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Revocable Transfer on Death Deeds: Cheap, Simple, and Has California's Trusts & (and) Estates Attorneys Heading for the Hills

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I. INTRODUCTION

In early 2004, seventy-nine year old Mary Pat Toups met soon-to-be-minted Assemblyman Chuck Devore at a retirement-village event. The topic of conversation centered on what would become Assemblyman Devore's first contribution upon taking his oath in office. Assembly Bill 12 ("AB12") proposed to create "Beneficiary Deeds," which laypersons would use as a cost-effective tool to avoid California's probate system. AB12 seemed to provide an answer for the many senior citizens who had been spending their final years purchasing "how to" forms and proficiently

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3. See id.
4. Revocable Transfer On Death (TOD) Deed, 36 CAL. L. REVISION COMMISSION REP., 103, 109 (2006), available at http://clrc.ca.gov/pub/Printed-Reports/Pub226.pdf ("‘Beneficiary deed’ is the term used in several jurisdictions that have adopted the concept that an owner of real property may deed property to a named beneficiary, the transfer to become operative on the owner's death and to remain revocable until then.").
5. Id. at 202.
instructing themselves on the best way to create their own "Inter vivos Transfer with a Reserved Life Estate," or "Conveyance Pursuant to a General Nonprobate Transfer Statute." AB12 was not met with a warm welcome by the State Bar of California Trusts and Estates Executive Committee, which was staunchly opposed to the legislation and successfully prevented it from achieving its desired goals. Due to the efforts of Assemblyman Devore, the ideas of AB12 have been refined in the presently proposed Assembly Bill 250 ("AB250"). The problem of conflicting legal philosophies, however, remains.

The statutory enactment of the Transfer on Death deed ("TOD deed") has inspired widespread debate. Proponents of TOD deed legislation argue that the device addresses the prospective transferor's needs concerning affordability and simplicity. In response to unsatisfactory results with joint tenancy and other interest-bearing conveyances, the TOD deed is fully revocable during the life of the transferor.

6. See id. at 129-30 (noting that the inter vivos transfer with a reserved life estate effectively splits the title and that the device may create unforeseen difficulties due to the intricacy of the transfer).

7. See id. at 125-28.

8. See AB12 Beneficiary Deeds, http://www.transfer-on-death-deeds.com/AB12BeneficiaryDeeds.html (last visited Aug. 30, 2008) ("After implementing many amendments, the AB12 supporters were told (1) that anyone who owned a home could afford to pay a lawyer for a Trust and (2) that this piece of legislation would never pass the legislature, and be signed by the Governor, without the approval of the state bar, and (3) that the Section would never approve of Transfer-on-Death Beneficiary Deed legislation, because the only way to transfer real estate at death is by a trust or by probate.").


10. See id. ("When finally it appeared that AB250 did not have the votes to pass, my Assemblyman Chuck DeVore suggested that he would ask that this hearing be cancelled, so that we could work with the Senators and the Senate Judiciary Staff to explain AB250 better, and then bring it back in January of 2008.").


13. Id. at 161-62.
Further, the structure of the TOD deed, generally a single page form, promotes a fundamental understanding of the transfer process that would-be transferors cannot find in other nonprobate devices. Such an understanding creates confidence in the prospective transferor when dealing with a subject matter long under the control of trusts and estates attorneys.

Opponents of the TOD deed legislation quickly labeled it a "cookie cutter" solution to what is, in reality, a very complex problem. Those averse to the TOD deed argue that although the up-front cost of the device might be lower, the history of the TOD deed shows that the frequent legal mistakes of a prospective transferor are likely to diminish the overall value of the estate. Many of the decisions concerning the transfer of real property assets have been made with little to no education about the device or, worse yet, at the advice of unlicensed practitioners. Opponents argue that the TOD deed poses too great a risk to its users, mainly seniors and those with limited means, as they would likely fall victim to fraudulently induced transfers due to the nature and simplicity of the device. In their view, the TOD deed is an unnecessary addition likely to create more litigation, further burdening the already complex area of nonprobate law.

This comment analyzes the debate between the proponents and opponents of the TOD deed legislation proposed in the California Legislature. Part II of this comment reviews the basic elements of the TOD deed and the various alternatives in nonprobate and probate law. Part

15. See Gary, supra note 11, at 543.
16. See id.
17. See Jacobs, supra note 2.
19. See Gary, supra note 11, at 543 ("A disadvantage of TOD Deeds is that people may use them without consulting a lawyer and may make legal mistakes.").
20. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 207–08.
21. See Barrier, supra note 11, at 20.
22. See discussion infra Parts IV–V.
23. See discussion infra Part II.
III identifies the legal issue, focusing on the rationale for and against the enactment of the statute.\textsuperscript{24} After considering the background and legal issue, Part IV will examine three divisive topics in the debate surrounding the TOD deed legislation proposed in AB250.\textsuperscript{25} Lastly, this comment argues for the adoption of TOD deeds in California and subsequent measures to ensure that this estate planning mechanism is used safely and effectively by prospective transferors.\textsuperscript{26}

II. BACKGROUND

A. What Is a TOD Deed?

TOD deeds are a nonprobate device from which “an owner of real property may deed the property to a named beneficiary, the transfer to become operative on the owner’s death and to remain revocable until then.”\textsuperscript{27} Jurisdictions are split on how the statute should be structured: five states provide the transferor with a statutory form,\textsuperscript{28} and four states merely guide the transferor by way of statutory language.\textsuperscript{29}

The TOD deed’s combination of recordation and revocation without the requirements of notice or consideration make the deed a particularly unique nonprobate device. In every jurisdiction maintaining a TOD deed statute, the mere execution of the device is insufficient to effectuate the transferor’s intent.\textsuperscript{30} Additionally, the transferor is not compelled to provide notice to the beneficiary of either the creation or revocation of a future interest.\textsuperscript{31} Significantly, no consideration need be provided for the deed,\textsuperscript{32} nor need the transferee denote the deed as a gift to

\textsuperscript{24} See discussion infra Part III.
\textsuperscript{25} See discussion infra Part IV.
\textsuperscript{26} See discussion infra Part V.
\textsuperscript{27} Revocable Transfer on Death (TOD) Deed, supra note 4, at 109.
\textsuperscript{28} ARIZ. REV. STAT. ANN. § 33-405 (2007); ARK. CODE ANN. § 18-12-608 (2003); NEV. REV. STAT. ANN. § 111.109 (LexisNexis 2004); N.M. STAT. § 45-6-401 (Supp. 2007); OHIO. REV. CODE ANN. § 5302.22 (LexisNexis 2004 & Supp. 2008).
\textsuperscript{29} COLO. REV. STAT. § 15-15-401 (2007); KAN. STAT. ANN. § 59-3501 (2005); MO. ANN. STAT. § 461.025 (West 2007); WIS. STAT. ANN. § 705.15 (West 2001).
\textsuperscript{30} Revocable Transfer on Death (TOD) Deed, supra note 4, at 14850.
\textsuperscript{31} See id.
\textsuperscript{32} See infra notes 59–67 (discussing statutes in nine jurisdictions where consideration need not be given in order to execute or record the TOD Deed).
operate effectively. Finally, neither delivery to the beneficiary nor his acceptance is required to validate a TOD deed. Instead, the validity of the TOD deed lies in each state's deed-recording process.

