schmiedeskamp
ROBERTSON NEU & MITCHELL LLP
LAWYERS

HOLDING TITLE TO ASSETS AND DESIGNATING BENEFICIARIES

Prepared By
By James A. Rapp
and
The Schmiedeskamp Estate Planning Group
525 Jersey Street
Quincy, Illinois 62301
Telephone: 217.223.3030

Introduction

How assets are held or beneficiaries designated are important decisions. They may have very important consequences to a person's estate plan. Therefore, consider these issues with great care.

Many times the reason for holding assets in a particular way or naming beneficiaries makes a great deal of sense. A married couple without estate tax concerns and a stable family situation, for example, might hold everything jointly or designate each other as beneficiaries. Other times this is not at all appropriate. What is important is to clearly understand what you are doing in titling assets or naming beneficiaries, why you are doing it, and the consequences or pitfalls of what decisions you make.

Assets may be titled in a variety of ways. This information outlines the most common ways titles are held. It also discusses issues that involve beneficiary designations.

The Schmiedeskamp Estate Planning and Administration Group

This form has been provided for the convenience of clients and friends of the Schmiedeskamp, Robertson, Neu & Mitchell LLP Estate Planning and Administration Group. Our clients are families and individuals from all walks of life, along with individual and corporate executors, trustees, and fiduciaries, as well as public and private charities. The Group provides estate planning and administration services from the simple to the complex. Services relate to wills, trusts, beneficiary arrangements, and other estate planning techniques and approaches. We advise our clients regarding the effective and efficient transfer of wealth and succession planning. We work closely with our client's accountant, financial, insurance, and other advisors. For more information about the Estate Planning and Administration Group and all our lawyers, please visit www.srnm.com.

Common Titles

These are the most common forms of title:

- Individually: Assets may be held in one's own individual name. Where this is done, an asset would pass upon death to that individual's estate and, ultimately, to the beneficiaries designated in the individual's will or, if no will, to the individual's next of kin or heirs.

- Tenants in Common: Assets may be co-owned as tenants in common. In this arrangement, an individual co-owns an undivided share of the entire asset. For example, two individuals may each own an undivided one-half interest in the asset. The respective ownership interests may vary, however, such as one-quarter or one-third, and don't have to be equal shares. A person's individual share passes in the same manner upon death as individually owned property.

- Joint Tenancy: Assets may be held in joint tenancy which carries with it the right of survivorship. Where property is held in joint tenancy, the entire interest to the property passes upon death to the surviving joint tenant or joint tenants. The asset does not pass to the deceased joint tenant's estate unless the last surviving joint tenant. While joint tenancy often has two joint tenants, there may be any number of joint tenants with the last survivor to succeed to the entire interest.

- Tenants by the Entirety: A husband and wife may hold their residence in Illinois as tenants by the entirety. Other states, such as Missouri, allow husbands and wives to own their residence and any other assets as tenants by the entirety as well. Tenancy by the entirety operates in much the same manner as joint tenancy but is permitted only by married couples. However, it has an important advantage. The advantage of tenancy by the entirety is to preclude claims against the property unless the claim is by a creditor who has a claim against both spouses. Also, it prevents either spouse from conveying any interest or dealing with the property without the concurrence of the other spouse. Tenants by the entirety, therefore, may protect one's residence from claims by creditors of one but not both spouses in Illinois and even other assets in Missouri. Tenancy by the entirety is most often the desired form of ownership of a couple's residence.

- Beneficiary Designations: Some assets are held in an individual's name but designate a beneficiary upon death. Examples include payable or transfer on death (POD or TOD) accounts and beneficiary designations in insurance policies, annuity contracts, or retirement plans. These assets, on death, pass to the beneficiary or beneficiaries designated.

- Fiduciary Ownership: Assets may be held for the benefit of oneself or others in a special capacity. These are generally referred to as fiduciary relationships, although other names may be used. Where assets are held for someone else in a fiduciary

capacity, it is important that the title reflects this relationship. Examples include assets held as a trustee, the legal representative of an estate, or a custodian for minors.

These are the most common ways individuals may hold property. There are others, such as community property which is not recognized in Illinois or Missouri, but is in other jurisdictions (e.g., California and Wisconsin). Where property is held outside of Illinois or Missouri, these other forms of ownership should also be considered.

Considerations in Titling Assets

When titles are established, owners are frequently lulled into one method of ownership or another. Don't assume that recommendations made by those helping you set up an account, purchase real estate, or buy insurance, are necessarily best for you. More importantly, don't assume that the advice will result in the assets ultimately passing as you wish. It is important to carefully understand the significance of how titles are held as the decision will have a significant effect to you, your estate planning, and precisely what happens to your estate.

Many considerations are important in determining how assets should be titled. Many advantages and disadvantages of particular forms of ownership could be outlined. There are a few issues that should be given primary consideration.

