

Date of Hearing: March 21, 2023

ASSEMBLY COMMITTEE ON JUDICIARY

Brian Maienschein, Chair

AB 288 (Maienschein) – As Amended March 16, 2023

PROPOSED CONSENT

SUBJECT: REVOCABLE TRANSFER ON DEATH DEEDS

KEY ISSUE: SHOULD THE SCOPE OF THE REVOCABLE TRANSFER ON DEATH DEED BE EXPANDED TO ALLOW FOR THE TRANSFER OF INTEREST IN A STOCK COOPERATIVE, AS RECOMMENDED BY THE CALIFORNIA LAW REVISION COMMISSION?

SYNOPSIS

In 2015, the Legislature created a novel method of probate transfers for specified types of real property called “revocable transfer on death deeds” (RTDDs). Originally established as a 5-year pilot program that has since been renewed twice, RTDDs allow owners of real property to transfer their property upon death, outside the normal probate procedure, through a written instrument known as a “revocable transfer on death deed.” Because of significant concerns about the effect of the RTDD and its likelihood of creating confusion, impact on Medi-Cal reimbursement, and, most importantly, creation of a new opportunity for fraud and elder abuse, the bill was limited to transfers of only certain property. In February 2022, the California Law Revision Commission (CLRC) released its recommendation regarding the inclusion of stock cooperatives in the category of real property that may be transferred via RTDD. A stock cooperative is a form of common interest development where the entirety of the interest in real property is held by a corporation and the separate interest consists of a share of stock in the corporation that creates an exclusive right to occupy a specified property. Stock cooperatives were initially excluded from RTDDs due to concern that a change in ownership of real property, which is reflected through transfer or modification of a deed, was necessarily distinct from a change in ownership of stock. In 2022, the CLRC released a recommendation that RTDDs be expanded to allow for transfer of interest in a stock cooperative.

This bill incorporates the CLRC’s recommendations to amend the RTDD statute in order to make it applicable to an interest in a stock cooperative. The bill makes three primary changes to account for the expansion, as detailed further in the COMMENTS section of this analysis. Briefly, the bill adds a provision to the Probate Code expressly permitting the transfer of interest in stock cooperatives via RTDD, ensuring the continuing validity of limitations incorporated in the stock cooperative’s governing documents, and simplifying the recording requirements for RTDDs in the case of conflicting transfers. The bill is sponsored by the California Law Revision Commission. There is no known opposition.

SUMMARY: Expands revocable transfer on death deeds (RTDDs) to allow the transfer of real property which is not typically transferred by use of a deed, including interest in a stock cooperative. Specifically, **this bill:**

- 1) Redefines real property to include a separate interest in a stock cooperative for purposes of a RTDD.

- 2) Permits an RTDD to be used to transfer real property even if ownership of the property is not typically evidenced or transferred by use of a deed.
- 3) Defines “stock cooperative” to mean a development in which a corporation is formed or availed of, primarily for the purpose of holding title to, either in fee simple or for a term of years, improved real property, and all or substantially all of the shareholders of the corporation receive a right of exclusive occupancy in a portion of the real property, title to which is held by the corporation, as defined in the Civil Code.
- 4) Allows an interest in a stock cooperative to be transferred by an RTDD, subject to any limitation on the transferor’s interest that is expressed in the governing documents of the stock cooperative or in a written agreement between the stock cooperative and the transferor, regardless of whether or not those instruments are recorded.
- 5) Provides that if a stock cooperative exercises an option to purchase property transferred by an RTDD on the transferor’s death, the result is as follows:
 - a) The property is transferred to the stock cooperative rather than the beneficiary;
 - b) The purchase price is paid to the beneficiary. Unless the law or the governing documents of the stock cooperative provide otherwise, the purchase price is the fair market value of the property, less the amount of any liens or encumbrances on the property at the time of the owner’s death and less any amount that the decedent owed to the stock cooperative.
- 6) Makes conforming changes to the statutory RTDD form.
- 7) Removes provisions requiring a competing instrument to be recorded within 120 days after an affidavit was filed pursuant to existing statute in order to be effective over an RTDD.
- 8) Makes the later executed instrument operative between an RTDD recorded on or before 60 days after the date it was acknowledged before a notary public, and another instrument that makes a revocable disposition of the property.
- 9) Makes the other instrument operative between an RTDD recorded on or before 60 days after the date it was acknowledged before a notary public and another instrument that purports to dispose of the same property if the other instrument makes an irrevocable disposition of the property.
- 10) Requires a claim that an RTDD is inoperative pursuant to the provisions of this bill to be brought as a contest under this Chapter.

