

RESOLUTION 08-03-2017

DIGEST

Probate: Revocable Transfer on Death Deeds

Amends Probate Code section 5642 to conform the statutory deed form to changes in the Medi-Cal recovery/reimbursement law.

RESOLUTIONS COMMITTEE RECOMMENDATION

APPROVE IN PRINCIPLE

History:

No similar resolutions found.

Reasons:

This resolution amends Probate Code section 5642 to conform the statutory deed form to changes in the Medi-Cal recovery/reimbursement law. This resolution should be approved in principle because it will make current and more accurate the information provided to lay persons who use the form.

Probate Code section 5642 provides the public with a statutory form of Revocable Transfer on Death Deed. Such a deed allows for a simple method of transferring real property that avoids probate and does not require the creation of a trust, which can be expensive. The form also provides basic information about the deed, in a “questions and answers” format. The last of those questions and answers states that the property transferred may be subject to Medi-Cal reimbursement. However, since the amendment of Welfare and Institutions Code section 14009.5 in 2016, only probate assets are subject to Medi-Cal reimbursement. Thus, this property would be subject to Medi-Cal reimbursement only if the transferee predeceased the transferor, or for some other reason that caused the property to pass by probate transfer. This proposed amendment therefore makes the statutory form correctly state the law.

TEXT OF RESOLUTION

RESOLVED that the Conference of California Bar Association recommends that legislation be sponsored to amend Probate Code section 5642 to read as follows:

1 § 5642.

2 A revocable transfer on death deed shall be substantially in the following form.

3 (a) The first page of the form shall be substantially the following:

4 **SIMPLE REVOCABLE TRANSFER ON DEATH (TOD) DEED**

5 (California Probate Code Section 5642)

6

7 Recording Requested By:

8 When Recorded Mail This Deed To:

9 Name:

10 Address:

11 Assessor’s Parcel Number:

Space Above For Recorder’s Use

12
13 This document is exempt from documentary transfer tax under Rev. & Tax. Code §
14 11930. This document is exempt from preliminary change of ownership report under Rev. &
15 Tax. Code § 480.3.

16
17 **IMPORTANT NOTICE: THIS DEED MUST BE RECORDED ON OR BEFORE 60**
18 **DAYS AFTER THE DATE IT IS SIGNED AND NOTARIZED**

19
20 Use this deed to transfer the residential property described below directly to your named
21 beneficiaries when you die. YOU SHOULD CAREFULLY READ ALL OF THE
22 INFORMATION ON THE OTHER PAGES OF THIS FORM. You may wish to consult an
23 attorney before using this deed. It may have results that you do not want. Provide only the
24 information asked for in the form. DO NOT INSERT ANY OTHER INFORMATION OR
25 INSTRUCTIONS. This form MUST be RECORDED on or before 60 days after the date it is
26 signed and notarized or it will not be effective.

27
28 **PROPERTY DESCRIPTION**

29
30 Print the legal description of the residential property affected by this deed:
31

32 _____
33

34 **BENEFICIARY(IES)**

35
36 Print the FULL NAME(S) of the person(s) who will receive the property on your death
37 (DO NOT use general terms like “my children”) and state the RELATIONSHIP that each named
38 person has to you (spouse, son, daughter, friend, etc.):
39

40 _____
41

42 _____
43

44 _____
45

46 **TRANSFER ON DEATH**

47
48 I transfer all of my interest in the described property to the named beneficiary(ies) on my
49 death. I may revoke this deed. When recorded, this deed revokes any TOD deed that I made
50 before signing this deed.

51 Sign and print your name below (your name should exactly match the name shown on
52 your title documents):

53
54 _____ Date _____
55

56 NOTE: This deed only transfers MY ownership share of the property. The deed does
57 NOT transfer the share of any co-owner of the property. Any co-owner who wants to name a
58 TOD beneficiary must execute and RECORD a SEPARATE deed.
59

60 **ACKNOWLEDGMENT OF NOTARY**
61

62 A notary public or other officer completing this certificate verifies only the identity of the
63 individual who signed the document to which this certificate is attached, and not the truthfulness,
64 accuracy, or validity of that document.
65

66 State of California)
67 County of _____)

68
69 On _____ before me, (here insert name and title of the officer),
70 personally appeared _____, who proved to me on the basis of
71 satisfactory evidence to be the person(s) whose name(s) is/are subscribed to the within
72 instrument and acknowledged to me that he/she/they executed the same in his/her/their
73 authorized capacity(ies), and that by his/her/their signature(s) on the instrument the person(s), or
74 the entity upon behalf of which the person(s) acted, executed the instrument.
75

