

SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2021-2022 Regular Session

SB 315 (Roth)

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Fiscal: Yes

Urgency: No

JT

SUBJECT

Revocable transfer on death deeds

DIGEST

This bill, with respect to the statutes governing revocable transfer on death deeds (RTODD), makes various changes recommended by the California Law Revision Commission (Commission).

EXECUTIVE SUMMARY

An RTODD is a deed of real property that designates a beneficiary to receive the property when the transferor dies. An RTODD enables a homeowner to deed the property directly to a desired beneficiary without the expense of creating a trust or going through a probate proceeding.

Following the Commission's 2006 recommendation to adopt legislation providing for RTODDs and multiple failed attempts at enacting that recommendation, the Legislature passed AB 139 (Gatto, Ch. 293, Stats. 2015) as a five-year pilot program, with a requirement that the Commission study the effect of RTODDs and make recommendations for the reform of the law based on its findings. In 2019, the Commission completed its study and issued tentative recommendations. In 2020, the Legislature extended the RTODD authorization until January 1, 2022. This bill incorporates the Commission's recommendations. The bill is author-sponsored and is opposed by the California Land Title Association (CLTA) and Executive Committee of the Trusts and Estates Section of the California Lawyers Association (TEXCOM).

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Authorizes, until January 1, 2022, the use of an RTODD to transfer real property with four or fewer residential dwelling units, a condominium unit, or a single tract of agricultural real estate consisting of 40 acres or less with a single-family residence. (Prob. Code §§ 5600(c) & 5610.)¹
- 2) Defines an RTODD as an instrument that does all of the following:
 - a. makes a donative transfer of real property to a named beneficiary;
 - b. operates on the transferor's death; and
 - c. remains revocable until the transferor's death. (§ 5614(a).)
- 3) Provides that an owner who has the capacity to contract may make an RTODD, which must identify the beneficiary by name, be signed by the transferor, and duly notarized. (§§ 5620, 5622 & 5624.)
- 4) Sets forth requirements for execution, revocation, implementation, and challenging the validity of RTODD. (§§ 5620, 5630, 5650, 5690.)
- 5) Required the Commission to study the effects of the RTODD statute and make recommendations to the Legislature by January 1, 2020. (AB 139 (Gatto) Stats. 2015, Ch. 293 § 15.)

This bill:

- 1) Extends the RTODD statute's operation until January 1, 2032, with the Commission to deliver a second follow-up study by January 1, 2031.
- 2) Requires that the deed be signed by two witnesses who were both present when the RTODD was signed or acknowledged by the transferor, and requires that the witnesses be competent to provide evidence in an action to contest the validity of the RTODD. Provides that if a beneficiary of an RTODD also signs as a witness, the RTODD would be presumed to be the product of fraud or undue influence.
- 3) Requires that an RTODD beneficiary give notice to the transferor's heirs when the transferor dies. Clarifies that the beneficiary of a revoked RTODD has standing to contest the validity of a revocation, but only after the transferor's death.

¹ All further statutory references are to the Probate Code.

- 4) Excludes stock cooperatives from the types of property that may be transferred via RTODD and includes agricultural land with up to four residential dwelling units.
- 5) Provides for a transfer of real property via an RTODD into a trust; clarifies that an error or ambiguity in describing an RTODD does not invalidate the RTODD, if a court can determine the transferor's intent by applying the general law on judicial construction of deeds; and allows use of an RTODD to transfer real property to a public entity or private nonprofit entity, enabling a court to apply *cy pres* principles to reform a charitable RTODD that would otherwise fail because the named beneficiary disclaims the gift or does not exist at the time the RTODD operates.
- 6) Clarifies that a beneficiary's personal liability for a deceased transferor's unsecured debts includes liability for the transferor's funeral expenses, expenses of last illness, and wage claims. Makes the beneficiary personally liable to the estate for a calculated share of those debts, based on the existing rules of abatement.
- 7) Clarifies that an enforceable restriction on the use of property transferred by RTODD does not impair the transfer of title; the beneficiary takes title subject to the restriction.
- 8) Adds guidance to the "Common Questions" document to address the effect of an RTODD on a mobilehome.
- 9) Makes a variety of technical and minor substantive changes to improve the clarity and operation of the law.
- 10) Clarifies that the provisions governing RTODDs do not limit the application of other law that imposes a penalty or provides a remedy for the creation of an RTODD by means of fraud, undue influence, menace, or duress.
- 11) Specifies that its provisions do not apply to RTODDs that were signed before January 1, 2022.