EXISTING LAW:

- 1) Allows an interest in certain residential real property to be transferred on death by recording an RTDD signed and acknowledged by the record owner of the property, with the capacity to contract, and designating a beneficiary or beneficiaries. Provides that the deed transfers ownership of the property interest upon the death of the owner. The pilot program is effective for any RTDD made by a transferor who dies on or after January 1, 2016, regardless of when the RTDD was executed or recorded. No RTDD may be executed on or after January 1, 2032, but any RTDD properly executed before that date remains valid and may be revoked

after that date. (Probate Code Section 5600 *et seq.* Unless stated otherwise, all further statutory references are to the Probate Code.)

- 2) Provides that an RTDD does not affect any ownership rights during the transferor's lifetime, nor does it convey any rights to the beneficiary or the beneficiary's creditors during the transferor's lifetime. Provides that an RTDD is not effective until the transferor's death. (Section 5650.)
- 3) Provides a statutory form RTDD and requires that an RTDD must be in a substantially similar form. The statutory deed includes information to the transferor, including explaining how the RTDD works, how it is effectuated, and some of its consequences through the form's "Common Questions About the Use of This Form." Provides that the "Common Questions" portion of the statutory form is not required to be recorded with the RTDD and that failure to record that portion of the RTDD has no impact on the effectiveness of the RTDD. (Sections 5626, 5642.)
- 4) Provides that an RTDD operates on the transferor's death and remains revocable until the transferor's death. (Section 5614.)
- 5) Provides that property subject to an RTDD is still part of the transferor's estate for purposes of Medi-Cal eligibility and will be subject to Medi-Cal reimbursement claims. Property subject to an RTDD is subject to claims from the transferor's secured and unsecured creditors. Allows the beneficiary to avoid unsecured claims by returning the property to the transferor's estate. (Sections 5670-76.)
- 6) Permits contest of the RTDD for, among other things, lack of capacity to transfer, transfer to a disqualified person, fraud, duress, and undue influence. (Sections 5690-96.)

FISCAL EFFECT: As currently in print this bill is keyed non-fiscal.

COMMENTS: In 2015, the Legislature created a novel method of non-probate transfers for specified types of real property called "revocable transfer on death deeds" (RTDDs). Originally established as a 5-year pilot program that has since been extended twice, RTDDs allow owners of real property to transfer their property upon death, outside of the normal probate procedure, through a written instrument known as a "revocable transfer on death deed." Because of significant concerns about the effect of the RTDD and its likelihood of creating confusion, impact on Medi-Cal reimbursement, and creation of a new opportunity for fraud and elder abuse, the original legislation was limited to transfers of only certain property. In particular, stock cooperatives were excluded from the RTDD statute.

A stock cooperative is a form of common interest development where the entirety of the interest in real property is held by a corporation and the separate interest consists of a share of stock in the corporation that creates an exclusive right to occupy a specified property. Including stock cooperatives in the RTDD statute initially raised a concern that because a change in ownership of real property, which is reflected through transfer or modification of a deed, is necessarily distinct from a change in ownership of stock, inclusion in the statute would cause undue confusion. In other words, "[a] deed conveys title to real property, not the ownership of a share of stock." (*Revocable Transfer on Death Deed: Follow-Up Study*, California Law Revision Commission (2019), p. 157 available at <http://clrc.ca.gov/pub/Printed-Reports/Pub241-L3032.1.pdf>). Since

California Law Revision Commission’s 2022 Recommendations. In February 2022, the CLRC released a study recommending that stock cooperatives be included in the RTDD statute. The CLRC’s 2022 recommendation stated that in regard to the threshold question of whether the RTDD statute could be used to transfer stock interest, rather than strictly interest in real property, “that problem [...] could be solved by adding language to affirmatively address the issue” by revising the definition of “revocable transfer on death deed” to expressly state “[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.” (*Stock Cooperatives and Revocable Transfer on Death Deeds*, California Law Revision Commission February 2022, p. 2, found at: [RECcpp-L3032.5 \(ca.gov\)](#).)