In Estate of Dugger v. Dugger, a Missouri court of appeals noted that the recordation process is a sufficient "formality that takes the place of delivery." Commentators have suggested that as a result of not demanding delivery, the created legal relationship cannot then require the beneficiary to offer some form of valid acceptance. The beneficiary, in order to obtain the interest transferred by the TOD deed, must submit an affidavit of death and a certified copy of the transferor's death certificate. Generally, if the TOD deed beneficiary does not wish to obtain the transferred interest, the individual may execute a valid disclaimer.

A TOD deed, like a will, functions as "a donative transfer of property that take[s] effect on death." Though not dispositive, Missouri courts have found that the transferor need only have testamentary capacity to execute and record a valid TOD deed. The testamentary capacity necessary to create a will is generally lower than the legal capacity to convey real property. The effect of using testamentary capacity creates a legal paradox in that TOD deeds are based on the idea of a recorded land conveyance, but merely require the transferor to have the limited legal capacity needed to create a will. Nevertheless, if heirs unnamed in the deed

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33. See Eickhoff, supra note 11, at 96 ("There are no gift tax consequences in a TOD direction because no title interest is conveyed to the beneficiary.").
34. Revocable Transfer on Death (TOD) Deed, supra note 4, at 147-48.
35. See id. at 148-49.
37. Id. at 428 (citation omitted).
38. Revocable Transfer on Death (TOD) Deed, supra note 4, at 148.
39. Id. at 156.
40. Id. at 182.
41. Id. at 146.
42. See Allee v. Ruby Scott Sigears Estate, 182 S.W.3d 772, 781 (Mo. Ct. App. 2006) ("In order to have testamentary capacity at the time a will is executed, the testator must: (1) understand the ordinary affairs of his life; (2) understand the nature and extent of his property; (3) know the persons who were the natural objects of the bounty; and (4) intelligently weigh and appreciate his natural obligations to those persons and know that he is giving his property to the persons mentioned in his will.").
43. Revocable Transfer on Death (TOD) Deed, supra note 4, at 145.
44. See McCouch, supra note 11, at 1124-31; see generally Percy Bordwell,
were to challenge the capacity of the then-deceased transferor, it appears likely that probate courts would apply a testamentary capacity standard to determine the validity of the deed.  

The TOD deed is a highly formalistic device that draws clear lines concerning execution, recordation, and effectuation. The main feature of the TOD deed that provides subsequent guarantees of security is the transferor's ability to revoke. Generally, revocation may be accomplished by "executing and recording a revocation prior to the grantor's death," recording a subsequent TOD deed, "or by an absolute conveyance," to a third party or original grantee. The ability to revoke relies on the TOD deed's unique premise that a deed may be recorded without leaving the named beneficiary any actual interest in the real property until the death of the transferor.

In many situations, transferors executing real property conveyances may record various deeds, wills, or transfers that lead to conflict or litigation between disputing parties. TOD deeds, however, are not subject to probate and "there is no opportunity for a claimant of the property to contest the transfer before the property passes to the beneficiary by operation of law." A contrary claim by a third party regarding the interests covered by the deed is not likely to interfere with the vesting in the named beneficiary unless

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Testamentary Dispositions, 19 KY. L.J. 283 (1931).
45. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 145-46.
46. See discussion infra Part II.B.
47. See Barrier, supra note 11, at 21.
48. Id.
49. BLACK'S LAW DICTIONARY 357 (8th ed. 2004) ("[A]bsolute conveyance. A conveyance in which a right or property is transferred to another free of conditions or qualifications (i.e., not as a security.").
50. See Barrier, supra note 11, at 21.
51. RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 46, at 118-19 (2d ed. 1955) ("What then is a deed? Unfortunately the word is not free from ambiguity. In the original and technical sense a deed is a written instrument under the seal of the party executing it. Because, however, of the wide use of such instruments in the conveyance of real estate, it has come to mean in popular acceptance any formal conveyance for the transfer of land or of an interest therein.").
52. See Gary, supra note 11, at 542.
53. See id at 550-55 (noting some possible variations that are likely to cause conflict).
54. Revocable Transfer on Death (TOD) Deed, supra note 4, at 157.
obtained through fraud, duress, or undue influence. Missouri noted that a beneficiary wrongfully in possession of the interest is subject to an action by the rightful transferees. It is important to clarify, however, that the "disappointed claimant's remedy is against the beneficiary, not against the property."

B. Who Is Using the TOD Deed?

As of this writing, nine jurisdictions have some variation of the TOD deed. The jurisdictions that have enacted the device are Missouri (1989), Kansas (1997), Ohio (2000), Arizona (2001), New Mexico (2001), Nevada (2003), Colorado (2004), Arkansas (2005), and Wisconsin (2005). Generally, jurisdictions use one of two phrases to characterize the device: "beneficiary deed" or "transfer on death deed." Due to a short history and limited use, there has been little litigation surrounding the use of the TOD deed. Missouri case law, and Arizona statutory history, however, present apt guidance concerning the general issues that should be considered when drafting TOD deed legislation so as to avoid

55. MO. ANN. STAT. § 461.054 (West 2007).
56. § 461.067.
57. Revocable Transfer on Death (TOD) Deed, supra note 4, at 158.
58. Id. at 135.
59. § 461.025.
63. See N.M. STAT. § 45-6-401 (Supp. 2007).
64. See NEV. REV. STAT. ANN. § 111.109 (LexisNexis 2004).
67. See WIS. STAT. ANN. § 705.15 (West 2001).
70. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 137.
Missouri was the first to develop TOD deed legislation and has been using the device for nearly eighteen years.\textsuperscript{74} There are estimates that indicate that over 350,000 beneficiary deeds have been recorded within the state of Missouri.\textsuperscript{75} As a result, Missouri has developed the largest body of case law concerning disputes evolving out of the beneficiary deed statute.\textsuperscript{76} The most prevalently litigated issues center on improper use by prospective transferors.\textsuperscript{77}