COMMENTS

1. Author's statement

The author writes:

For many of California's homeowners, real property is the only asset they can pass onto their heirs. Prior to establishment of Revocable Transfer on Death

Deeds (RTODD), the only way to convey property to an heir was through a will or a trust, both of which require cost-prohibitive probate or estate planning attorney consultation. An RTODD is a much more accessible and affordable mechanism for many Californians. This bill applies direct recommendations from the California Law Revision Commission (CLRC), who investigated the effects of the RTODD, to extend the sunset date until January 1, 2032 and strengthen transferor and beneficiary protections on RTODDs. The sunset extension grants the CLRC additional time to study the efficacy of RTODDs, evaluate the effects of the new reforms, and make additional recommendations for the continuation or termination of RTODD authorization. SB 315 will ensure the continuance of a useful tool for those who may otherwise have no other feasible option.

2. Background

In 2005, AB 12 (DeVore, Ch. 422, Stats. 2005) was introduced as a bill to create the instrument that has come to be known as an RTODD, but was subsequently amended to instead direct the Commission to study this type of deed and determine whether California should create it as a new nonprobate transfer instrument that becomes effective only upon the death of the transferor. The study was recommended for the following reasons: (1) there is a 1914 California case that already allows for the use of beneficiary deeds (another name for the revocable TOD deed) that has never been overturned (*Tenant v. John Tenant Memorial Home* (1914) 167 Cal. 570); (2) various parties, including the California Land Title Company, the California Judges Association, and the Trusts and Estates Section of the State Bar, expressed strong opposition to the bill for lack of clarity and failure to address unintended consequences; and (3) the possibility of increased litigation because of the potential impact of an RTODD on the transferor's property ownership and of fraudulent transfers.

The Commission was directed to address a non-exclusive list of issues in its study, including, for example, whether and when a beneficiary deed would be the most appropriate nonprobate transfer mechanism to use, if a beneficiary deed should be recorded or held by the grantor or grantees until the time of death, and, if not recorded, whether a potential for fraud is created and what effect the recordation of an RTODD would have on the transferor's property rights after recordation.

In October 2006, the Commission issued its recommendation to adopt legislation enabling the use of RTODDs in California.² At the time, nine other states statutorily recognized these instruments for conveying real property without using a trust or going through a probate proceeding. The Commission found that, while these instruments were relatively novel and data on their effectiveness was scant, practitioners generally

² *Recommendation: Revocable Transfer On Death (TOD) Deed* (Oct. 2006) 36 Cal. L. Rev. Comm'n Repts 103, 105, <http://www.clrc.ca.gov/pub/Printed-Reports/Pub226.pdf> (as of Mar. 8, 2021).

responded positively to these instruments. The Commission concluded that the benefits of a low-cost, efficient method of conveying real property outweighed concerns about the potential for fraud and abuse, stating as follows:

The nonprobate revolution has largely bypassed real property. Nearly all other significant assets, including life insurance, securities, bank accounts, and pension plans, pass commonly by beneficiary designation outside the probate system. Real property is the last major holdout, although substantial amounts of real property pass by right of survivorship under joint tenancy or community property or under a trust. It has been observed that ownership of real property is the factor most likely to determine whether a death will lead to a probate proceeding.

California law does not adequately deal with the many types of nonprobate transfer and their consequences. Comprehensive treatment of the area is necessary, much as Missouri has done with its nonprobate transfer law and as the Uniform Probate Code has done with creditor rights issues. But the need for comprehensive treatment of nonprobate transfer law should not be cause for delay in considering the concept of the revocable TOD deed on its merits.

