

## **How To Fund Revocable Trusts At Death And Avoid Probate**

How property is titled determines in large part the manner in which that property will be transferred upon the owner's death. In Virginia, probate is the system used to transfer title to property at your death. A married couple will often own property jointly with rights of survivorship so that at the first spouse's death, title to the entire property will pass to the surviving spouse without the necessity of going through the probate system. This form of ownership, tenancy by the entirety, with right of survivorship, is only available to married couples.

Two or more people who are not married to each other may also own property as joint tenants with right of survivorship. If the property is owned by more than two joint tenants, each joint tenant receives a proportionate share of a deceased co-owner's share until the last co-owner survives. This results in a "he who dies last wins" situation in which the last survivor of the co-owners receives title to the entire property and may then do with it as he or she pleases. The last joint tenant to die cannot, however, rely on the joint title to avoid probate.

Unfortunately, the laws of joint tenancy may cause other unfavorable results. When property is owned jointly (other than land owned jointly by spouses), one co-owner's creditors may reach that co-owner's interest in the joint property. The other co-owners may be forced to go to court to defend their interests in the property, and even if they are successful in protecting their interests, they will have to spend both time and money to do so. Joint tenancy with right of survivorship may not be the best way to own property with another person, especially if that person may have financial or legal difficulties.

In 1994, the Virginia General Assembly enacted the Uniform Transfers on Death (TOD) Security Registration Act ("the TOD Act"). The TOD Act allows a person who owns a stock or bond (a "security") or a security account to register the security or security account naming a beneficiary who will receive title to the security or security account upon the death of the owner. By adding the designation "TOD" (Transfer on Death) or "POD" (Pay on Death) and the beneficiary's name, the owner can ensure that the named beneficiary will receive title to the security or security account after the owner's death without the need for the asset to go through the probate system.

The TOD or POD beneficiary designation can be used by co-owners who own stocks or bonds with rights of survivorship so that a designated beneficiary will receive the security or security account after the death of the owner. If the owner desires to have the designated beneficiary's children or grandchildren take the property if the primary beneficiary should predecease the owner, then "LDPS" can be added after the beneficiary's name to specify that the property belongs to the "lineal descendants

*per stirpes*" of the primary beneficiary. The owner can also provide for a substitute beneficiary to take title in the event the primary beneficiary predeceases the owner by indicating "SUB BENE" between the primary beneficiary's name and the substitute beneficiary's name. For example, a stock may be titled, or owned, by Sam Shareholder, TOD Mary Widow SUB BENE Lucky Person. In this case, upon Sam's death, the security would be transferred to Mary Widow without the need for probate. If Mary Widow did not survive Sam, Luck Person would receive the security.

Use of the TOD or POD beneficiary designation can provide a number of other benefits. For example, a revocable living trust may be named as the TOD beneficiary. At the owner's death, the title to the security or the security account will be "poured over" into the trust to be administered or distributed according to the terms of the trust without the necessity of probate to transfer title. This technique provides privacy as to the ultimate beneficiaries of the security or security account as a living trust is generally not part of the public records. Use of the TOD provisions can ensure that a trust is funded at death without the publicity of probate, while at the same time eliminating the need to re-title the asset during the owner's lifetime to take advantage of the living trust benefits.

Another benefit is available if the security is stock in a professional corporation. Usually professional corporation stock cannot be owned by a trust during the professional/owner's lifetime. This is because the trust does not have a license to practice medicine, law, public accounting or engineering. As such, this stock would generally have to pass through the probate system upon the owner's death. However, by using the TOD designation with a trust as beneficiary, the stock can be administered and distributed according to the terms of the trust upon the owner's death. This both preserves the owner's and the beneficiaries' privacy and avoids the probate system.

An additional benefit is that while the beneficiary is entitled to ownership of the security or security account upon the owner's death, he or she has no attachable interest in it during the owner's lifetime. A beneficiary's creditors cannot attach or take an interest in the stock or bond because the beneficiary's right or title is not vested, or complete, until after the owner's death. The owner may change the TOD or POD beneficiary designation at any time during his lifetime. This is much easier to accomplish than amending a will or trust. Thus, the beneficiary's creditors cannot reach the security or security account during while the owner is still alive. The owner will not need to defend his interest in the property against the beneficiary's interest in court to protect his assets.

Registering your securities or security accounts with a TOD or POD designation can avoid a number of potential problems. In order to learn more about how to register your securities or security accounts in this manner, you should contact an experienced estate planning attorney.

*This article was prepared by Midgett & Preti PC and is intended to provide general advice only. For answers relating to a specific situation, you should consult a competent estate-planning lawyer.*