Arizona’s legislative history may also be helpful to states looking to draft TOD deed legislation. The Arizona TOD deed statute was amended twice: once in 2002\textsuperscript{78} and again in 2006.\textsuperscript{79} Doubtful practitioners and title companies quickly criticized the initial version of the Arizona statute.\textsuperscript{80} The problems centered on what was thought to be an under-inclusive and generally poorly drafted statute.\textsuperscript{81} Interested opponents believed that the then-current statute failed to address beneficiary duties, rules governing the predeceasing of the beneficiary, effects of conveyances and encumbrances, designation of successor benefits, and marriage and community property issues.\textsuperscript{82} The history of the TOD deed in Arizona illustrates the importance of comprehensive construction, particularly where the nature of the device is formalistic rather than intent-based.\textsuperscript{83}

C. What Are the Other Ways to Transfer?

Transfers of real property subject to the death of the transferor generally fall into one of two categories: probate or nonprobate. Probate is a “judicial procedure by which a testamentary document is established to be a valid will.”\textsuperscript{84}

\textsuperscript{73} See Revocable Transfer on Death (TOD) Deed, supra note 4, at 136–44.
\textsuperscript{74} Id. at 135; see MO. REV. STAT. § 461.025 (1989).
\textsuperscript{75} Revocable Transfer on Death (TOD) Deed, supra note 4, at 137.
\textsuperscript{76} See cases cited supra note 71.
\textsuperscript{77} See cases cited supra note 71.
\textsuperscript{80} Gary, supra note 11, at 546.
\textsuperscript{81} See Revocable Transfer on Death (TOD) Deed, supra note 4, at 141–42.
\textsuperscript{82} Id.
\textsuperscript{83} See generally NORMAN J. SINGER & J.D. SHAMBIE SINGER, STATUTES AND STATUTORY CONSTRUCTION (7th ed. 2007).
\textsuperscript{84} BLACK'S LAW DICTIONARY 1239 (8th ed. 2004).
Though generally subsumed under the term "probate," "the sum total of . . . activities . . . by which the estate of the decedent" is managed is titled "administration." Every state maintains its own probate system, the focus of which is to identify heirs, to determine the validity of wills, and to govern the administration of the estate. The TOD deed is an attempt to avoid this arduous and expensive process, while offering the prospective transferor a formalistic device for effectuating the transfer.

The TOD deed is merely one option in what has become known as the "nonprobate revolution." Technically, [nonprobate devices] avoid the reach of the probate system by disposing of property during life, leaving the owner only with rights or interests that terminate at death. Since the list of nonprobate devices is exhaustive as well as unnecessary to the understanding of TOD deeds in general, this comment has selected three particular devices to enlighten the reader on the voids of the nonprobate system. The devices best suited to aid in understanding the TOD deed's nonprobate

85. MAX RHEINSTEIN & MARY ANN GLENDON, THE LAW OF DECEDENTS' ESTATES 478 (1971) ("In lawyers' parlance, the two terms are not always distinguished.").
86. McCouch, supra note 11, at 1124–25.
87. See generally Revocable Transfer on Death (TOD) Deed, supra note 4, at 116 ("The cost of probate administration is based on the value of the estate. The personal representative is entitled to compensation on a sliding scale, starting at 4% on the first $100,000, going down to 1% of amounts between $1 million and $10 million, and allowing smaller percentages for larger estates. The estate attorney's compensation for ordinary services is on a similar scale as the personal representative's. There are also filing fees and other costs. A reasonable estimate is that combined fees for a routine $400,000 estate are about $23,000.") (footnotes omitted).
88. See Michael A. Kirtland & Catherine Anne Seal, Beneficiary Deeds and Estate Planning, 66 ALA. LAW. 118, 123 ("Rightly or wrongly, avoidance of probate is seen as a good thing by many people.").
90. McCouch, supra note 11, at 1125.
91. Langbein, supra note 89, at 1115 ("If we were concerned to complete a taxonomy of will substitutes, we could lengthen our list to include devices that are scorned by both lawyers and financial intermediaries but that still attract laymen. A substantial case law chronicle's laymen's quixotic attempts to achieve will-like results by manipulating the contingent estates and delivery rules of the law of deeds. . . . These and other stray dogs of the American law of gratuitous transfers populate the law school casebooks but have not been quantitatively important in the nonprobate revolution.") (footnotes omitted).
goals are inter vivos trusts,92 joint tenancy,93 and California's revocable inter vivos transfers.94

1. Inter Vivos Trusts

Inter vivos trusts are the mainstay of modern nonprobate solutions.95 The focus of a trust is to secure a valid structure for the maintenance of the settlor's assets by a skilled entity, either an individual or institution.96 Inter vivos trusts are distinguished from testamentary trusts in that they become effective before the settlor has died,97 rather than as the result of effectuation of his will.98

Though trusts essentially accomplish the same goals as TOD deeds, particularly the avoidance of probate, the complicated nature of today's trusts usually requires consultation with those who have a more sophisticated comprehension of the subject matter.99 Generally, the intricate characteristics of today's trusts lend themselves to the creation of significant costs.100 Though it is likely that the costs of an inter vivos trust are less than the costs associated with probate, the estate planning mechanism remains out of the reach of those with limited means.101 The TOD deed's affordability and ease properly fills this void.

2. Joint Tenancy

Joint tenancy, a common law doctrine, is one of the oldest forms of nonprobate transfer.102 This estate planning mechanism labels the parties in interest not as each owning

92. See generally Norman F. Dacey, How To Avoid Probate (1965).
94. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 131-34.
95. Id. at 118-19.
96. See id.
97. Lucy A. Marsh, Practical Applications Of The Law: Wills, Trusts, & Estates 102 (1998) ("[T]he SETTLOR of the trust [is] the person who sets up and establishes the trust.").
98. Id.
99. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 119 ("[T]rust instruments are more sophisticated than in the past. . . . Self-help books and software are available for the do-it-yourselfer; however, these may require some sophistication.").
100. See Gary, supra note 11, at 540.
101. Id.
partial shares of the property, but rather as both owning the equal and undivided whole throughout the duration of the cotenants lives. As a singular legal entity, the death of one of the joint tenants extinguishes the deceased's interest as a result of the right of survivorship.

Unlike the TOD deed, joint tenancy relies on the conveyance of a current interest that is wholly irrevocable. After the conveyance, the newly-minted cotenant may encumber the property or even unilaterally sever the joint tenancy and later sell his half of the property. Though this is one of the most simple and economic nonprobate transfers, joint tenancy has many drawbacks that would be cured by comprehensive TOD deed legislation. Specifically, the revocability of the TOD provides a solution to the problems in joint tenancy.