Probate v. Nonprobate

It is important to realize that some assets are "probate" assets while others are "non-probate" assets. The term "probate" is used because these refer to the assets that would pass under the terms of one's will. Examples of probate assets include individually owned property or a person's individual undivided ownership of property held as tenants in common. These assets would also include life insurance, annuities, and retirement plans where no beneficiary is designated. These assets pass under the terms of one's will or the applicable provisions of law where there is no will. Other assets, such as property in joint tenancy or with designated beneficiaries, are non-probate assets. These assets pass by operation of law or contract to the joint tenant or designated beneficiary. They are not affected or governed by will or the laws applicable where there is no will.

The distinction between probate and non-probate assets may be very significant when titling assets. Some have the mistaken belief that a will overrides or trumps joint tenancy or beneficiary designations. It does not. The joint tenancy or beneficiary designation applies. Therefore, non-probate beneficiary designations should not be used without considering the impact of such designations on estate and tax planning. Non-probate assets should be used only where the true intention is to have the asset pass to the intended beneficiary free of any claims by others.

It should be recognized that use of non-probate forms of titling assets is sometimes very appropriate. As already mentioned, for example, joint tenancy or beneficiary designations may be particularly convenient between husbands and wives where estate taxes are not a concern and a stable family situation is involved. This also may be appropriate where there is a single beneficiary

or a special gift planned for a selected beneficiary. Nevertheless, many problems may arise from the use of joint tenancy or beneficiary designations and so it's important to make certain that it's the right tool for the right job.

If there is a desire to avoid probate, other means may be used. A revocable living trust, for example, serves this purpose. That might be something to consider rather than other non-probate forms.

Estate Planning Issues

Many individuals inadvertently use non-probate assets that may have the effect of interfering with an overall estate plan established in a will or a trust. Holding assets in this manner is convenient, but may have adverse impacts. There are many examples of this.

One common example involves the designation of a child as the joint tenant of a bank account. Joint bank accounts with children, in particular, are often established so that someone can sign checks, handle banking, and so on. Upon death, the asset would pass to the designated beneficiary and not under one's will. It is difficult, sometimes impossible, for other family members to challenge such a designation. Although the named child might share the account with other beneficiaries, he or she is usually under no legal obligation to do so. Unless the account actually designates all those who are the desired beneficiaries, a power of attorney is a preferable method for handling banking.

Rather than designate one joint tenant or beneficiary, multiple beneficiaries are sometimes named. A parent, for example, may designate all children as joint tenants of an account because of a desire to have the asset pass to all children. Although this might accomplish an individual's purpose, matters will become very complicated if a child dies or has financial difficulties. Where a child dies, the child's children will not always receive the parent's share and will instead be disinherited with regard to that account, policy or asset. The asset usually will pass to the surviving beneficiaries (that is, the other children who survive). Also, where a child is involved in bankruptcy or marital disputes, the asset may become embroiled in claims by others.

Non-probate assets also may create problems where they are actually intended to pass in a trust. This is common where a trust for minor or disabled children is created. It is usually desirable to have assets pass to one's estate and then into the trust created under a will rather than have the asset pass directly to the child. If the asset passed directly to the minor child, the purposes of the trust in holding assets until a specified age and others would be defeated. The child would receive it at age 18 and, in the meantime, would have to be held in a guardianship. If the child is disabled and a special needs trust established, the assets would go to the child and not the trust, perhaps then disqualifying the child for assistance or benefits.

It is important to recognize that where co-owners are added to accounts, all co-owners may be required to sign documents relating to the asset. This is usually not the case for bank accounts, but usually is the case for other assets such as real estate, stocks, bonds, and brokerage accounts. What this means is that the person who sets up the account no longer may deal with the account on their own.

Some planning may avoid certain of these problems. However, others might arise. What's important is to get proper advice before titling assets.

Payable or Transfer on Death Accounts

A very frequently used technique to avoid probate is the POD (payable on death) or TOD (transfer on death) account. At one time this was only permitted at banks or similar financial institutions. Laws were revised allowing brokers and others to now do the same. Some states have something similar even for real estate.

Where POD or TOD accounts are used, it will usually provide that the account is payable or transferred on death to named individuals. What is not always clear – and this is very important – is just what happens when one of those individuals dies before the account holder. Because of this, it's important to clearly determine what will happen and make certain you agree. Ask questions! And make certain the documents you are furnished confirm that what happens is what you want.

What are the possibilities?

- To Others Named: One possibility is that the account will pass to the other named beneficiaries. If there are three children named, for example, and one dies, the account would entirely pass to the other named children.

