
CONSENT

Bill No: AB 288
Author: Maienschein (D), et al.
Amended: 3/16/23 in Assembly
Vote: 21

SENATE JUDICIARY COMMITTEE: 10-0, 6/13/23
AYES: Umberg, Wilk, Allen, Ashby, Caballero, Durazo, Laird, Min, Niello,
Wiener
NO VOTE RECORDED: Stern

ASSEMBLY FLOOR: 77-0, 3/27/23 (Consent) - See last page for vote

SUBJECT: Revocable transfer on death deeds

SOURCE: California Law Revision Commission

DIGEST: This bill allows an interest in a stock cooperative to be transferred under the statutes governing revocable transfer on death deeds (RTODD) and makes various conforming changes, as recommended by the California Law Revision Commission (Commission).

ANALYSIS:

Existing law:

- 1) Authorizes, until January 1, 2032, 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

¹ All further references are to the Probate Code unless specified otherwise.

- 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) Provides that 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. (§ 5652(b).)
- 6) Provides rules for determining the effect of a transfer of title when another instrument purports to dispose of the same property. (§ 5660.)

This bill:

- 1) Defines real property to include a separate interest in a stock cooperative for purposes of a RTODD.
- 2) Authorizes an RTODD 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) Authorizes an interest in a stock cooperative to be transferred by an RTODD, 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; and
 - b) The purchase price is paid to the beneficiary.

- i) 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) Revises rules for determining the effect of a transfer of title when another instrument purports to dispose of the same property.
- a) Makes the later executed instrument operative between an RTODD 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.
 - b) Makes the other instrument operative between an RTODD 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.
 - c) Requires a claim that an RTODD is inoperative to be brought as a contest under these provisions, as specified.
- 7) Makes various conforming changes.

Comments

This bill is author sponsored, but the Commission is the source of the bill. In 2005, AB 12 (DeVore, Chapter 422, Statutes of 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 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 grantee 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

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).

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.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, Chapter 293, Statutes of 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. The Commission also recommended several changes to the RTODD statute, which were incorporated into SB 315 (Roth, Chapter 215, Statutes of 2021).

When the initial statute creating the RTODD was enacted, stock cooperatives were excluded from its provisions. Concerns were raised that a change in ownership of real property, which is reflected through transfer or modification of a deed, is distinct from a change in ownership of stock, and that inclusion of stock cooperatives in the statute would cause confusion. A stock cooperative is “a kind of common interest development where the entirety of the development is owned by a corporation formed for that purpose.” The “owners of separate interests hold shares [or stock] in the corporation” entitling them to the “exclusive right to occupy a specified apartment,” but owners do not hold title to any pieces of the development.⁵ In 2019, the Commission concluded that stock cooperatives should still be excluded but indicated that the Commission planned to continue studying the issue.⁶ In February 2022, the Commission recommended that stock cooperatives be included in the RTODD statute.⁷

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).

⁵ *Id.* at 157.

⁶ *Ibid.*

⁷ *Stock Cooperatives and Revocable Transfer on Death Deeds* (Feb. 2022) Cal. L. Rev. Comm’n, available at <http://www.clrc.ca.gov/pub/Printed-Reports/Pub244-L3032.5.pdf>.

The Commission addressed several issues in its report that were raised about the inclusion of stock cooperatives in the RTODD statute. First, in response to concerns about the statute being used to transfer stock instead of solely real property, the Commission stated this concern could be alleviated 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.”⁸ The second issue the Commission addressed was accounting for the different document recording practices for real property versus procedural corporate practices. Under the current RTODD statute, an unrecorded restriction is unenforceable against property transferred. (§ 5652.) However, stock cooperatives often implement rules or restrictions for the properties they maintain separate interest in, such as board approvals for new occupants, a right to repurchase a separate interest on the owner’s death, or restricting purchase and sale prices.⁹ Generally, these types of rules or restrictions are not recorded in the stock itself but in the governing documents of the stock cooperative or a separate agreement (propriety lease or occupancy agreement). The current RTODD statute specifically provides that 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. (§ 5652(b).) In order to ensure that these unrecorded restrictions would not become unenforceable if ownership in a stock cooperative was transferred under the RTODD statute, the Commission recommends adding an exception that provides a restriction expressed in a stock cooperative’s governing documents, or an agreement between the stock cooperative and the transferor would remain enforceable against the property transferred.¹⁰ This exception would apply regardless if the restriction was recorded or not.

Lastly, the Commission addressed the issue of determining the dispositive document in the event of conflicting documents. Under the current statutory scheme, preference is given to the first recorded document. The result of this is “[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.”¹¹ To address this, the Commission suggests removing the recording requirements currently specified in Section 5660, which would result in a conflicting claim being treated as any other contest of the validity of an RTODD (e.g. a contest based on a claim of fraud, incapacity, or mistake). The Commission

⁸ *Id.* at 2.

⁹ *Ibid.*

¹⁰ *Id.* at 3.

¹¹ *Id.* at 4.

argues this amendment strikes a balance between acknowledging the validity of a recorded document as well as the transferor's intentions.

FISCAL EFFECT: Appropriation: No Fiscal Com.: No Local: No

SUPPORT: (Verified 6/14/23)

California Law Revision Commission (source)

OPPOSITION: (Verified 6/14/23)

None received

ARGUMENTS IN SUPPORT: The author writes, "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."

ASSEMBLY FLOOR: 77-0, 3/27/23

AYES: Addis, Aguiar-Curry, Alanis, Alvarez, Arambula, Bains, Bauer-Kahan, Bennett, Berman, Boerner Horvath, Bonta, Bryan, Calderon, Juan Carrillo, Wendy Carrillo, Cervantes, Chen, Connolly, Megan Dahle, Davies, Dixon, Essayli, Flora, Mike Fong, Vince Fong, Friedman, Gabriel, Gallagher, Gipson, Grayson, Haney, Hart, Holden, Hoover, Irwin, Jackson, Jones-Sawyer, Kalra, Lackey, Lee, Low, Lowenthal, Maienschein, Mathis, McCarty, McKinnor, Muratsuchi, Stephanie Nguyen, Pacheco, Papan, Jim Patterson, Joe Patterson, Pellerin, Petrie-Norris, Quirk-Silva, Ramos, Reyes, Luz Rivas, Robert Rivas, Rodriguez, Blanca Rubio, Sanchez, Santiago, Schiavo, Soria, Ta, Ting, Valencia, Villapudua, Waldron, Wallis, Ward, Weber, Wicks, Wilson, Wood, Rendon

NO VOTE RECORDED: Garcia, Ortega, Zbur

Prepared by: Amanda Mattson / JUD. / (916) 651-4113
6/16/23 13:16:49

**** **END** ****