3. Revocable Inter Vivos Transfers

Revocable inter vivos transfers represent another class of nonprobate transfers. In Tenant v. John Tennant Memorial Home, the California Supreme Court held that revocable inter vivos transfers are valid where the transferor executed a deed which passed a future interest, contingent upon his choosing not to convey to another or revoke the deed throughout the duration of his life. Though not widely used, California still recognizes the validity of revocable inter vivos transfers. This type of transfer appears very similar to a TOD deed. However, the differences between a murky set of limited case law and comprehensive legislation show that the two estate planning mechanisms are worlds apart. Competent TOD deed legislation would provide

103. Id.
105. See Gary, supra note 11, at 535-36.
106. Id. at 536.
107. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 121-23.
109. Id. at 243.
110. See id. at 246-47.
111. Revocable Transfer on Death (TOD) Deed, supra note 4, at 132.
112. See Bonta v. Burke, 120 Cal. Rptr. 2d 72 (Ct. App. 2002).
113. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 132 ("This is a complex type of transfer that is rarely used. The legal consequences are not fully understood.").
security that a would-be transferor would not find with revocable inter vivos transfers.

D. What Is California's History With the TOD Deed?

The California Legislature has, at times, demonstrated both support and opposition with regard to the enactment of TOD deed legislation.\footnote{114. See generally AB12 Beneficiary Deeds, supra note 8 (showing that the California Legislature was on a course to enact both AB12 and AB250, but on each occasion the statutes were prevented from being passed).} The TOD deed statute began its life as AB12, the beneficiary deeds statute.\footnote{115. See id.} Upon submission to the Assembly Committee on Judiciary, it quickly met with a harsh response from the California State Bar's Trusts and Estates Executive Committee (the "Trust Committee").\footnote{116. See supra note 8 and accompanying text.} Due to the efforts of the Trust Committee AB12 was transformed by amendment into a California Law Revision Commission ("CLRC") study.\footnote{117. AB12 Beneficiary Deeds, supra note 8.} Demoting AB12 to a CLRC study allowed the bill to pass though the California Legislature wholly uncontested.\footnote{118. Id.} At the same time, however, the study halted any progress that the TOD deed legislation had made by effectively removing it from the limelight.\footnote{119. See id.}

The CLRC study, created as a result of AB12, provided promising results for the proponents of the TOD deed legislation.\footnote{120. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 105–06 ("After weighing the advantages and disadvantages of the revocable TOD deed, the Commission concludes that revocable TOD deed legislation would be beneficial in California.").} After reading the CLRC's positive response, Assemblyman Chuck Devore introduced AB 250 in February of 2007.\footnote{121. See Assemb.B. 250, 2007–08 Leg., Reg. Sess. (Cal. 2007).} AB 250 passed uncontested in the California State Assembly.\footnote{122. See id. (listing the votes by the Assembly Judiciary Committee, March 27, 2007; the Assembly Appropriations Committee, May 31, 2007; the General Assembly, June 4, 2007).} Appearing to be a comprehensive proposal, the bill was then referred to the Senate Judiciary Committee for a vote on July 10, 2007.\footnote{123. AB250 Revocable Transfer on Death (TOD) Deeds, supra note 9.} After discussion with the Senate...
Judiciary Committee prior to the committee's vote, the Assemblyman found that there were insufficient votes to pass AB 250.124 Failing to pass AB 250 by the end of the 2007 term meant that the bill had to be reintroduced in the next legislative session and must now be passed by both the Assembly and Senate.125

III. HURDLES FOR TOD DEED LEGISLATION

The legislation proposed in AB 250 is an attempt to address a long standing void in the nonprobate revolution.126 This legislation offers a prospective transferor certain freedoms that arguably no other nonprobate device presents.127 The debate over whether California should adopt AB 250, however, turns on the cost of those freedoms and whether the benefits claimed are subsequently worthwhile to the State of California as a whole.128 As the California Legislature has thus far been unable to resolve the issues, the debate continues.129

The focus of the debate centers on three main issues. First, the costs involved in the creation, maintenance, revocation, and effectuation of a TOD deed have garnered a large portion of the debate.130 The monetary costs involved are extremely low when compared to the alternatives available.131 This up-front analysis, however, may prove to be insufficient when assessing the various monetary and intangible costs that might accrue as a result of using the TOD deed.132 The second issue centers on the ease and

124. Id.
125. Id.
126. See Gary, supra note 11, at 532–33.
127. See discussion supra Part II.C (explaining the shortcomings of often used devices such as the inter vivos trust and joint tenancy).
128. See Barrier, supra note 11, at 20.
129. See discussion supra Part II.D.
130. See discussion infra Part IV.A.
131. See generally Revocable Transfer on Death (TOD) Deed, supra note 4, at 115–34.
132. See Barrier, supra note 11, at 20 (explaining that there are limited uses for the TOD deed and that the device may have unintended consequences); but see Gary, supra note 11, at 568–69 ("Because the cost to hire a lawyer to prepare a TOD deed will be significantly less than the cost to have a will or trust prepared, property owners may be more likely to seek the legal advice they need.").
simplicity of the TOD deed.\textsuperscript{133} Though ease and simplicity may seem to support the enactment of TOD deed legislation, this aspect of the deed has proven to create uncertainty within the California Legislature, especially concerning issues of fraud and coercion.\textsuperscript{134} The third and final divisive issue is whether the TOD deed adequately fills a certain nonprobate void or merely provides an unnecessary exception that will further sully the already complex nonprobate system.\textsuperscript{135} Though arguments proffered by both sides have merit, the benefits of the TOD deed far outweigh the disadvantages. The California Legislature should not hesitate to pass AB250 in 2008.

IV. ISSUES WITH TOD DEEDS

A. Cost

Cost is the first concern of most prospective transferors when planning their estate. Every person venturing into this area of law has heard horror stories in which the legal issues end up consuming the estate and the heirs are left without recourse against a complex system. Cost, however, is not limited to the dollars and cents that may change hands in the creation and effectuation of a trust, will, or land conveyance. Cost must also include those intangibles, such as limited use, that are likely to play a role in the decision to utilize a certain type of estate conveyance device.

