Survey Sheds Light on the Perils of TOD and POD Account Registrations

A survey was recently circulated among the Philadelphia Bar Association Probate and Trust Section attorney members seeking commentary on their experiences with clients who have accounts registered as transfer on death (TOD) or payable on death (POD).

By **Amy Neifeld Shkedy and Rebecca Rosenberger Smolen** | March 05, 2018

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A survey was recently circulated among the Philadelphia Bar Association Probate and Trust Section attorney members seeking commentary on their experiences with clients who have accounts registered as transfer on death (TOD) or payable on death (POD). These are accounts with special designations which cause the assets in the accounts to transfer outside of probate to the named designee, rather than pass under the probate estate (i.e., pursuant to the

terms of the will). The common refrain of the attorneys responding to the survey was that TOD or POD account registrations often thwart well thought out estate plans and when not "fixed" before death, have resulted in asset dispositions at death that are inconsistent with the intentions of the account owner.

The overwhelming majority of the survey responses indicated that many clients have set up TOD or POD accounts without consulting with their estate planning attorneys, often inadvertently at the direction of the clients' financial advisers. A client may be advised that a TOD or POD account registration is beneficial because it avoids the need for probate, but the client (and perhaps the adviser) does not understand the effect this type of account registration may have on the client's estate plan. In many cases, clients may not even realize that their accounts are titled this way or do not understand that they had a choice when the account was set up.

At an estate planning meeting, even if the attorney asks the question about how accounts are registered, clients may change the title or designations on their accounts after the fact. This commonly happens when a client moves assets from one financial institution to another or when a client updates beneficiary designation forms for his or her retirement plans and a TOD account form is included in the mix for the nonretirement brokerage accounts, without the client really understanding that nonretirement accounts need not (and oftentimes should not) have beneficiary designations associated with them. There are often different considerations in naming a beneficiary for a tax-deferred retirement account than for a nonretirement account.

A shared concern was expressed by the surveyed estate planning attorneys that they have had estate administrations made significantly more complicated by TOD or POD accounts. Oftentimes, unintended and unpleasant issues arise in the estate administration process because of these designations, particularly in cases where a client doesn't realize (or forgets) that the account was titled in such way. If these accounts are not properly updated during the estate planning process (or if a client later changes the registration on an account to a TOD), beneficiaries under the

intended estate plan may end up being unintentionally disinherited or bearing the burden of the inheritance and/or estate taxes and other estate administration expenses imposed on the POD/TOD assets passing outside of the probate estate. Sometimes only one child (or perhaps another individual) is named as beneficiary of the TOD account, excluding the other children, or, even if all of the children are named as beneficiaries of the TOD account, if a child predeceases the account owner, the TOD designation may not contemplate such deceased child's descendants, whereas had the account passed in accordance with the terms of the will or revocable trust, descendants of a deceased child would have been covered, as intended by the account owner. Another significant issue that these types of account registrations can cause is to disrupt the intended trust structures for family members under an estate plan, where the TOD designation named individuals directly (and not trusts) as the designated beneficiaries.

It seems that the main reason behind the TOD account registrations is the avoidance of probate (which, in both Pennsylvania and New Jersey, is not nearly as much of an administrative burden or expense as in many other jurisdictions). An alternative to this, which would not disrupt an estate plan, would be to simply re-title the account into the name of the client's revocable living trust. This accomplishes the avoidance of probate, but also makes sure that the assets pass to the intended beneficiaries in the manner desired by the account owner, and may be easily updated by the account owner by an amendment without needing to update account titles or beneficiary designation forms at multiple financial institutions.

In response to the survey results, the Legislative Committee of the Probate and Trust Section will be considering potential changes to the applicable law to help alleviate the problems associated with unintended and undesired POD/TOD designations by clients. These types of nonprobate dispositions of assets at death have been around for a long time. However, based on our own experience and the survey results, it appears that it has become a more prevalent problem in recent years. This is likely due to the ease with which designations may now be made electronically, the greater

amount of a typical client's assets passing outside of probate under IRAs and qualified plans than was the case for past generations, as well as the rise of the non-lawyer wealth advisers who provide holistic financial and estate planning advice to clients.

In our experience, the best use of TOD/POD designations is for small accounts which the account owner wants to direct separately from the rest of his or her estate plan; or, for estates where the account owner has elected not to establish a formal estate plan. For every account owner with a formal estate plan, until and unless the law is changed down the road to protect them from inadvertent TOD/POD designations that are inconsistent with their estate plans, extreme caution should be taken when making any updates to beneficiary designations, changing title on accounts, or opening accounts with new financial institutions. For such account owners (and their nonlawyer wealth advisers), it is always advisable to consult with the estate planning attorney to make sure that all account titles and beneficiary designations are properly coordinated with the existing estate plan. Truly, in this area, an ounce of prevention is worth a pound of cure, and in many cases may be absolutely necessary to avert an incurable and undesired result.

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