

SENATE JUDICIARY COMMITTEE
Senator Hannah-Beth Jackson, Chair
2019-2020 Regular Session

SB 1305 (Roth)
Version: May 13, 2020
Hearing Date: May 22, 2020
Fiscal: No
Urgency: No
JT

SUBJECT

Revocable transfer on death deeds

DIGEST

This bill would extend the sunset date for revocable transfer on death deeds (RTODD) from January 1, 2021 to January 1, 2022.

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 a trust or a probate proceeding.

Following the California Law Revision Commission's (Commission) recommendation to adopt legislation providing for RTODDs and a few failed attempts at legislation, the Legislature passed AB 139 (Gatto, Ch. 293, Stats. 2015) as a five-year pilot program, set to expire January 1, 2021, with a requirement that the Commission study the effect of RTODDs and make recommendations for the reform of the law based on its findings. The Commission has completed its study and issued tentative recommendations.

However, because legislative efforts have been concentrated on addressing the COVID-19 pandemic, there has not been a sufficient opportunity to fully consider these recommendations. This bill would extend the sunset date for RTODDs from January 1, 2021 to January 1, 2022, so that the Legislature may vet these issues next session. The bill has no support or opposition.

PROPOSED CHANGES TO THE LAW

Existing law:

- 1) Authorizes, until January 1, 2021, 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.)

This bill extends the sunset date for RTODDs from January 1, 2021 to January 1, 2022.

COMMENTS

1. Background

In 2006, the Commission issued a study that recommended the adoption of 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 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.

The Commission concluded as follows:

The nonprobate revolution has largely bypassed real property. Nearly all other significant assets, including life insurance, securities, bank accounts, and pension

¹ All further statutory references are to the Probate Code.

² CLRC, *Recommendation: Revocable Transfer On Death (TOD) Deed* (Oct. 2006) 36 Cal. L. Rev. Comm'n Repts, available at <http://clrc.ca.gov/pub/Printed-Reports/Pub241-L3032.1.pdf> (as of May 17, 2020).

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

2. The Commission's study

AB 139 (Gatto, Stats. 2015, Ch. 293), which authorized the use of RTODDs, directed the Commission to conduct a study based on a series of questions. (*Id.* at § 21.) The Commission recently issued the study,⁴ which drew the following conclusions:

- With minor exceptions, there are no problems with the RTODD statute and it 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.
- To improve the RTODD statute, the Legislature should make the following changes:
 1. Require an RTODD to be witnessed under rules similar to those governing wills.⁵ Specifically, require that:
 - The deed be signed by two witnesses who were both present when the RTODD was signed or acknowledged by the transferor.
 - 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 *Id.* at pp. 211-212.

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

⁵ See §§ 6110, 6112; Evid. Code § 870.

- Witnesses be eligible to provide evidence in an action to contest the validity of the RTODD.
- 2. Require that an RTODD beneficiary give notice to the transferor's heirs when the transferor dies.
- 3. 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.
- 4. 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.
- 5. Extend the time to record and thereby preserve the effect of third party interests in property transferred by an RTODD.
- 6. Clarify that an error or ambiguity in 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.
- 7. Expressly allow 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.
- 8. Clarify 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.
- 9. Make clear that the beneficiary of a revoked RTODD has standing to contest the validity of the revocation, but only after the transferor's death.
- 10. Add guidance to the "Common Questions" document to address the effect of an RTODD on a mobilehome.
- 11. Make a variety of technical and minor substantive changes to improve the clarity and operation of the law.

The introduced version of this bill incorporated these recommended changes. However, legislative efforts have been redirected towards addressing the COVID-19 pandemic. By extending the sunset of the RTODD by one year, this bill would enable Legislature to contemplate these recommendations next session. The author writes:

SB 1305 ensures that the [RTODD] process is not repealed before an adequate exploration of the California Law Revision Commission's recommendations can be discussed in the legislature – a conversation which must be postponed due to the impact of COVID-19. This bill will allow RTODDs, a useful and accessible tool for many Californians, to continue for an additional year and give the legislature more time to discuss how to best improve them.

SUPPORT

None

OPPOSITION

None

RELATED LEGISLATION

Pending Legislation: None known

Prior Legislation:

AB 1739 (Chau, Ch. 65, Stats. 2018) clarified that the “Common Questions” language in the statutory form for an RTODD need not be recorded along with the deed portion of the form.

AB 3004 (Kiley, 2018) would have made various changes to the statutory provisions governing RTODD. It was held in the Assembly Judiciary Committee.

AB 139 (Gatto, Ch. 293, Stats. 2015) established a five-year pilot program for RTODD.