Opponents of TOD deed legislation believe that the limited up-front costs do not adequately represent the entire outlay involved in the creation of the TOD deed.\textsuperscript{136} The TOD deed poses a considerable risk that the user will make a mistake that does not properly effectuate his or her intent.\textsuperscript{137} In the end, this drawback may require the transferor to pay a hefty price to effectuate his intent.\textsuperscript{138} Essentially, the low cost of the TOD deed comes from the individual's ability to execute and record the device without the aid of third party

\begin{itemize}
  \item \textsuperscript{133} See discussion infra Part IV.B.
  \item \textsuperscript{134} See Revocable Transfer on Death (TOD) Deed, supra note 4, at 211–12.
  \item \textsuperscript{135} See discussion infra Part IV.C.
  \item \textsuperscript{136} See Barrier, supra note 11, at 20.
  \item \textsuperscript{137} See Gary, supra note 11, at 543–44.
  \item \textsuperscript{138} See Groh v. Ballard, 965 S.W.2d 872, 874 (Mo. Ct. App. 1998).
\end{itemize}
intermediaries. 139 Though there has been limited litigation due to the short history of the TOD deed, the majority of claims filed have centered on the transferor's failure to properly execute and record the device. 140 Opponents argue that the failure to effectuate the intent of the transferor will almost always lead to litigation between disputing heirs. 141

Those averse to the TOD deed further note that the uses of the device are limited in nature. 142 Even assuming its inexpensive up-front cost, the TOD deed is limited to the conveyance of real property. 143 Thus, the transferor is required to distribute the various other assets or contents of the estate through the creation of some other device, such as a will or trust. 144 Opponents claim that the overall cost of the TOD deed will increase due to a lack of uniformity in the distribution of the estate and the need to employ other devices to fully accomplish the transferor's goals. 145 The high possibility for muddling up an estate, by way of employing devices that may conflict, must weigh into the costs involved in the use of the TOD deed. 146

139. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 211 ("The revocable TOD deed enables a seductively simple transfer of what could well be the transferor's major asset without any neutral guidance or assistance.").

140. See Pippin v. Pippin, 154 S.W.3d 376, 380 (Mo. Ct. App. 2004); Estate of Dugger v. Dugger, 110 S.W.3d 423, 430 (Mo. Ct. App. 2003); Groh, 965 S.W.2d at 874.

141. See Barrier, supra note 11, at 20 (noting the heightened possibility for litigation where subsequent deeds are recorded as well as where unnamed heirs or contingencies are created).

142. See id. ("Having been offered the beneficiary deed as a cheap substitute for a trust agreement, the client may have to use it to accomplish less than all their aims . . . .").

143. See statutes cited supra notes 59-67 (referring specifically to the transfer of real property).

144. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 139 ("Some of the disadvantages of using a transfer-on-death deed are: What happens to the contents of the home and items of personality? Who is going to pay the bills? ")

145. See id. at 209 ("The revocable TOD deed would add an ad hoc device to the . . . other types of estate planning mechanisms . . . . 'This proliferation results in confusion, inconsistency, litigation, and frustration for all involved. It makes it increasingly difficult to prepare estate plans for people and have any assurance that the plan will be consistently implemented by all the beneficiary choices that people make.' ") (quoting Staff Memorandum 2006-19 on Beneficiary Deeds from Cal. Law Revision Comm'n supra note 18, at 73).

146. See Gary, supra note 11, at 541 ("The advantages of transferring property through probate lie in the supervision courts provide. The court may protect the estate from fraud and undue influence . . . .").
Advocates of TOD deed legislation have a stronger argument concerning the costs involved in the creation, management, revocation and effectuation of the device. First, there are limited up-front costs in creating this type of transfer. Further, no third party intermediary, such as a transfer agent, trustee, or bank, is required to effectuate the nonprobate transfer or issue a new title. Though the limited monetary costs alone provide incentive to utilize the TOD deed, proponents tout that the deed also provides a certain security due to its revocability. This intangible benefit weighs heavily in determining the remunerative nature of the TOD deed. Those advocating TOD deed legislation seem willing to incur or at least manage some of the costs inherent in the device in order to maintain that level of control.

In addressing the concerns of TOD deed opponents, advocates for the device argue that legal mistakes and unintended consequences are problematic in almost any kind of nonprobate device. Also, the low up-front cost of the TOD deed does not wholly arise from the limited participation of third party intermediaries. The decreased cost also results from a lack of maintenance of the device, limited paperwork, and simple revocation. Therefore, the transferor may avoid a substantial portion of the cost even

147. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 204.
148. See id. ("In a probate proceeding, a court issues a decree of title, or a court-appointed personal representative transfers title.").
149. See Gary, supra note 11, at 547.
150. See id. at 543 ("The TOD deed option also may protect owners from unscrupulous relatives. . . . Chuck Devore, the assemblymen who proposed the TOD deed legislation for California, argues that the statute will 'give people more control of their financial assets by letting them make decisions that don't require costly attorney fees.' " (quoting Tim Willert, Bill Would Simplify Transfer of Real Property, S.F. DAILY J., May 26, 2005, at 3)).
151. See Eickhoff, supra note 11, at 95–96 (noting that in certain situations rules can be put into place to limit the possible adverse consequences of creating the TOD deed).
152. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 210 ("California law has allowed nonprobate transfer devices to proliferate without consistent standards or consistent consequences. At some point, this area of law must be treated comprehensively. However, consideration of the revocable TOD deed concept should not be deferred until that can be done.").
153. See id. at 205–07.
154. See id.
where the transferor chooses to consult with an attorney.\textsuperscript{155} The limited role the attorney might play, such as reviewing the executed document or minimal consultation on the TOD deed, will ensure that the cost-efficient goals of the estate planning mechanism are accomplished.\textsuperscript{156}

Lastly, proponents of the TOD deed claim that the limited nature of the device should not prevent its legislative enactment.\textsuperscript{157} For many people, a home or piece of property is their only major asset.\textsuperscript{158} The TOD deed gives the transferor an affordable tool, with guarantees of security, which he may use to convey his most valued asset.\textsuperscript{159} This addition to nonprobate law would not complicate estates. Instead, it would simplify the transfer of a commonly disputed asset by making a clear and concise conveyance.\textsuperscript{160} Proponents are aware that “[a] TOD deed will not be the best transfer device for every property owner, but for many property owners the ability to use the deed will provide significant benefits.”\textsuperscript{161}

