

Trusts and Estates Law

The Transfer-on-Death Security Registration Act

by Hon. C. Raymond Radigan and Frank J. Gobes

Perhaps with a goal of keeping things simple, or simply trying to avoid probate, joint bank and brokerage accounts with right of survivorship are extremely popular today.

One or all of the joint account holders could contribute to, or fund, the joint account and any of the joint holders could make withdrawals. The funds are payable to the survivor upon the death of the other joint account holders. Although the gift tax consequences of establishing a joint account, as well as the concept of a moiety, are generally not understood by many joint account holders, the biggest problem with joint accounts is the potential for abuse. Case law demonstrates that joint accounts are often established by the elderly for purposes of convenience or transferring the account upon their death. However, the unscrupulous joint account holder is able to immediately withdraw all or most of the money for his own use, leaving the elderly joint holder without means of support.

As a way to avoid the abuse described above, Totten trusts (Estates Powers and Trust Law, EPTL 7-5) became, and continue to be, very popular. A Totten trust is established by the bank depositor to give his or her beneficiary the right to the bank funds upon the death of the depositor. The beneficiary has no access, or right, to the bank funds while the depositor is alive.

The Act

Basically, the purpose of the Transfer-On-Death Security Registration Act is to bestow upon security or brokerage account holders the same privileges, or choices, that bank account holders have with regard to Totten trusts.

The act amends the estates, powers and trusts law (EPTL) by adding a new

part 4 to Article 13. The act presently encompasses EPTL 13-4.1 through 13-4.12.

EPTL 13-4.1 contains numerous definitions, which are relatively straightforward. Section (a) defines a "beneficiary form" as a registration of a security (includes security account), which "indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security [or security account] upon the death of the owner." A "beneficiary form" creates what is commonly known as a "payable on death (POD)" or "transfer on death (TOD)" account. Most of us, and our clients, are familiar with "beneficiary forms" in the context of Individual Retirement Accounts, 401(k) plans and pensions, and the purpose of beneficiary forms is the same for each of these types of investments.

EPTL 13-4.2 essentially states that POD security accounts can only be established by sole owners or multiple owners having right of survivorship. Owners of security accounts as tenants in common are expressly prohibited from establishing a POD account. "Multiple owners of a security registered in beneficiary form hold as joint tenants with right of survivorship, as tenants by the entirety or as owners of community property held in survivorship form, and not as tenants in common."

A POD account has been established when the documentation initiating the account "includes a designation of a beneficiary to take the ownership at the death of the owner or the deaths of all multiple owners." (EPTL 13-4.4).

There is no one special word or phrase that creates an account under this act. EPTL 13-4.5 states that evidence of such an account "may" be "shown by the words 'transfer on death' or the abbreviation 'TOD,' or by the words 'pay on death' or the abbreviation 'POD,' after the name of the registered owner and before the name of the beneficiary." Thus, a security account opened as "John Smith TOD Jane Smith" should signify that the account was opened pursuant to this statute with John as the owner and Jane as the beneficiary.

POD accounts are revocable. The beneficiary's interest vests upon the death of the account owner. To revoke a POD account, the consent of the beneficiary is not required (EPTL 13-6(a)). A POD account "can [also] be

revoked or amended by an express direction in the owner's will which specifically refers to" the account (EPTL 13-6(b)). If no beneficiary survives the death of all owners, the POD account belongs to the estate of the deceased sole owner or the estate of the last to die of all multiple owners (EPTL 13-4.7).

A "registering entity" (i.e., a broker or transfer agent) is not required to offer or to accept POD accounts (EPTL 13-4.8(a)). A registering entity is discharged from all claims of interested parties if it transfers the POD security assets to the beneficiary upon the death of the account owner and does so "in good faith reliance" on the documentation establishing the account, on this statute and "on information provided to it by affidavit of the personal representative of the deceased owner, or by the surviving beneficiary or by the surviving beneficiary's representatives, or other information available to the registering entity." (EPTL 13-4.8(c)). The protections of EPTL 13-4.8 do not extend to payments made to a POD account beneficiary after the broker or transfer agent has received written notice from any claimant to the account (Id.). Thus, upon written notice from a claimant to the registering entity, the broker or transfer agent should exert its status as a mere stakeholder and await the outcome of the dispute.

A broker or transfer agent who elects to offer POD accounts may establish the terms and conditions under which it will offer POD accounts, change beneficiary designations and pay beneficiaries. The terms and conditions so established may provide for proving death, designating primary and contingent beneficiaries, and substituting a named beneficiary's descendants to take in the place of the named beneficiary in the event of the beneficiary's death (EPTL 13-4.10).

The act adds a new subparagraph (c) to EPTL 5-1.4, which revokes the POD security account beneficiary status of a spouse "at the dissolution of the marriage, its annulment or upon any declaration of its nullity. After revocation, the security belongs to the estate of the owner upon his or her death unless there is a contingent beneficiary or the owner establishes another subsequent and valid disposition of the security at death."

The act amends subparagraph (1) of paragraph (a) of EPTL 2-1.11 to clarify the status of a POD account as an asset which may be renounced by the

beneficiary upon the death of the account owner. The act also adds a new paragraph (f) to EPTL 2-1.6 and provides that "[u]nless otherwise provided in the [POD account] documents" when the owner and a beneficiary of a POD account "die and there is no sufficient evidence that they have died otherwise than simultaneously, the [POD account] shall be treated as if the owner had survived the beneficiary." The act also amends subparagraph 1 of paragraph (b) of EPTL 5-1.1-A to add a POD account as a testamentary substitute for the purpose of the right of election by a surviving spouse.

Some Practical Tips

As POD brokerage accounts become popular, it is conceivable that the typical estate consisting of a house, bank account, security account and 401(k) account could have most of its assets passing outside of the testamentary estate. There is nothing wrong with this result, as long as it was the intent of the testator.

It is good practice for the estate planner to not rely on the testator's memory with regard to the beneficiary status of estate assets, including POD security accounts. The beneficiary status of all assets should be ascertained at the time the estate plan is being implemented and should be periodically reviewed thereafter.

Of course, the estate planner must have knowledge of the beneficiary designation status of all estate assets. Otherwise, credit shelter and marital trusts may go unfunded.

Concerns

The day a testator executes his will, there is a presumption that he was focused on the disposition of his property. This is especially true when the will was drafted by an attorney and executed under attorney supervision. Can the same be said on the day an owner opens a POD security account? A POD account will probably be opened without the involvement or supervision of an attorney. At the time the POD security account is opened, how much time will be spent by the broker or transfer agent in explaining the ramifications of a POD designation, when "important" topics such as asset diversification and expected yield need to be discussed?

A small POD security account may be opened and years later, as a result of many factors including the sale of other assets and the closing or merger of other security accounts, that formerly small POD security account may become the major asset of an estate. If the owner overlooks or fails to remember whom he designated as the beneficiary at the time the account was opened, upon his death his intended dispositive scheme may be frustrated.

The Transfer-On-Death Security Registration Act (the act) was signed into law on July 26, 2005 (L. 2005, Ch. 325). Although the effective date of the act is Jan. 1, 2006, it applies to registrations of securities in beneficiary form "by decedents dying on or after January first, two thousand seven." As a result, during the period between Jan. 1, 2006 and Jan. 1, 2007, persons could register securities in transfer-on-death form, but not have the new law apply to the transfer of the securities if they should die during 2006. This scenario has been criticized as being inconsistent and confusing. A bill has passed the Assembly and Senate, which, if signed into law, would amend the act to have it apply to registrations of securities in beneficiary form by decedents dying on or after Jan. 1, 2006.

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