What's In A Name? Understanding the Implications of How You Hold Title to Your Assets

Mar 07 2016

Posted By: Rebecca H. Simoni & Megan L.W. Jerabek

Practice Area: Trusts and Estates & Estate Planning & Estate and Trust Administration & Fiduciary and Beneficiary Representation

We often get calls from clients saying they have added a child to their bank account, but when we ask them whether they added their child as an agent, joint owner or payable on death beneficiary we are usually met with uncertainty. Other times the call is from parents who want to add their child's name to the deed to their house, but they are unclear about what that means from a legal standpoint. The goal may be to provide some assistance in managing property, to provide a family member immediate access to funds at death or to avoid the necessity of probate court involvement upon death. Regardless of the situation, it is important to understand the legal implications of the various ways to hold title and how such titling will affect the transfer of the asset on death. This *Update* will provide you with brief descriptions of the most common ways to hold title and some issues to consider in deciding whether to use such methods.

Title Summary

• **Adding an Agent.** Adding an agent to an account is a method many people use when they are relying on another person for assistance with their finances. This does not give the agent any ownership rights nor does it designate the agent as a beneficiary of such account at your death, but rather it allows them to act on your behalf with regard to such assets during your lifetime (i.e. write checks, make deposits, access account information, etc.). Upon your death, the account transfers pursuant to your estate plan.

• **TOD = Transfer on Death.** This is a method of providing for the transfer of certain assets to a named beneficiary on death with the presentation of a death certificate. The beneficiary is named on a form provided by the institution (as to securities) or in a beneficiary designation recorded with the register of deeds (as to real estate), but receives no ownership or management rights to the property during the owner's lifetime. Upon the owner's death, the asset is transferred to the designated beneficiary outside of the owner's estate plan and is not subject to the probate process.

• **POD = Payable-on-Death.** Similar to TOD, but normally applicable only to bank accounts (including certificates of deposit).

• **Tenants-in-Common.** This is a method of titling property in the name of two or more owners. All title holders are current owners of the asset while they are alive, with ownership interests in proportion to the amount each contributed to the asset, or if the proportionate ownership is written on the deed, then in that proportion. When one of the titleholders dies, his/her interest will pass to whomever he/she has specified in his/her estate plan rather than transferring automatically to the surviving titleholders. This form of ownership allows each owner to choose his/her successors in other estate documents.

• **Joint Tenancy.** This is another method for titling property when there are two or more owners. The joint tenants are considered to own the property equally while they are alive regardless of what they contributed to the asset and both parties have the equal, undivided right to control the property. Unlike tenancy-in-common, joint tenancy creates a right of survivorship. Property owned in joint tenancy passes directly to the survivor when the first owner dies rather than allowing the decedent to name his/her successor. This transfer is not controlled by an owner's estate plan and is not subject to the probate process.

• **Marital Property with Rights of Survivorship.** This is a form of joint tenancy that can be used only by spouses. As with joint property, each owner has an equal interest in marital property and has control over such during his/her lifetime. Upon the death of one spouse, the other will become the owner of the asset. This happens outside of the couple's estate plan and is not subject to the probate process.

• **Revocable Trust.** If you have a Trust plan, your attorney may advise you to retitle some or all of your assets into the name of the Trust for administration purposes. Upon doing this, your Trust becomes the owner of the assets and the trustees of your Trust then have legal rights to manage, hold, and administer the assets in accordance with the terms of the Trust. In most cases, this does not change your ability to control or use the assets during your lifetime because you are also the trustees of the Trust. However, as trustees change (due to death or incapacity) since the Trust is already the owner of the property, the new trustee will have immediate control over the assets and assets may not need to be retitled. This makes the transition of administration much easier. Assets held in the name of a Trust are not subject to probate on death.

• **Beneficiary Designations.** Certain assets, such as life insurance policies, qualified employee benefits plans (such as 401(k) and 403(b) plans), IRAs, annuities, and Wisconsin real estate, allow the owner to name a beneficiary who will receive such assets upon the account or real estate owner's death. At death, these assets transfer directly to the named beneficiary outside of the owner's estate plan and are not subject to the probate process.

• **"Washington Will"/Non-Probate Transfer Provisions.** Washington Will is a reference to a provision in a marital property agreement that transfers property at the death of one or both spouses to a designated person, trust or other entity, without probate. This is often used to assist in the funding of a Revocable Trust upon death.

Issues to Consider
In putting any of the foregoing methods of transfer or ownership into place, you should keep the following in mind:

• It is extremely important to remember that Wisconsin is a marital property state, which means that without a marital property agreement to the contrary, a married couple's assets accumulated during marriage and while living in Wisconsin are considered to be owned 50/50 regardless of title. Upon a spouse's death, he/she is free to direct the distribution of only his/her one-half marital interest in the couple's assets and any individual property. The remaining assets stay with the surviving spouse.

• While it may be tempting to add TOD/POD designations to your assets to avoid probate at your death, it is important that you use these techniques in coordination with your overall estate plan, as TOD/POD designations and beneficiary designations override what is stated in a Will or trust. Without coordination, this may leave your estate without the assets necessary to pay your final expenses and taxes, which could result in a fire sale of your other assets to make such payments. Additionally, using these designations without coordination may result in the beneficiaries of your estate plan receiving less than anticipated or suffering the burden of tax attributable to property received by another individual.

• Opening a "joint account for convenience" or "convenience account" is one area where owners need to be particularly careful. This is when the owner of a bank account adds another person, often a child, to the account for convenience purposes â€“ they want that person to be able to assist them with writing checks, making deposits, or receiving account information. However, instead of adding the child as an agent (as discussed above) they merely add the child to the account as an additional owner. Doing so likely creates a joint account, which gives the person ownership rights immediately and will result in all assets in the account transferring to the surviving owner automatically upon the original owner's death. There can be unexpected consequences of this arrangement. The account will be subject to the creditors of the new owner during the life of the original owner and at the original owner's death. At death, it can cause dissention among family members if the person who is added to the account believes (or wants to believe) that he or she is simply entitled to the balance of the account.

• Finally, with the exception of formal beneficiary designations, which do allow you to name contingent beneficiaries, many of the techniques outlined above do not allow you to provide for alternate distributions in the event that the named beneficiary fails to survive you. They also do not allow you to provide trust protections or other alternate plans of distributions for your heirs or planning for minors. These can be very important estate planning opportunities that are lost if you do not plan carefully.

2016 Estate Tax / Gift Tax Exemptions

Today's record-high estate/gift tax exemptions provide clients with great opportunities for transferring assets free of tax during life or at death. The increased exemptions, coupled with the availability of the portability election (an election that allows a surviving spouse to assume his/her deceased spouse's unused estate tax exemption), allows many clients the opportunity to simplify complex trust arrangements and replace them with trusts that include distribution plans specifically tailored to their family's needs rather than centered around tax planning. Please contact a von Briesen & Roper Trusts & Estates attorney who will help you assess your needs and create a plan that meets your objectives.

	2015	2016
Estate Tax/Lifetime Gift Tax Exemption	$5.43 million	$5.45 million
Annual Gift Tax Exclusion	$14,000/person	$14,000/person

* Wisconsin does not currently impose a separate state estate or gift tax.

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