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Guest Article

Joint Accounts Are Not Adequate Substitute For Proper Estate Planning

By Jeffrey A. Baskies

A client referral source called and left the following message: "I just met a client who had all of her assets in joint names with her children, so she doesn't need a will or trust, right?" And I've heard similar comments from clients in the past: "so long as my accounts are joint, why pay for an estate plan?" or "I have payable on death designations on all of my accounts so I don't need a lawyer."

These questions are actually inter-related and symptomatic of a basic lack of understanding of the costs and benefits of joint ownership. Clients who fail to plan because they feel comfortable with their joint assets or their payable on death ("POD") accounts generally fail to understand the risks associated with such.

While the costs and benefits of planning with joint accounts or POD accounts probably vary a little state by state, we can generalize the most significant points:

The Benefits

The primary benefit of joint ownership is the ability of the survivor to take the property post-death without going through probate. But for real property, that may not be 100 percent accurate. Usually, some post-death action is needed to clear the deceased tenant's name from the title, although that may still be less work than needed for a formal probate.

Another benefit might be the ability of the co-tenant to tap into the funds in case of the client's incapacity. This would allow the co-tenant to use a joint bank account, for example, to pay the client's monthly bills.

Additionally, joint accounts have a benefit over more sophisticated estate planning in that they can be set up for free. Indeed, some banking institutions offer clients this advice every time they try to open an account that is not joint.

Payable on Death accounts offer the same post-death probate avoidance benefit, and the same cost-free establishment benefit, but do not have the incapacity benefit.

The Downside

Given how joint ownership offers free estate planning and potentially incapacity planning as well, why are joint titles not the panacea some clients want them to be?

- Sometimes creating joint ownership results in a taxable gift. Generally, creating a joint tenancy in real property is a taxable gift upon execution of the deed and delivery. So too, generally, creating joint ownership of stock or bond certificates is a present taxable gift. That means the unified credit might be used up or even gift tax paid as a result. And to add insult to injury, in spite of the taxable gift, because of the joint ownership the property will wind up coming back into the client's taxable estate for federal estate tax purposes. By contrast, creating a joint tenancy in a bank or brokerage account usually is not a present taxable gift, although any withdrawals by the non-contributing joint tenant are then taxable gifts.

- Joint accounts present the risk of the joint tenant's absconding with the funds. While most clients deride this suggestion, I've seen enough probate litigations to know that family members are capable of hurting one another when money is involved. Why would my client want to put herself in a position where her child or children could withdraw all of her assets and disappear? It's true that in most states the client could sue the joint tenant for a return of the funds (and an accounting), but that is little solace if the funds are spent and the child is judgment proof.

- If the client isn't worried about her child taking assets from her joint account, maybe she should be concerned about her son or daughter-in-law making a claim on it in case of a divorce. Since the child's name is on the account, a divorcing spouse could assert a claim to a portion of it. And even if state law doesn't permit this, the client would have the burden of appearing and proving she put all the funds into the joint account - a hassle she would not have had to deal with but for the creation of the joint tenancy.

- The client should be concerned about claims by creditors of her co-tenants. What if the child gets sued and a judgment creditor makes a claim on the joint assets? Again, state law may protect the client, but she may be forced to defend her claim to the joint assets - an action I'm sure she would prefer to avoid.

- What if there are multiple children? If you add only one child as joint owner on all the accounts, then the other children may get nothing. Even if the one child wants to share the funds with the others, he or she might face gift tax issues after the client dies. And what if that child refuses to share? Or what if the client puts all of the children on as co-owners? The latter exponentially increases the risks described above. Plus, it adds a new twist - if a child predeceases the client, her or his children would get nothing (as the surviving joint tenants would split the assets). But most clients want their grandchildren to step up and take a child's share if the child dies, so this type of planning might foil the intentions of a majority of clients.

While POD accounts avoid many of these issues, they do not avoid the last one, and they cannot help with incapacity planning.

Conclusion

All estate planners need to be comfortable addressing the costs and the benefits of joint ownership based upon state law. In my view, the benefits do not outweigh the detriments, and I'd prefer to see clients do proper estate planning. If probate avoidance and incapacity planning are primary concerns, those clients might benefit with revocable trust planning. That allows clients to keep control of their assets, avoid making taxable gifts, and dodge potential claims against their assets by their children, their children's divorcing spouses or their children's creditors.

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