Having surveyed existing transfer devices and reviewed the experience in other jurisdictions, and having considered the legal incidents of the revocable TOD deed, the Law Revision Commission recommends adoption of the device in California [...].³

In the ensuing decade, a number of legislators tried to create a simplified process to transfer real property outside of probate and without the use of a trust. (AB 250 (DeVore, 2007), AB 724 (DeVore, 2009-10), AB 699 (Wagner, 2011).) All of those efforts were unsuccessful until AB 139 (Gatto, Ch. 293, Stats. 2015) was enacted, which finally established a five-year pilot program that allows owners of real property, until January 1, 2021, to transfer their property upon death, outside the normal probate procedure, through an RTODD. Given concerns about misuse of the RTODD, the Legislature directed the Commission to study the RTODD pilot program and to report back to the Legislature by January 1, 2020 on how the program was operating.

The Commission issued its report on the RTODD in November 2019,⁴ recommending that a number of changes be made to the RTODD process, but that overall the RTODD should be extended for another 10 years and that the Commission do a further study prior to that 10-year sunset. In broad strokes, the Commission drew the following conclusions:

³ *Id.* at 211-212.

⁴ *Revocable Transfer on Death Deed: Follow-Up Study* (Nov. 2019) 46 Cal. L. Rev. Comm'n Repts. 135, <http://clrc.ca.gov/pub/Printed-Reports/Pub241-L3032.1.pdf> (as of May 17, 2019).

- With minor exceptions relating to execution of an RTODD, there are no problems with the operation of the RTODD statute.
- The Commission has not had sufficient time to fully evaluate the practical effects of the RTODD statute. The statute should be continued for another 10 years, with the Commission directed to conduct a second follow-up study before the end of that period.
- The RTODD does not appear to be subject to misuse or misunderstanding, as it is more straightforward and limited than other property transfer instruments, such as grant deeds.
- There is no evidence that the RTODD is any more prone to financial abuse than any other kind of instrument that can be used to transfer title to real property.

The Commission also recommended several changes to the RTODD statute, which were incorporated into the introduced version of last year's SB 1305 (Roth, Ch. 238, Stats. 2020). However, when legislative efforts were redirected towards addressing the COVID-19 pandemic, the bill was amended to extend the sunset of the RTODD by one year, in order to enable Legislature to postpone fully contemplating these recommendations. This bill seeks to complete what SB 1305 started.

3. Implements the Commission's recommended changes

a. *Protections against financial abuse*

The Commission did not find specific examples of appellate case law addressing financial abuse of an RTODD in California, but did find some examples in other states; nevertheless, the Commission noted that all testamentary instruments are potentially subject to fraud and undue influence and that the RTODD statute did not seem to be more vulnerable to abuse than its counterparts.⁵

i. Witnessing

Under existing law, an RTODD must be notarized. (§ 5624.) To provide more protection, the study recommends additionally requiring that an RTODD to be witnessed under rules similar to those governing wills.⁶ (See §§ 6110, 6112; Evid. Code § 870.) In accordance with the Commission's recommendation, the bill would require that the deed be signed by two witnesses who were both present when the RTODD was signed or acknowledged by the transferor. These witnesses must be competent to provide evidence in an action to contest the validity of the RTODD.

The requirement that an RTODD be witnessed and notarized is more protective than the rules governing wills, which require two witnesses but do not require notarization.

⁵ *Id.* at 141, 146-147.

⁶ *Id.* at 150-151.

(§ 6110.) Furthermore, if a will is handwritten, the witnessing rule may be dispensed with. (§ 6111(a).)