76 I certify under PENALTY OF PERJURY under the laws of the State of California that
77 the foregoing paragraph is true and correct.
78

79 WITNESS my hand and official seal.
80

81 Signature _____ (Seal)
82

83 (b) Subsequent pages of a form executed under this section shall be in substantially the
84 following form:
85

86 **COMMON QUESTIONS ABOUT THE USE OF THIS FORM**
87

88 WHAT DOES THE TOD DEED DO? When you die, the identified property will transfer
89 to your named beneficiary without probate. The TOD deed has no effect until you die. You can
90 revoke it at any time.
91

92 CAN I USE THIS DEED TO TRANSFER BUSINESS PROPERTY? This deed can only
93 be used to transfer (1) a parcel of property that contains one to four residential dwelling units, (2)
94 a condominium unit, or (3) a parcel of agricultural land of 40 acres or less, which contains a
95 single-family residence.
96

97 HOW DO I USE THE TOD DEED? Complete this form. Have it notarized. RECORD
98 the form in the county where the property is located. The form MUST be recorded on or before
99 60 days after the date you sign it or the deed has no effect.
100

101 IS THE "LEGAL DESCRIPTION" OF THE PROPERTY NECESSARY? Yes.

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HOW DO I FIND THE "LEGAL DESCRIPTION" OF THE PROPERTY? This information may be on the deed you received when you became an owner of the property. This information may also be available in the office of the county recorder for the county where the property is located. If you are not absolutely sure, consult an attorney.

HOW DO I "RECORD" THE FORM? Take the completed and notarized form to the county recorder for the county in which the property is located. Follow the instructions given by the county recorder to make the form part of the official property records.

WHAT IF I SHARE OWNERSHIP OF THE PROPERTY? This form only transfers YOUR share of the property. If a co-owner also wants to name a TOD beneficiary, that co-owner must complete and RECORD a separate form.

CAN I REVOKE THE TOD DEED IF I CHANGE MY MIND? Yes. You may revoke the TOD deed at any time. No one, including your beneficiary, can prevent you from revoking the deed.

HOW DO I REVOKE THE TOD DEED? There are three ways to revoke a recorded TOD deed: (1) Complete, have notarized, and RECORD a revocation form. (2) Create, have notarized, and RECORD a new TOD deed. (3) Sell or give away the property, or transfer it to a trust, before your death and RECORD the deed. A TOD deed can only affect property that you own when you die. A TOD deed cannot be revoked by will.

CAN I REVOKE A TOD DEED BY CREATING A NEW DOCUMENT THAT DISPOSES OF THE PROPERTY (FOR EXAMPLE, BY CREATING A NEW TOD DEED OR BY ASSIGNING THE PROPERTY TO A TRUST)? Yes, but only if the new document is RECORDED. To avoid any doubt, you may wish to RECORD a TOD deed revocation form before creating the new instrument. A TOD deed cannot be revoked by will, or by purporting to leave the subject property to anyone via will.

IF I SELL OR GIVE AWAY THE PROPERTY DESCRIBED IN A TOD DEED, WHAT HAPPENS WHEN I DIE? If the deed or other document used to transfer your property is RECORDED before your death, the TOD deed will have no effect. If the transfer document is not RECORDED before your death, the TOD deed will take effect.

I AM BEING PRESSURED TO COMPLETE THIS FORM. WHAT SHOULD I DO? Do NOT complete this form unless you freely choose to do so. If you are being pressured to dispose of your property in a way that you do not want, you may want to alert a family member, friend, the district attorney, or a senior service agency.

DO I NEED TO TELL MY BENEFICIARY ABOUT THE TOD DEED? No. But secrecy can cause later complications and might make it easier for others to commit fraud.

WHAT DOES MY BENEFICIARY NEED TO DO WHEN I DIE? Your beneficiary must RECORD evidence of your death (Prob. Code § 210), and file a change in ownership notice

148 (Rev. & Tax. Code § 480). If you received Medi-Cal benefits, your beneficiary must notify the
149 State Department of Health Care Services of your death and provide a copy of your death
150 certificate (Prob. Code § 215).

151
152 **WHAT IF I NAME MORE THAN ONE BENEFICIARY?** Your beneficiaries will
153 become co-owners in equal shares as tenants in common. If you want a different result, you
154 should not use this form.