Finally, the CLRC looked at potential modifications to the statute’s existing methods of determining the dispositive document in the event of conflicting documents. Under current law, preference is given to the first recorded document, making it so a properly recorded RTDD will always prevail over an unrecorded instrument. The result of this current language is that “[a]n unrecorded conflicting instrument will always fail, leaving the beneficiary of the other instrument without a remedy [...] even if the unrecorded instrument would otherwise have been given effect by a court as the best expression of the transferor’s intentions.” (*Id.* at p. 4). To address this issue, the CLRC suggested removing the recording requirements currently specified in Section 5660. This modification would result in treatment of conflicting claims as any other contest of the validity of an RTDD (such as a contest based on a claim of fraud, incapacity, or mistake.) According to the CLRC, this amendment that would strike a balance between acknowledging the validity of a recorded document as well as the transferor’s intentions.

AB 288 is an important bill that will make minor adjustments to the existing revocable transfer on death deed statute, based on the recommendations of the California Law Revision

Commission. This measure will simplify and improve the existing statute to make it workable for stock cooperatives.

Allowing for the transfer of stock cooperatives via an RTDD. The bill makes three changes to the existing statute following the CLRC's recommendations. First, it modifies the definition of "real property" currently in Probation Code Section 5610 to eliminate the express exclusion of a separate interest in stock cooperative and adds language authorizing the transfer of real property that is not typically transferred through a deed. The bill also makes conforming changes to the statutory form captured in Probate Code Section 5642 to reflect the changes made by this bill. The bill additionally cross-references Civil Code Section 4190 to incorporate the existing statutory definition of "stock cooperative."

Protecting existing restrictions on properties held in stock cooperatives. Second, the bill amends Section 5652 to add a provision that would allow any restrictions on the use or transfer of the property created by the stock cooperative within their governing documents to remain in full force upon the transfer through RTDD, regardless of whether or not they are recorded. New language in this section would also ensure that in the event a stock cooperative elects to purchase property transferred via RTDD upon the transferor's death, the property would be transferred to the stock cooperative and the beneficiary would receive the purchase price, subject to any existing modification captured by the stock cooperative's governing documents.

Conflicting recordings. Finally, the bill incorporates the CLRC's recommendation regarding prioritization of recorded transfers in the event of conflicting recordings. The bill strikes the requirement that a potential conflicting document be recorded within 120 days after the conflict is raised pursuant to Section 5682 of the Probate Code. This modification results in treatment of conflicting RTDD transfers the same as any other potential conflict, as governed by Section 5690.

Past Related Legislation. SB 315 (Roth, 2021) extended the sunset date for revocable transfer on death deeds (RTDDs) for 10 years, until January 1, 2032, and makes other changes to the RTDD recommended by the California Law Revision Commission. Status: Chap. 215, Stats. 2021.

SB 1305 (Roth, 2020) extended the sunset date for revocable transfer on death deeds from January 1, 2021 to January 1, 2022. Status: Chap. 238, Stats. 2020.

AB 139 (Gatto, 2015) created, until January 1, 2021, a new nonprobate real property transfer instrument, a revocable transfer on death deed, which is effective to transfer specified residential real property upon death of the transferor. The bill requires the California Law Revision Commission to study the effects of the revocable transfer on death deed and make recommendations to the Legislature by January 1, 2020. Status: Chapter 293, Stats. 2015.

REGISTERED SUPPORT / OPPOSITION:

Support

California Law Revision Commission (sponsor)

Opposition

None on file

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