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Think Outside the Will

A detailed look at three alternative account designations where assets are transferred outside of a will or a trust.

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As your client prepares for the inevitability of death, he or she likely will prepare a trust or will to manage his or her individual property. Some property, however, is transferred to heirs outside of a will or trust. Traditionally, assets from an individual brokerage account, for example, transfer to designated beneficiaries according to the account owner's specifications in the relevant documents. But, designating a beneficiary is not the only way to transfer brokerage assets upon one's death. There are several other options to consider that may be more suitable for particular clients. This article will focus on three alternative account designations available in Pennsylvania: (1) joint tenancy with right of survivorship (JTWROS); (2) tenancy by the entirety (TBE); and (3) transfer on death (TOD).

JTWROS is a form of ownership where two or more parties have an equal right to the account’s assets during their lifetimes and upon death of one of the owners, the remaining owners inherit his or her portion of the account. The last surviving joint tenant becomes the sole owner of the account. For example, siblings who own an account as JTWROS maintain equal access and control over the money in the brokerage account during their lives. When one sibling/owner dies, the other automatically becomes the sole owner of the assets without having to involve the courts or other third parties.

This form of account ownership is often shared between family members, such as husband and wife. However, before advising your client to create this type of account, it is important to consider both the risks and benefits to setting up an account of this kind. For example, one of the key benefits of a JTWROS account is the avoidance of the probate process in which the court intervenes in the transfer of one's property upon death. For a JTWROS account, upon the death of one joint tenant, his or her rights to the account are immediately inherited by the other owners, thus avoiding the time and expense of probate. While in many instances the convenience of the transfer of such assets makes this a reasonable option to consider for certain clients, this may not always be the case.

It is important to explain to your client that once a person is added as an owner in a JTWROS account, he or she has equal access and control over all of the assets in that account, creating the potential for abuse or mismanagement. For example, if your client owns an individual account with his son as JTWROS, his son can make investment decisions and withdrawals without your client's permission. Thus, if your client's goal is to control the account while ensuring that his son inherits the account upon his death, a JTWROS designation might not be the best option. Another potential negative aspect of this type of account is that the assets are not protected against creditors. If creditors of one joint tenant execute against the property, it destroys the survivorship feature of the severed party's interest. This means that the property can be sold to satisfy the joint tenant's debt and your client has no right to object.

Another form of account ownership is TBE, which is available in some states, including Pennsylvania, to married couples only. The TBE designation provides married couples all of the benefits of the JTWROS, however it provides an additional safeguard against each spouse's individual creditors. The TBE gives spouses a degree of security not available to JTWROS as it is exposed only to joint debts. For example, if a husband defaults on his student loans, the loan company cannot attach the account assets to collect the debt. Only if the wife is also listed on the loan agreement may the loan company obtain access to the account assets.

Similar to JTWROS, in TBE accounts, upon the death of one spouse, the surviving spouse obtains ownership of the entire property. This means the account bypasses probate and ownership immediately transfers to the surviving spouse. Furthermore, neither spouse can terminate the TBE unilaterally. The TBE is, however, destroyed if the couple divorces.

There are a few downsides to this type of account. This type of ownership is available only to married couples, so it may not be applicable to many of your clients. Furthermore, one spouse cannot transfer their share of the property to a third-party —it must be consensual. This can cause problems if, for example, the couple has a rocky relationship or is separated but not divorced. In that situation, unless both parties agree to terminate the TBE, one spouse cannot give their share of the property to their child but instead, the property goes to the surviving spouse.

Transfer on Death

Alternatively, a TOD account is exactly what it sounds like. Upon the account owner's death, the account assets immediately transfer to the designated beneficiary. In the securities setting, this is called "registration in beneficiary form." Unlike the JTWROS, only the owner has access and control over the account during the owner's lifetime.

In order to create a TOD account, the owner must complete a beneficiary form designating to whom the account transfers upon his or her death. The beneficiary designation can be changed at any point during the owner's lifetime by the completion of a new beneficiary form. If there are multiple account owners, all owners must agree to the beneficiary change. The beneficiary, however, does not have to consent. Once the last account owner dies, the beneficiary cannot be changed.

A TOD account might be a reasonable option for clients who desire to maintain control over their own account while ensuring that a loved one receives the assets after he or she dies. It is a straight-forward way to transfer holdings, often without any fee. This account also bypasses the lengthy and expensive probate process. However, depending on the size of the overall estate, estate taxes may still apply on the assets. Furthermore, the account is protected from access by the beneficiary until the death of the last owner. It is important to note that TOD accounts supersede wills and trusts, therefore, naming only one child as a beneficiary can have unintended consequences. If your client designates only one child as the beneficiary of the account, that child alone will receive the entirety of the account assets and is not obligated to share them regardless of what the client's will or trust says. Thus, it is good practice to advise your clients to consider their wills, trusts, or other post-death intent when electing what type of brokerage account designations to make as a way to ensure consistency in their entire estate plan.

	Individual	JTWROS	TBE	TOD
Pros	• Simple. No additional documents necessary.	• Upon the death of one joint tenant, ownership immediately transfers to other joint tenant. • Bypasses probate.	• Upon the death of one spouse, ownership immediately transfer to other spouse. • Bypasses probate. • Protects the property from execution or foreclosure for debts of only one spouse.	• Upon death of the owner, title immediately transfers to beneficiary. • Only owner has access to account during owner's lifetime. • Bypasses probate. • Can be changed by owner at any time.

	Individual	JTWROS	TBE	TOD
			• Spouse cannot unilaterally terminate the arrangement.	• Protected from beneficiary's creditors during owner's lifetime.
Cons	• Must go through probate. • Not protected from creditors.	• Other joint tenants have a right to assets. • Not protected from creditors of joint tenants • Potential for mismanagement or abuse by joint tenants.	• Only available to married couples • Divorce severs arrangement • One spouse cannot devise their interest to a third-party. • If account held before marriage, it does not become a TBE simply by adding spouse's name. It must be closed and	• Must file additional form to register in beneficiary form. • Beneficiary designation supersedes instructions in will or trust. • Depending on size of estate, may still owe estate taxes.

	Individual	JTWROS	TBE	TOD
			reopened jointly.	

JTWROS, JBE and TOD designations can provide clients with a convenient way to arrange for the transfer of brokerage assets upon an account holder's death. Providing your clients with information as to the benefits and possible problems with each type of account is key to ensuring that their goals are being met. As with any recommendation, it is imperative to consider the specific needs and circumstances of your particular clients before advising them as to what type of account ownership might be best for them. Should your clients have questions about tax or legal ramifications related to any of the brokerage account types referenced above, advise them to contact a lawyer or other professional who handles such legal matters.

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