Estate Planning Insights

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MY COMMENTS ON "IT'S THE LAW"

This is a short newsletter that is more in the nature of an editorial than our usual educational piece.

Recent Case Involving A Statutory Durable Power of Attorney. A client of ours has been handling his mother's financial affairs using a valid, effective Statutory Durable Power of Attorney ("POA"), meaning that, legally, the client is acting as the agent for his mother, the "principal", pursuant to the POA. He recently went to CarMax to sell his mother's car. He was informed by the representative at CarMax that he could not sell his mother's car using the Power of Attorney because the car *and its Vehicle Identification Number* ("VIN") were not listed in the POA. He told my client, "That's the law." In fact, while that's the law in certain other states, it's not the law in Texas. However, because CarMax does business in all 50 states, they impose this requirement in Texas as well. Thus, this is just a business policy or practice of CarMax and, in my opinion, it is disingenuous of their representatives to tell Texas residents that "it's the law" that a car and its VIN must be listed in a POA in order for the agent to sell the principal's car. My client decided to go elsewhere to sell his mother's car.

Two Recent Cases Involving Joint Accounts Titled As "Tenants in Common." Two of our clients, both acting as the Independent Executor of a decedent's Estate, have recently encountered the same particular problem dealing with a national, "low cost" brokerage firm (I will not name the company because there are some very fine people working there, despite the problems that have come up recently). In each case, prior to the death of the decedent, the decedent and his/her spouse had a joint investment account with the brokerage firm that was titled in both of their names as "Tenants in Common." The assets in the joint account were community property under Texas law. In my opinion, it would be preferable to label or title such an account "Community Property"; however, very few financial institutions offer (or even allow) that sort of label. Thus, in many cases, couples in Texas who want to open a joint investment account are presented with the choice of only two possible labels: (1) "Joint Tenants With Right of Survivorship" ("JTWROS" or "JT TEN") or (2) "Tenants in Common" ("TIC"). Financial institutions tend to "push" the JTWROS form of titling on persons who open joint accounts for various reasons (some valid and some not valid at all). However, as we have discussed in many prior newsletters, if a married couple is doing any estate planning in their Wills, such as utilizing a Bypass Trust to shelter the estate tax exclusion amount owned by the first spouse to die from estate taxes, the JTWROS form of titling prevents the couple's joint investment account from being part of their estate plan because the assets in their JTWROS account automatically pass outside the Will to the surviving spouse on the death of the first spouse (and not into the Bypass Trust). Thus, for estate planning reasons, it is usually better for couples with taxable estates to pick "Tenants in Common" – and not "Joint Tenants With Right of Survivorship" – as the label for their joint accounts (assuming that the far superior "Community Property" label is not available).

Texas has some laws that specifically relate to "funds on deposit" in "Multiple Party Accounts". These laws provide some very good (and sensible) rules. For example, under Texas law, the funds deposited in joint accounts are owned during the lives of the parties to the account in proportion to the contributions made by those parties. Thus, if a married couple deposits community property funds into a joint bank account, each of them will own a community property ½ interest in the account. As another example, if a widow and her son open a joint bank account and the widow deposits 80% of the funds in the account and the son deposits 20% of the funds in the account, then the account is owned during their lives 80% by the widow and 20% by the son.

Texas law also addresses how the funds in joint accounts are owned on the death of one of the parties to the account. If the joint account is a "right of survivorship" account (JTWROS), then all of the funds in the account pass directly to the surviving joint account owner(s) on the death of a party. On the other hand, if the joint account does not have either a survivorship feature or a "Pay On Death" beneficiary, Texas law states that after the death of a party, the funds in the joint account continue to be owned by the parties in proportion to their contributions to the account, and the interest owned by

the deceased party passes as part of his estate per his Will (if he has one). Texas law also provides that the surviving joint account owner may continue to use the joint account after the death of the other party, subject to the rights of the beneficiaries of the deceased account owner's estate with respect to his interest in the account. Thus, a surviving spouse who is a party to a joint account holding community property funds continues to own ½ of the account, even if the deceased spouse's ½ interest passes to someone else under his Will.

In the two recent cases involving the brokerage firm, upon the death of the first spouse, the brokerage firm "froze" the couple's entire joint investment account and would not allow the surviving spouse to use or access even his/her community ½ interest in the account. In both cases, the account continued to be frozen long after the Executor of the deceased spouse's Estate presented Letters Testamentary to the brokerage firm. Because of the freeze, assets that were declining in value could not be sold and the surviving spouse had to find other means of support until the matter got straightened out. In both cases, the clients were told, "It's the law." I know of no law relevant here that allows a company to prevent a joint account owner from accessing his/her own interest in the account. Plus, upon presentment of Letters Testamentary, the Independent Executor of the deceased account owner's Estate had the legal right to access that ½ of the account. Unfortunately, clients of brokerage firms have very little recourse due to the requirement contained in all their contracts that disputes be submitted to arbitration. Further, most of these contracts apply the law of another state–not Texas–to these accounts. The best preventative measure is to make sure that you are dealing with a very seasoned account representative (with a good staff) who provides real customer service. And if you encounter a frustrating situation that you cannot resolve and are told, "It's the law," give us a call.

Contact Us:

If you have any questions about the material in this publication, or if we can be of assistance to you or someone you know regarding estate planning or probate matters, feel free to contact us by phone, fax or traditional mail at the address and phone number shown below.

You can also reach us by e-mail addressed to:

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