155
156 **HOW DO I NAME BENEFICIARIES?** You **MUST** name your beneficiaries
157 individually, using each beneficiary's **FULL** name. You **MAY NOT** use general terms to
158 describe beneficiaries, such as "my children." For each beneficiary that you name, you should
159 briefly state that person's relationship to you (for example, my spouse, my son, my daughter, my
160 friend, etc.).

161
162 **WHAT IF A BENEFICIARY DIES BEFORE I DO?** If all beneficiaries die before you,
163 the TOD deed has no effect. If a beneficiary dies before you, but other beneficiaries survive you,
164 the share of the deceased beneficiary will be divided equally between the surviving beneficiaries.
165 If that is not the result you want, you should not use the TOD deed.

166
167 **WHAT IS THE EFFECT OF A TOD DEED ON PROPERTY THAT I OWN AS JOINT**
168 **TENANCY OR COMMUNITY PROPERTY WITH RIGHT OF SURVIVORSHIP?** If you are
169 the first joint tenant or spouse to die, the deed is **VOID** and has no effect. The property transfers
170 to your joint tenant or surviving spouse and not according to this deed. If you are the last joint
171 tenant or spouse to die, the deed takes effect and controls the ownership of your property when
172 you die. If you do not want these results, do not use this form. The deed does **NOT** transfer the
173 share of a co-owner of the property. Any co-owner who wants to name a TOD beneficiary must
174 complete and **RECORD** a **SEPARATE** deed.

175
176 **CAN I ADD OTHER CONDITIONS ON THE FORM?** No. If you do, your beneficiary
177 may need to go to court to clear title.

178
179 **IS PROPERTY TRANSFERRED BY THE TOD DEED SUBJECT TO MY DEBTS?**
180 **Yes. DOES THE TOD DEED HELP ME TO AVOID GIFT AND ESTATE TAXES?** No.

181
182 **HOW DOES THE TOD DEED AFFECT PROPERTY TAXES?** The TOD deed has no
183 effect on your property taxes until your death. At that time, property tax law applies as it would
184 to any other change of ownership.

185
186 **DOES THE TOD DEED AFFECT MY ELIGIBILITY FOR MEDI-CAL?** No.

187
188 **AFTER MY DEATH, WILL MY HOME BE LIABLE FOR REIMBURSEMENT OF**
189 **THE STATE FOR MEDI-CAL EXPENDITURES?** SB 833, effective January 1, 2017, limits
190 recovery to only those assets subject to California probate. Upon your death, your property will
191 pass directly to your named beneficiary(ies) and will not be subject to reimbursement. However,
192 if your beneficiary(ies) predeceases you or the transfer fails for some other reason, ~~Y~~our home
193 may be liable for reimbursement. If you have questions, you should consult an attorney.

(Proposed new language underlined; language to be deleted stricken)

PROPONENT: Bar Association of Northern San Diego County.

STATEMENT OF REASONS

The Problem: On January 1, 2017, SB 833 became effective and changed the Medi-Cal recovery/reimbursement rules. Under SB 833, a Medi-Cal recovery/reimbursement claim is now limited to assets subject to California probate. The Common Questions section of the Revocable Transfer on Death (TOD) Deed includes a question about whether the property which is the subject of a TOD Deed would be subject to a Medi-Cal reimbursement claim and indicates that it may be recoverable. The answer is misleading under the new rules.

The Solution: This Resolution would clarify that property that passes to a beneficiary pursuant to a TOD Deed passes without probate and would not be subject to a Medi-Cal reimbursement/recovery claim. However, it does provide for additional clarification that if the TOD Deed fails for some reason, such as the prior death of a sole beneficiary, then the property would be subject to probate and now subject to a Medi-Cal reimbursement or recovery claim.

CURRENT OR PRIOR RELATED LEGISLATION:

None known.

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COUNTERARGUMENTS AND STATE BAR SECTION COMMENTS

TEXCOM - TECHNICAL COMMENTS ONLY

The California Law Revision Commission has been charged by the legislature with studying the Revocable Transfer on Death Deeds legislation and reporting back. TEXCOM had taken the position previously that no expansions of the RTODD law should be enacted until the CLRC makes its report.

This position is only that of the TRUSTS and ESTATES SECTION of the State Bar of California. This position has not been adopted by the State Bar's Board of Trustees, and is not to be construed as representing the position of the State Bar of California.

Membership in the TRUSTS and ESTATES SECTION is voluntary and funding for section activities, including all legislative activities, is obtained entirely from voluntary sources.