- To Descendants: Another possibility is that the account will pass to the descendants of the deceased owner and, if none, then to the other named beneficiaries (or their descendants if also deceased). This is what most people intend. But, again, that's not the usual rule. Instead, the account generally will pass to the other named beneficiaries.

How can you make certain the account goes to descendants? The answer is not always easy. The reason is that the law differs from state to state and, also, brokers or institutions can adopt their own rules. Here are some things to keep in mind:

- Usual Rule: Remember the general rule: The account will pass to the surviving beneficiaries. If that's what you want, fine. If it's not what you want, make certain your wishes are addressed.

- State Law: State law can make a difference. Some states – Illinois is one – that follows the usual rule. The beneficiaries who survive take all. Some states – Missouri is one – follow the alternative rule but only if the account beneficiary is a descendant of the account holder; the descendants of the deceased beneficiary take the beneficiary's share. While account holders usually don't pay attention to the law that governs an account, it can make a difference. What complicates this further is that an account might be set up in one state but the account in fine print provides that it is governed by the laws in still another state.

- Be Specific: The best thing to do is to clearly specify your wishes. One way to do this is to list the beneficiaries' names followed by the letters "LDPS." The "LDPS" means "lineal descendants per stirpes." This provides, in effect, that the descendant or, if more than one, the descendants collectively, of a deceased descendant represent and take the share of their parent. The account goes down the line. For example, the account would read:

  Abraham Lincoln
  TOD
  Robert Lincoln, Eddie Lincoln, Taddie Lincoln and Willie Lincoln LDPS

  A husband and wife may own an account jointly and do the same thing. For example:

  Abraham Lincoln and Mary Todd Lincoln JT TEN
  TOD
  Robert Lincoln, Eddie Lincoln, Taddie Lincoln and Willie Lincoln LDPS

Even in those states where assets presumptively go to descendants, adding "LDPS" is a good idea if that's what is intended just to make this clear. In those states where the presumption is to go to descendants, the presumption may be cancelled by putting "No LDPS."

Don't forget, brokers can have their own rules. Some don't accept LDPS designations at all. Others won't accept them unless you also specify the person (*e.g.*, an executor or trustee or other person) who will certify the descendants. Some allow it but have special forms with boxes to check making this clear. However, if protecting the descendants of a deceased beneficiary is important and the brokerage firm does not permit it, you might not have a choice but to go to another broker that does.

When it comes to payable on death or transfer on death accounts, the key point, again, is to make certain your wishes are clear. This is an important and often overlooked issue.

Life Insurance, Annuities, and Retirement Plans

Life insurance, annuities, and retirement plans are not exactly POD or TOD, but accomplish the same thing through beneficiary designations. Therefore, the same issues apply. Beneficiary designations must be carefully considered.

It is not uncommon for a beneficiary designation (or alternate) to specify "children of the insured" as beneficiaries. Under many policies, those children who survive take the entire policy proceeds; none passes to the descendants of a deceased child. By instead stating "descendants of the insured,

per stirpes," the proceeds would pass to the descendants of a deceased child. Of course, the fine print contained in the policy could provide this automatically (and some do).

Most insurance companies have sophisticated beneficiary designation forms. More and more retirement plans do so as well. It still is important for those holding plans to check and make certain the designations are correct.

Automatic Beneficiary Designations

Some beneficiary designations may be automatic. This in unusual, but be alert to this possibility. It will be most common for retirement plans and some life insurance. Where automatic beneficiary arrangements exist, the beneficiary may be to one's spouse, or if no spouse, then one's children. Provisions might then also provide that a deceased child's share passes to the child's descendants. However, the particular provisions of the automatic beneficiary designation should be reviewed if applicable.

Tax Planning

Non-probate assets may or may not be consistent with one's estate tax planning. For couples with larger estates, a frequent plan involves the use of a by-pass or exclusion trust. These trusts are funded by an amount up to the amount excluded from estate tax which ultimately passes to beneficiaries without payment of estate taxes after the surviving spouse's death and lifetime receipt of income. The exclusion amount for 2016 is $5.45 Million (federal) and $4 Million (Illinois). Missouri does not have an estate tax. Where assets are instead held in a manner whereby they would pass to the spouse, the benefits of the trust may be defeated. Of course, gifts to persons other than a spouse would count against the exemption from taxes. If tax planning is of concern, non-probate forms might not be best.

Marital Planning

Marital planning may be a factor in titling the property. While the laws of each state may differ, many states – Illinois and Missouri among them – recognize a distinction regarding the disposition of certain property. However, to help assure that result, it may be important to keep the property separate and not commingle it with a spouse through joint tenancy or other forms of co-ownership.

Closing

This material has sought to make you more aware of some of the factors in selecting titles to property and the consequences which may result. Be cautious when titling assets.

Please note that this discussion provides general information.
It is not intended to provide specific or personal legal advice.

Last Revised: 1.2016