

## RESOLUTION 05-05-05

### DIGEST

#### Probate: Transfer of Real Property on Death

Adds Probate Code section 5800 to allow the transfer of real estate without a court proceeding.

### RESOLUTIONS COMMITTEE RECOMMENDATION

DISAPPROVE

#### History:

Similar to Resolution 09-03-04, which was withdrawn.

#### Reasons:

This resolution adds Probate Code section 5800 to allow the transfer of real property without a court proceeding. This resolution should be disapproved because it creates and encourages estate planning substitutes that are more likely to increase elder abuse and real property title problems.

The proponent resubmits the resolution from last year, but adds the requirement for two witnesses or a certificate of review by an attorney to be included on the beneficiary deed. The current resolution fails to address abuses and chain of title problems that are likely to be created with this type of deed. The use of witnesses does not reduce the likelihood of undue influence. In the event a property owner executes multiple beneficiary deeds at different times, the true intent of the property owner may not be followed if the deeds are not recorded in the order in which they were signed. Further, there are valid reasons the law provides for heirs at law and creditors to receive notice upon the death of a person in probates and trust administrations. The beneficiary deed does not allow heirs at law or creditors to know real property has passed to named designees upon the death of a family member, and as a result the property may be sold or refinanced before possible abuse claims can be raised.

Assembly Bill No. 12 is similar to the proponent's resolution, but it contains protection for creditors. The bill has been sent to the California Law Revision Commission for study.

### SECTION/COMMITTEE REPORTS

#### TRUSTS & ESTATES COMMITTEE RECOMMENDATION

DISAPPROVE

Revocable deeds with reserved life estates are valid in California based on *Tennant v. John Tennant Memorial Home* and have been used with the advice of counsel in the past where the cases are simple ones which do not involve alternate or multiple takers. The proposed legislation is neither necessary nor appropriate, since it would add yet another area of self-help estate planning in a situation where the inherent inflexibility of the planning method is ignored. The potential for fraud and confusion by the creation of such deeds is significant. If revocable deeds with reserved life estates are to be used at all, it is best that they be used with competent legal advice as they are under current case law.

*This position is only that of the Trusts and Estates Section of the State Bar of California. This position has not been adopted by either the State Bar's Board of Governors or overall membership, 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.*

### TEXT OF RESOLUTION

RESOLVED that the Conference of Delegates of California Bar Associations recommends that legislation be sponsored to add Probate Code section 5800 to read as follows:

- 1     § 5800
- 2             (a) A deed that conveys an interest in real property, including any debt secured by a lien  
3 on real property to a grantee beneficiary designated by the owner and that expressly states that the  
4 Deed is effective on the death of the owner transfers the interest to the designated grantee  
5 beneficiary effective on the death of the owner subject to all conveyances, assignments, contracts,  
6 mortgages, deeds of trust, liens, security pledges and other encumbrances made by the owner or to  
7 which the owner was subject during the owner's lifetime.
- 8             (b) A beneficiary deed may designate multiple grantees who take title as joint tenants  
9 with right of survivorship, tenants in common, a husband and wife as community property with right of  
10 survivorship, or any other tenancy that is valid under the laws of this state.
- 11            (c) A beneficiary deed may designate a successor grantee beneficiary. If the beneficiary  
12 deed designates a successor grantee beneficiary, the deed shall state the condition on which the  
13 interest of the successor grantee beneficiary would vest.
- 14            (d) If real property is owned as joint tenants with right of survivorship or as community  
15 property with the right of survivorship, a deed that conveys an interest in the real property to a  
16 grantee beneficiary designated by all of the then surviving owners and that expressly states that the  
17 deed is effective on the death of the last surviving owner transfers the interest to the designated  
18 grantee beneficiary effective on the death of the last surviving owner. If a beneficiary deed is  
19 executed by fewer than all of the owners of real property owned as joint tenants with right of  
20 survivorship or community property with right of survivorship the beneficiary deed is valid if the last  
21 surviving owner is one of the persons who executes the beneficiary deed. If the last surviving owner  
22 did not execute the beneficiary deed, the transfer shall lapse and the deed is void. An estate in joint  
23 tenancy with right of survivorship or community property with right of survivorship is not affected by  
24 the execution of a beneficiary deed that is executed by fewer than all of the owners of the real  
25 property and the rights of a surviving joint tenant with right of survivorship or a surviving spouse in  
26 community property with right of survivorship shall prevail over a grantee beneficiary named in a  
27 beneficiary deed.
- 28            (e) A beneficiary deed is valid only if the deed is executed and recorded as provided by  
29 law in the office of the county recorder of the county in which the property is located before the death  
30 of the owner or the last surviving owner. A beneficiary deed may be used to transfer an interest in  
31 real property to the trustee of a trust even if the trust is revocable.
- 32            (f) A beneficiary deed may be revoked at any time by the owner or, if there is more than  
33 one owner, by any of the owners who executed the beneficiary deed. To be effective, the revocation  
34 must be executed and recorded as provided by law in the office of the county recorder of the county  
35 in which the real property is located before the death of the owner who executes the revocation. If  
36 the real property, is owned as joint tenants with right of survivorship or community property with right  
37 of survivorship and if the revocation is not executed by all the owners the revocation is not effective  
38 unless executed by the last surviving owner.
- 39            (g) If an owner executes and records more than one beneficiary deed concerning the  
40 same real property, the last beneficiary deed that is recorded before the owner's death is the effective  
41 beneficiary deed.
- 42            (h) This Section does not prohibit other methods of conveying property that are  
43 permitted by law and have the effect of postponing enjoyment of an interest in real property until the  
44 death of the owner. This section does not invalidate any deed otherwise effective by law to convey  
45 title to the interests and estates provided in the deed that is not recorded until after the death of the  
46 owner.
- 47            (i) The signature, consent or agreement of or notice to a grantee beneficiary of a  
48 beneficiary deed is not required for any purpose during the lifetime of the owner.

49 (j) A beneficiary deed that is executed, acknowledged and recorded in accordance with  
50 this section is not revoked by the provisions of a will.

51 (k) A beneficiary deed is sufficient if it complies with other applicable laws and if it is in  
52 substantially the following form:

53

54 Beneficiary Deed

55 I (we) \_\_\_\_\_ (owner) hereby convey to \_\_\_\_\_ (Grantee  
56 Beneficiary) effective on my (our) death the following described real property:

57

58 [legal description]

59

60

61 Signature of Grantor(s)

62

63 (Acknowledgment)

64

65 (1) The instrument of revocation shall be sufficient if it complies with other applicable  
66 laws and is in substantially the following form:

67

68 Revocation of Beneficiary Deed

69

70 The undersigned hereby revokes the beneficiary deed recorded on \_\_\_\_\_ in document or book  
71 number \_\_\_\_\_ at page \_\_\_\_\_, or instrument no. \_\_\_\_\_ records of  
72 \_\_\_\_\_ County, California.

73

74 Dated:

75

76

77 Signature

78

79 (Acknowledgment)

80

81 (m) For the purposes of this section:

82

83 1. "Beneficiary Deed" means a deed authorized under this section.  
84 2. "Owner" means any person who executes a beneficiary deed as provided in this

85

86 (n) There shall be an attestation provision as hereinafter stated in (1) below executed by  
87 at least two disinterested witnesses at the time of execution by the Owner or an Attorney's Certificate  
88 of Independent Review as hereinafter stated in (2) below:

89

90 (1) (Notice to Witnesses: Two (2) adults must sign as witnesses. Each witness must  
91 read the following provision before signing. The witnesses should not receive any interest from the  
92 Beneficiary Deed. Each of us declares under penalty of perjury under the laws of the State of  
93 California that the following is true and correct:

94

95 (A) On the date written below the maker of this Beneficiary Deed declared to us that this  
96 instrument was the Owner's Beneficiary Deed and requested us to act as witnesses to it:

97

98 (B) We understand this is the Owner's Beneficiary Deed;

99

(C) The Owner signed this Beneficiary Deed in our presence, all of us being present at

the same time;

(D) We now, at the Owner's request, and in the Owner's and each other's presence, sign

below as witnesses;

(E) We believe the Owner is of sound mind and memory;

100 (F) We believe that this Beneficiary Deed was not pressured by duress, menace fraud or  
101 undue influence; and  
102 (G) Each of us is now 18 or older, is a competent witness, and resides at the address set  
103 forth after his or her name.