The problems touted by the opposition are neither novel nor are they insurmountable. They claim that the limited participation of informed third parties may lead to an increased possibility for complicating the estate or failing to effectuate the intent of the transferor.\textsuperscript{162} Those drawbacks, however, have simply not been proven pervasive enough to remove the benefits of security, personal control of one’s estate, and minimal monetary outlay. California should

\begin{itemize}
\item \textsuperscript{155} See Eickhoff, supra note 11, at 97 (“While a TOD direction is a will substitute, it is not a substitute for good advice from the family lawyer. . . . Periodic review with a person’s lawyer should also be encouraged. This will help insure that the owner not only knows what he is doing when making the direction but that it is truly consistent with his or her estate disposition and tax planning.”).
\item \textsuperscript{156} See Gary, supra note 11, at 568–69 (“Indeed, because the cost to hire a lawyer to prepare a TOD deed will be significantly less than the cost to have a will or trust prepared, property owners may be more likely to seek the legal advice they need.”) (emphasis added).
\item \textsuperscript{157} See id. at 543 (noting that problems concerning elder abuse and harmful management of the estate often involve real property).
\item \textsuperscript{158} See Kirtland & Seal, supra note 88, at 118.
\item \textsuperscript{159} See id. at 123 (“Creation of the beneficiary deed statute facilitates the simplification of real property transfers in a variety of situations, benefits our clients and eliminates problems which exist with the current methods of property transfers.”).
\item \textsuperscript{160} See Revocable Transfer on Death (TOD) Deed, supra note 4, at 209–11.
\item \textsuperscript{161} Gary, supra note 11, at 569.
\item \textsuperscript{162} See supra note 151 and accompanying text.
\end{itemize}
consider the values that the TOD deed offers to those who are planning their estates and place cost as a factor in favor of passing TOD deed legislation.

B. Ease of Transaction vs. Ease of Fraud

There is little doubt that people generally take what has come to be known as the path of least resistance or principle of least effort. The simplest method, however, sometimes provides undesirable secondary effects. The ease or simplicity of the form, filing, revocation, and effectuation of the TOD deed should not merely be accepted as wholly beneficial. Instead, these promising attributes should be considered in light of the possible secondary effects that such an estate planning mechanism might create.

One of the secondary effects of the simplicity of the deed is the possibility of fraudulent conveyances or elder abuse. The goal of any probate or nonprobate device is to ensure that the "transferor's wishes are carried out as the transferor intended." With TOD deeds, however, supposedly neutral third parties can easily deceive the elderly or uninformed. Worse yet, it is possible for disadvantaged groups to be entirely unaware that such a malicious transaction has occurred. Part of the ease or simplicity of the TOD deed is that it operates outside of the probate system. This kind of nonprobate device passes the property to the beneficiary by operation of law. This fast track method further facilitates fraudulent activity because a wrongfully removed beneficiary

163. See generally GEORGE KINGSLEY ZIPF, HUMAN BEHAVIOUR AND THE PRINCIPLE OF LEAST EFFORT: AN INTRODUCTION TO HUMAN ECOLOGY (1949).
164. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 208 ("Historically, a 'quick and easy' conveyancing document such as a quitclaim deed is often the instrument of choice of a perpetrator of fraud who preys on seniors and unsophisticated consumers.").
165. Id.
166. See id. at 207–08 ("Because [the TOD deed] is easy to use, cheap to record, and does not require the use of an attorney or other third party intermediary, it facilitates fraud.").
167. Id. at 207.
168. See supra note 166 and accompanying text.
169. See generally Staff Memorandum 2006-19 on Beneficiary Deeds from Cal. Law Revision Comm'n supra note 18, at 73.
170. See Gary, supra note 11, at 531–32.
171. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 157.
does not have the ability to contest the transfer. The only recourse the wrongfully removed beneficiary would have is against the fraudulent beneficiary who remains in complete control of the real property.

Opponents of the TOD deed legislation also point out that another secondary effect of the simplicity of the conveyance is the heightened possibility for conflicting estate planning documents. The layperson need not consult an attorney in order to utilize the TOD deed. This compromises the transaction due to the transferor's lack of understanding regarding the legal effects or consequences of recording the device. The implication is that unknown secondary effects may occur due to conflicting documents or possible encumbrances on the property. Unaware of these consequences, but having already completed the TOD deed, the court may fail to effectuate the intent of the transferor upon his or her passing. Essentially, the simplicity of the TOD deed encourages the prospective transferor to either overuse the device or use the estate planning mechanism without first considering whether other legal steps have been taken already.

Proponents of the TOD deed argue that the simplicity of the device allows the average person to control a prominent aspect of his life, one over which attorneys have historically held a monopoly. With the device, the average person is not merely submissive to a set of confusing processes or to informed third parties. Rather, the simplicity of the TOD deed allows the individual to fully understand how his most valued asset is being transferred. In effect, the simplicity

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172. See id.
173. Id. at 157-58.
174. See Barrier, supra note 11, at 20 (noting the implications that conflicting estate planning documents can have on the title, especially were there are multiple beneficiaries).
175. See statutes cited supra notes 59-67 (noting that all TOD and Beneficiary Deed statutes permit the transferor to execute and record the deed).
176. See Gary, supra note 11, at 544-45.
177. See Barrier, supra note 11, at 20.
178. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 209.
179. See id. at 210-11.
180. See id. "[The TOD deed] is a straight forward, efficient, direct, private, and trouble-free way to transfer property to an heir. . . . This is a consumer friendly device." Id. at 205.
181. See id. at 211.
of the device gives the average person a heightened freedom where he was once required to do as he was told by those controlling the nonprobate system.\textsuperscript{182}

Additionally, advocates of TOD deed legislation believe that there are sufficient safeguards that will prevent rampant fraudulent conveyances.\textsuperscript{183} In order to prevent fraudulent conduct, the various TOD deed statutes in use have mandated a recording requirement.\textsuperscript{184} Though proponents of the TOD deed acknowledge that a "wrongdoer could unduly influence an owner to execute a deed and then record it,"\textsuperscript{185} they believe that "the formality of the recording process . . . decreases [that] risk."\textsuperscript{186} Further, the TOD deed is fully revocable, which allows a mistake or fraudulent act to be corrected with ease.\textsuperscript{187} Although in some cases honest and interested third parties may not be present to intervene, the TOD deed by itself does not convey to the beneficiary, fraudulent or not, any present interest in the property.\textsuperscript{188} Though the TOD deed does not provide ironclad guarantees of security,\textsuperscript{189} it does provide appropriate remedies and safeguards that promote the prevention or correction of fraudulent activity.\textsuperscript{190}

Proponents of the TOD deed also believe that there are sufficient procedures in place that properly order conflicting estate planning documents.\textsuperscript{191} The opposition's argument depends on the belief that the TOD deed is so simple that the transferor will record the device without first considering the other devices already in use or the subsequent estate planning mechanisms he might use in the future.\textsuperscript{192} Recognizing that on some level such consequences are unavoidable, proponents of the TOD deed argue that various procedures are already in place that determine the