Additionally, the bill would provide that if a beneficiary of an RTODD also signs as a witness, the RTODD would be presumed to be the product of fraud or undue influence. This parallels rules governing wills. (See § 6112.)

ii. Notice to the transferor's heirs

When a trust becomes revocable because of the death of the trustor, the trustee must, among other things, provide written notice to the trustor's heirs. (§ 16061.7(a)(1).) According to the Commission, this requirement apprises heirs of the existence of the trust and gives an opportunity for them to contest the trust if it is the product of fraud or undue influence.⁷ The bill would adopt a similar approach for RTODDs by requiring that an RTODD beneficiary give notice to the transferor's heirs when the transferor dies. The beneficiary is liable for failure to comply with this requirement if the failure is intentional or grossly negligent.

iii. Beneficiary standing to contest revocation of an RTODD

Section 5690 governs actions to contest the validity of the RTODD and section 5692 provides that such a contest may only be commenced after the transferor's death. The Commission argues that beneficiaries could be the only parties interested in contesting the revocation.⁸ The bill would clarify that the beneficiary of a revoked RTODD has standing to contest the validity of a revocation, but only after the transferor's death.

b. *Changes related to the type of real property that may be conveyed through an RTODD*

The RTODD statute limits the kind of real property that can be transferred by RTODD to real property with between one and four residential dwelling units, a condominium unit, or a single tract of agricultural real estate consisting of 40 acres or less that is improved with a single family residence. (§ 5610.) Among other things, the Commission made the following recommendations:

- the Legislature should not expand RTODDs to apply to commercial property;⁹
- stock cooperatives, which are evidenced by a share of corporate stock rather than a deed, should be excluded from the types of property that may be transferred via RTODD;¹⁰
- the RTODD should apply to community apartment projects or planned developments, which are similar to condominiums in that all of those types of property are made up of separate interests that can be transferred by deed;¹¹ and

⁷ *Id.* at 151-152.

⁸ *Id.* at 144.

⁹ *Id.* at 155.

¹⁰ *Id.* at 157.

- agricultural land should be allowed to have up to four residential dwelling units, consistent with how the RTODD statute treats non-agricultural property.¹²

These changes, along with other technical ones related to the type of property, are embodied in the bill.

c. Permissible beneficiaries

Under the existing RTODD statute, there is some confusion about whether an RTODD can only be conveyed to an individual or whether a legal entity may be a beneficiary.¹³ This bill, in accordance with the Commission's recommendation, would:

- expressly provide that a trust may be a beneficiary of an RTODD;
- allow use of an RTODD to transfer real property to a public entity or private nonprofit entity; and
- enable a court to apply *cy pres* principles to reform a charitable RTODD that would otherwise fail because the named beneficiary disclaims the gift or does not exist at the time the RTODD operates.

d. Creditors

A beneficiary under an RTODD is personally liable for the unsecured debts of the transferor, up to the value of the property received at the time of the transferor's death. (§§ 5672, 5674.) Additionally, there is a three-year period in which the transferor's personal representative can require that the beneficiary return the property to the transferor's estate for use in paying creditors (§ 5676), modeled after long-standing procedures.¹⁴ Among other changes recommended by the Commission, the bill would:

- clarify that a beneficiary's personal liability for a deceased transferor's unsecured debts includes liability for the transferor's funeral expenses, expenses of last illness, and wage claims;
- replace existing section 5676, which authorizes the return of transferred property to a deceased transferor's estate for use in paying unsecured debts, with a provision that instead makes the beneficiary personally liable to the estate for a calculated share of those debts, based on the existing rules of abatement;
- provide for voluntary return of property to the estate in lieu of selling the property to pay debts;
- limit the beneficiary's liability to the value of the property; and
- extend the time to record and thereby preserve the effect of third party interests in property transferred by an RTODD.

¹¹ *Id.* at 157-158.

¹² *Id.* at 160.

¹³ *Id.* at 161-162.

¹⁴ *Id.* at 171.

e. Additional changes

The bill's additional changes to improve the effectiveness of the RTODD and avoid misuse and misunderstanding include:

- clarifying that an error or ambiguity in describing an RTODD does not invalidate the RTODD, if a court can determine the transferor's intent by applying the general law on judicial construction of deeds;
- clarifying that an enforceable restriction on the use of property transferred by RTODD does not impair the transfer of title; the beneficiary takes title subject to the restriction;
- adding guidance to the "Common Questions" document to clarify that a mobilehome can be transferred via an RTODD only if it is a fixture or improvement that is an appurtenance to real property; and
- a variety of technical and minor substantive changes to improve the clarity and operation of the law.

f. Sunset extension

As noted above, the Commission found no California appellate decisions addressing the RTODD statute and thus did not find any evidence that the RTODD statute has been abused. The Commission also stated that it did not find evidence of unresolved problems with the RTODD statute. Nevertheless, the Commission cautioned that it is possible that such problems exist but have not yet been discovered. Accordingly, the Commission recommended extending the sunset date another 10-years with a directive for the Commission to conduct a second follow-up study before the end of that period.¹⁵ This bill would extend the sunset date to January 1, 2032, with the Commission required to report the results of its study by January 1, 2031.

