 that they made a reasonably diligent effort to comply. For purposes of this subdivision,  
9 “reasonably diligent effort” means that the beneficiary has delivered notice pursuant to  
10 Section 1215 to the heir at the heir’s last address actually known to the beneficiary.

11 (2) A beneficiary is not liable under this subdivision if that beneficiary reasonably  
12 relied, in good faith, on another beneficiary’s statement that the other beneficiary would  
13 satisfy the requirements of this section.

14 (3) A beneficiary is not to be held to the same standard as a fiduciary.

15 **Comment.** Section 5681 is amended to require that notice be given to a stock cooperative  
16 when an interest in the stock cooperative would be transferred by a revocable transfer on death  
17 deed. See Section 5614.5 (“stock cooperative” defined).