\textsuperscript{182} See id.
\textsuperscript{183} See Kirtland & Seal, supra note 88, at 120.
\textsuperscript{184} Gary, supra note 11, at 546.
\textsuperscript{185} Id. at 547.
\textsuperscript{186} Id.
\textsuperscript{187} Kirtland & Seal, supra note 88, at 119.
\textsuperscript{188} Id.
\textsuperscript{189} See Revocable Transfer on Death (TOD) Deed, supra note 4, at 148–50.
\textsuperscript{190} See id. at 160–63.
\textsuperscript{191} See Gary, supra note 11, at 544–45.
\textsuperscript{192} See generally Barrier, supra note 11, at 20.
supremacy of conflicting documents. These procedures specify that where conflicting TOD deeds are recorded, the last executed should control. If a TOD deed and trust are in conflict, then “the primacy of the recorded instrument should be the determining factor.” If a TOD deed is recorded subsequent to a conflicting irrevocable recorded instrument, the “TOD deed should have no effect.” The TOD deed’s simplicity may create a heightened possibility for the creation of conflicting documents, but the procedures in place are sufficient to control the fallout of such impasses.

The nonprobate system is in need of reorganization and simplification in its procedures. Simplification for the many who are attempting to plan their estates requires that they have the freedom to control the distribution of their major assets. That freedom comes from leveling the playing field, which is accomplished through a simplification of the system. This allows the average person to form an understanding of a legal procedure that will help him accomplish his goals. Proponents of the TOD deed properly argue that there are sufficient safeguards already in place or that can easily be created to counteract the possibility of fraud or conflicting estate planning documents. While interested parties on both sides have noted the problems involved with the uneducated self-help use of the TOD deed, it is important to clarify that “the existence of the device will not generate problems that do not already exist if an individual is inclined to avoid counsel and to avoid probate.” The TOD deed at least provides these prospective transferors with a structure and process that will aid them in accomplishing their estate planning goals.

193. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 151.
194. See id. at 150–55 (“Arizona provides the opposite rule —‘If an owner executes and records more than one beneficiary deed concerning the same real property, the last beneficiary deed that is recorded before the owner’s death is the effective beneficiary deed.’”) (quoting ARIZ. REV. STAT. ANN. § 33-405(G) (2001)).
195. Id. at 151 (citing proposed CAL. PROB. CODE § 5660).
196. Id.
197. See id. at 150–55.
198. See id. at 210.
199. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 150–55.
200. Id. at 211.
C. Other Instruments and the Void

Arguably, California’s system of nonprobate transfers has mushroomed at such a pace so as to leave interested parties without knowledge of consistent standards or concrete legal consequences. Therefore, the question becomes: do we want to add to this burgeoning mass of often confusing and sometimes ambiguous law? Proponents of the TOD deed note that “[r]ightly or wrongly, avoidance of probate is seen as a good thing by many people.” Though undoubtedly this belief reigns, critics argue that nonprobate law needs to be treated comprehensively. The nonprobate system provides a myriad of options to those seeking to avoid the cost and delay of the probate process. The focus of this section is to ascertain whether, given the presently utilized options for nonprobate transfer, the TOD deed would become a helpful nonprobate tool or merely another useless addition to an already complex body of law.

Opponents of the TOD deed claim that the nonprobate mechanisms available are sufficient to aid the prospective transferor in accomplishing goals similar to those promoted by the TOD deed. If the transferor wants an affordable and speedy way to transfer real property, he can use joint tenancy. Additionally, if the transferor wants to maintain control over the estate until his passing, an inter vivos trust may be appropriate. Also important is that “California already recognizes the functional equivalent” of the TOD deed. A revocable deed with a reserved life estate, recognized in *John Tennant Memorial Home*, permits a revocability clause to be combined with the life estate. This presumably guarantees the same kind of control given by a

201. See id. at 210.
203. See *Revocable Transfer on Death (TOD) Deed*, supra note 4, at 210.
204. See discussion supra Part II.C.
205. See *Gary*, supra note 11, at 534–37.
206. See generally *Revocable Transfer on Death (TOD) Deed*, supra note 4, at 118–34.
207. See id. at 121–22.
208. See *Gary*, supra note 11, at 537.
209. *Revocable Transfer on Death (TOD) Deed*, supra note 4, at 209 (citing *Tennant v. John Tennant Memorial Home*, 140 P. 242 (Cal. 1914)).
211. Id.
TOD deed. These estate planning mechanisms are presently available and have been frequently used to successfully effectuate the transferor's intent. At a point where knowledgeable parties are becoming comfortable with the existing nonprobate system, opponents argue it seems dangerous and irresponsible for the Legislature to further complicate the legal system.

Proponents of the TOD deed argue that none of the existing devices offer the cohesive benefits that the TOD deed provides. The problem with an inter vivos trust is that someone with knowledge of the system is required to create and monitor the often complex device. The individual employing the trust gets the ability to revoke or alter the device, but the cost of doing so can be very high. Also, the transferor's comprehension of and participation in the creation of the inter vivos trust is usually limited to informing the lawyer as to who gets which part of the estate. Furthermore, a large part of California's population is neither in a position to fully understand nor adequately pay for the inter vivos transfer. Much of the value of the TOD deed is that not only does the transferor have a greater understanding of and control over his most prized asset, but he can also afford to transfer it.

Proponents of the TOD deed claim that joint tenancy does not adequately fulfill the needs of prospective transferors. In joint tenancy, the would-be transferor is looking at a much lower up-front cost. The drawback, however, is that the transferor must actually create present ownership rights for

212. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 131–32.
213. See id. at 118–34.
215. See Gary, supra note 11, at 542 ("A TOD deed solves many of the drawbacks associated with the other mechanisms available for transferring real property at death.").
216. Revocable Transfer on Death (TOD) Deed, supra note 4, at 203.
217. Gary, supra note 11, at 540
218. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 203.
219. See id. at 119.
220. See id. ("It would be preferable for the law to provide a simple, understandable device with clear rules, such as the revocable TOD deed . . .").
221. Eickhoff, supra note 11, at 96.
222. Gary, supra note 11, at 538.
the beneficiary. Therefore, once the joint tenancy has been created, it may not be revoked. Ideally joint tenancy would successfully fill the need for an estate planning mechanism such as the TOD deed. Instead, contingencies for failed relationships need to be available for prospective transferors who may wish to revoke their conveyances at a later date.

In addressing the viability of the revocable deed with a reserved life estate, such as the one employed in California, critics of the device note that the estate planning mechanism is complex and rarely used. Though technically such a device may create results similar to that of the TOD deed, "[t]he legal consequences [of the device] are not fully understood." The main issue regarding the revocable deed with a reserved life estate is that neither the boundaries nor the structure of the device has been fully developed. The revocable deed with a reserved life estate was created in 1914 by a decision of the California Supreme Court, and the device is based purely in a limited body of law. Although the revocable deed with a reserved life estate has seen some recent use in California, the limited case law surrounding the device fails to provide prospective transferors with a viable estate planning option.