4. Opposition

TEXCOM argues that while the additional safeguards added by this bill are, on balance, necessary to ensure the validity and integrity of RTODDs, they undermine the effectiveness of RTODDs by making the process significantly more complex, which will deter the use of RTODDs or necessitate seeking legal advice, contrary to the intent that RTODDs be simple and useful for the laity. In particular, TEXCOM points out that no other type of deed that provides for transfer on death requires witnessing or notice to heirs. TEXCOM additionally argues that the RTODD statutes should be allowed to lapse or, alternatively, the sunset date in this bill should be shortened until January 1, 2027.

CLTA, which represents the title insurance industry, opposes several aspects of the bill they argue could lead to more uncertainty and litigation. Among other things, CLTA

¹⁵ *Id.* at 141.

argues that SB 315 expands the use of RTODDs for more complicated transfers than originally envisioned, such as naming trusts or other legal entities as beneficiaries of an RTODD, which could increase the risk of errors and litigation. They also argue that the bill should not give courts the ability to apply *cy pres* principles or cure harmless errors. Similarly, CLTA argues that the bill should not enable a beneficiary to act as a witness because this would trigger a presumption of undue influence, which would require litigation to resolve. CLTA also argues for other changes that could reduce uncertainty in the use of RTODDs, such as a provision that makes an affidavit of notice to heirs presumptively valid.

5. 10-year pilot project for a more useful, if less simple, RTODD

It is true, as far as it goes, that RTODDs were envisioned as a simple device for transferring real property upon death akin to the way that some bank accounts, insurance benefits, or pensions may be automatically passed on to a beneficiary. But this was always an imperfect analogy. Transferring real property is a far more complicated endeavor.

The bill makes RTODDs somewhat more complicated in order to make them more useful. For instance, the bill moderately expands the scope of eligible beneficiaries and adds related safeguards. As CLTA points out, enabling RTODDs to be used to transfer property to a nonprofit creates the possibility of uncertainty if, say, the nonprofit changes its name or goes out of business. But the bill also incorporates the longstanding doctrine of *cy pres*,¹⁶ which establishes a set of principles for carrying out the transferor's charitable purpose when the beneficiary does not accept the gift or is no longer available. The added complexity thus entails the potential benefit of facilitating charitable giving and providing more choice to individuals, using a well-understood framework that courts would apply if the person instead conveyed the property via a trust or a will scribbled on a cocktail napkin.

Such tradeoffs are, in the Commission's expert and considered judgment, beneficial overall. These recommendations are worthy of deference. If this bill becomes law, the Commission will put them to the test and report back to the Legislature by 2031, a year before the bill sunsets.

¹⁶ Probate Code section 11603(c) provides: "If the whereabouts of a distributee named in the order is unknown, the order shall provide for alternate distributees and the share to which each is entitled. The alternate distributees shall be the persons, to the extent known or reasonably ascertainable, who would be entitled under the decedent's will or under the laws of intestate succession if the distributee named in the order had predeceased the decedent, or in the case of a devise for a charitable purpose, under the doctrine of *cy pres*. If the distributee named in the order does not claim the share to which the distributee is entitled within five years after the date of the order, the distributee is deemed to have predeceased the decedent for the purpose of this section and the alternate distributees are entitled to the share as provided in the order."

SUPPORT

None known

OPPOSITION

California Land Title Association
Executive Committee of the Trusts and Estates Section of the California Lawyers Association

RELATED LEGISLATION

Pending Legislation: None known.

Prior Legislation: *See* Comment 1.