104  
105 Dated:

106  
107 \_\_\_\_\_  
108 Signature

107 \_\_\_\_\_  
108 Signature

109  
110 Print name here:

109  
110 Print name here:

111  
112 \_\_\_\_\_  
113  
114 Residence Address:

111  
112 \_\_\_\_\_  
113  
114 Residence Address:

115  
116  
117 \_\_\_\_\_  
118  
119  
120 AT LEAST TWO WITNESSES MUST SIGN  
121 NOTARIZATION ALONE IS NOT SUFFICIENT

122  
123 (2) CERTIFICATE OF INDEPENDENT REVIEW

124  
125 I, \_\_\_\_\_ (attorney's name), have reviewed the Beneficiary Deed and  
126 counseled my client, \_\_\_\_\_ (name of client), on the nature and consequences of  
127 the transfer, or transfers, of property to \_\_\_\_\_ (name of transferee(s)) contained in  
128 the Beneficiary Deed. I am so disassociated from the interest of the transferee as to be in a position  
129 to advise my client independently, impartially, and confidentially as to the consequences of the  
130 transfer. On the basis of this counsel, I conclude that the transfer, or transfers, in the Beneficiary  
131 Deed are valid because the transfer is not the product of fraud menace, duress or undue influence.  
132

133  
134  
135 \_\_\_\_\_  
136 Name of Attorney

134  
135 \_\_\_\_\_  
136 Date

137 (o) For the Beneficiary Deed to be effective to transfer title on death, the Beneficiary  
138 Deed must be recorded in the County in which the real property is located within thirty (30) days of  
139 execution by the Owner.

140 (p) For the revocation o the Beneficiary Deed to be effective, it must be recorded in the  
141 County in which the real property is located prior to the death of the Owner.

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

PROPONENT: Orange County Bar Association

STATEMENT OF REASONS

Existing Law: There is no present code section or provision providing a transfer on death for real estate like a savings account or like a "pod" account for securities.

This Resolution: Allows an individual to transfer real estate in the same manner as transfer on death ("tod") accounts and paid on death ("pod") accounts.

The Problem: Some individuals want to transfer real estate at death other than by joint tenancy or to create a trust. This new law is from an Arizona statute.

#### IMPACT STATEMENT

This resolution does not affect any other laws.

CO-AUTHORS AND/OR PERMANENT CONTACTS: Edward H. Stone and Mary Pat Toups, 18201 Von Karman Avenue, Suite 1160, Irvine, CA 92612-1005, voice 949-833-7708, fax 949-833-7583, e-mail none.

RESPONSIBLE FLOOR DELEGATE: Edward H. Stone

#### COUNTERARGUMENTS

##### **SAN DIEGO COUNTY BAR ASSOCIATION**

This resolution fails to address the issue of a conflicting provision in a will. In addition, it is likely to create additional issues. For instance, could a beneficiary obtain a loan on this entitlement? It might also increase costs to obtain title insurance.

##### **SACRAMENTO COUNTY BAR ASSOCIATION**

This proposed resolution would create an overly complicated, duplicative method of disposing of real property at a person's death. In many ways it mirrors a probate proceeding with a will but provides none of the protections that go along with probate and a will. It would allow a person's real property to pass without payment of the person's creditors. It would create more opportunities than presently exist for non-lawyers to give inadequate or poor advice to persons wishing to avoid probate, and more opportunities for abusers to obtain title to property from the elderly, without the court overseeing the transfer. Title companies would object to it, on the grounds that it creates a revocable deed process, and the consequent greater difficulty of determining the state of title when title insurance is in issue. Assembly Bill No. 12 is currently active in the Assembly, with provisions similar to this proposed resolution, but containing protection for creditors. Delegates should vote "disapprove" or "action unnecessary" on this resolution.