Generally in the world of nonprobate transfers, if an individual wants to maintain control over his estate, he has to pay for it. For those individuals with limited means, that cost is likely to deplete the very interest they are attempting to convey. The TOD deed assembles the best qualities of the presently-used nonprobate devices. It provides an estate planning mechanism that is cost-efficient, simple to use, and does so with a single direction concerning the prospective transferor's most valued asset. Undoubtedly the concerns

223. Id.
224. Id.
225. See id.
226. Revocable Transfer on Death (TOD) Deed, supra note 4, at 132.
227. Id.
228. See id. at 131–32.
229. See id.
231. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 131–32.
232. See id. at 118–34.
233. See discussion supra Part IV.C.
234. See Gary, supra note 11, at 568–69.
of those opposed to the TOD deed are valid and should be taken into consideration.\textsuperscript{235} Those concerns, however, are not dissimilar to the problems surrounding other nonprobate mechanisms.\textsuperscript{236} The drawbacks of the TOD deed can be effectively guarded against by seeking guidance from the nine states that have adopted the device and by providing prospective transferors with the proper education on the TOD deed.\textsuperscript{237}

V. HOW CALIFORNIA SHOULD ADDRESS THE TOD DEED

The California Legislature should adopt the TOD deed legislation proposed in AB250. Citizens across the country have long since decided to seek means of avoiding probate proceedings.\textsuperscript{238} The nonprobate revolution, however, has failed to provide prospective transferors with an adequate device for the transfer of real property upon death.\textsuperscript{239} The California Legislature is refusing to remedy this problem by opposing a bill that seeks to provide a simpler and more effective conveyance of what is one of the most often disputed assets.

At the very least, the adoption of the TOD deed will demonstrate a change in the outlook of the California Legislature. The case law embodying the current nonprobate devices simply does not provide sufficient guidance for the would-be estate planner who intends to avoid the costs and complexity involved in California's present nonprobate system. Instead, the legislature, which is in a much better position than the courts, should create simplified standards that can be properly understood and adequately applied by prospective transferors. Denying the citizens of California access to the TOD deed all but guarantees a future of ad hoc devices created by laymen in an attempt to ascertain the very goals that the TOD deed proposes. These attempts are likely

\textsuperscript{235} See Revocable Transfer on Death (TOD) Deed, supra note 4, at 207–09.
\textsuperscript{236} See id. at 210–11.
\textsuperscript{237} See Gary, supra note 11, at 569.
\textsuperscript{238} See Kirtland & Seal, supra note 88, at 118 ("It sometimes seems there is a never-ending crusade to find new ways to avoid probate proceedings.").
\textsuperscript{239} See generally Langbein, supra note 89 (noting that the nonprobate revolution has been applied more effectively to subjects other than real property, such as life insurance policies, pension accounts, and bank, brokerage and mutual fund accounts).
to be inadequate and will create a surge of litigation that will further confuse and complicate this area of law. A change in legislative perspective will assure prospective transferors that governing bodies are taking steps to provide for their estate planning needs. This kind of understanding can promote a decrease in the erratic creation of ad hoc transfer devices and aid in the future organization of the nonprobate revolution.

California should use the TOD deed legislation as a litmus test for change in the area of nonprobate law. The TOD deed represents a viable balance between government action and the rights sought to be maintained in nonprobate transactions. The government controls the recording process as well as the effectuation of the deed through production of the appropriate records of death. The prospective transferor, however, has the authority to create, revoke, and maintain the deed with limited effort and minimal costs. This trend may provide an appropriate resolution to the nonprobate dilemma that exists not only in California but throughout the country. A continued refusal to adopt the TOD deed as a legitimate nonprobate device will have a discouraging effect on the development of nonprobate law as a whole. If legislation as necessary and as simple as the TOD deed proposed in AB250 cannot pass, it is unlikely that legislators will push for future improvements in the nonprobate arena.

Along with the enactment of AB250, California should be the first state to formally pass concurrent legislation for the funding of educational programs concerning the use and maintenance of the TOD deed. "The most cautionary issues surrounding the revocable TOD deed relate to the likelihood of uninformed self-help use of the device." Utilizing informational conferences, providing educational pamphlets, and funding for local legal clinics frequented by the elderly

240. See Revocable Transfer on Death (TOD) Deed, supra note 4, at 210.  
241. See Gary, supra note 11, at 546–47.  
242. See id. at 542–43.  
243. Revocable Transfer on Death (TOD) Deed, supra note 4, at 210. "[This] lead[s] to adverse estate planning consequences for the transferor, improperly drafted instruments that defeat the transferor's intent, failure to make the required recordation, and manipulation and financial abuse against the transferor." Id. at 210–11.
and those with limited means would address the problem of uninformed would-be transferors who wish to use the TOD deed. The opposition to the TOD deed bases its claims on a belief that the average person either does not want to learn or does not have the ability to properly fill out a single page conveyance. The citizens of California should not be so underestimated. Bookstores around the country are filled with instructional books on every kind of conveyance imaginable. Were the California Legislature to make available that level of information for the TOD deed, the opposition might have little to bolster their claims of lay incompetence.

VI. CONCLUSION

The nonprobate revolution will continue into the future of estate planning. The courts, however, have simply failed to adequately address this area of the law. Right now, the California Legislature is in the best position to create the much-needed structures and procedures that would provide clarity for nonprobate conveyances. If enacted, the TOD deed will represent that proper balance between individual rights and necessary government control. Further, if concurrent legislation is passed, thus funding education on the device, many of the concerns of the opposition would be addressed. The benefits of the TOD deed simply outweigh the drawbacks. AB 250 can provide a guiding light for the future of the nonprobate revolution.

"Simplification of people's lives is an essential purpose of the government."244 Such simplification with regard to nonprobate estate planning means limiting costs, clarifying the law, and implementing a device that cohesively presents all of the independent benefits of nonprobate law. For many people, especially those of limited means and the elderly, the current nonprobate system presents an insurmountable obstacle. These citizens want to be able to plan their own estates without having their decisions muddied by a complex system of case law or confusing legislative acts. By enacting TOD deed legislation, the legislature can now pass a law that would actually provide California citizens clarity and control. In 2008, the California Legislature should not hesitate to

244. Kirtland & Seal, supra note 88, at 123.
pass the TOD deed legislation in AB250.