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# Estate Planning Insights

A Quarterly Publication of

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## SHOULD YOUR BANK TELLER BE YOUR ESTATE PLANNER?

*Many people, including bank tellers and other persons who open new accounts on a regular basis, do not understand the legal effect of the way an account they are opening is titled. As a general rule, the way an account is titled should not be a substitute for a well thought out estate plan and also should not override a person's estate plan in his/her Will. If you want to revise your estate plan in your Will or Living Trust, you should seek competent legal advice and not rely on your bank teller to change your estate plan.*

**Recent Texas Supreme Court Case.** On June 26, 2009, the Texas Supreme Court decided *Holmes v. Beatty*. This is a significant case for Texas residents. The issue in the case was whether various joint accounts created by a husband and wife with their community property had a valid survivorship feature or not. A survivorship feature means that, on the death of the first spouse, the entire account passes to and belongs to the surviving spouse. In other words, the deceased spouse's community property one-half interest in such an account does not pass to her beneficiaries under her Will. The important fact to note in this case was that the spouses were in a second marriage and both had children from their prior marriages. Apparently, the couple did not sign a Pre-Marital Agreement before they married each other.

The amount involved in the *Holmes* case was over \$10 million, divided among several accounts and stock certificates. Each account or certificate contained slightly different wording in the title, such as "JT TEN", "JTWROS", "Joint (WROS)". The wife died first and the husband died second, about nine months later. The Executor of the wife's estate sued the Executor of the husband's estate, claiming that the wife's half of the accounts passed under her Will. While both the trial court and the appellate court ruled somewhat in favor of each side (based on the slightly different wording used from one account agreement to another), the Texas Supreme Court ruled that every account with any type of survivorship wording on it, and even stock certificates issued from such an account, automatically passed to the husband by right of survivorship. Thus, since the husband died second and his Will left all of his estate to his children only, the wife's children got nothing. In deciding the case, the Texas Supreme Court based its decision on what the spouses *intended*. Do you think the wife in this case really intended to cut out her children completely after her husband's death? Lay persons must realize that when courts have to determine a deceased person's *intent*, this does not mean the court is trying to discover what the

person actually intended, but is deciding what presumably knowledgeable people (who think like judges) must have intended based on applicable law and the precise wording that was used in the account agreement.

**Account Titling Issues.** When appropriate, we give our estate planning clients a "Frequently Asked Questions" memorandum discussing the proper and improper way of titling bank and other accounts based on the estate plan they are creating in their Will or Living Trust (these *Titling Accounts* FAQ memos are on the firm's website). All of the work and effort people put into creating their estate plan in their Will or Living Trust can be for naught if their accounts are improperly titled. In other words, certain forms of account titling will override the Will or Trust. Thus, it is vitally important for each person to understand the legal effect of the way his accounts are set up because one cannot rely on what the bank teller says.

**JTWROS Accounts.** If a married couple has "simple Wills" (also called "Mom and Pop Wills"), meaning that, on the death of the first spouse, the deceased spouse's estate passes entirely to the surviving spouse, then it probably does not matter if that couple has all of their bank and brokerage accounts titled in both names as "Joint Tenants With Right of Survivorship". Everything is going directly to the surviving spouse anyway, so what difference does it really make? However, assume, for whatever reason, the couple's Wills do not leave everything outright to the surviving spouse on the first spouse's death. This could be due to (i) tax planning the couple is doing (such as creating a Bypass Trust to avoid wasting the first spouse's estate tax exclusion amount) or (ii) second marriage planning (such as creating a "unitrust" or Marital Trust for the surviving spouse for life, with the assets remaining on the surviving spouse's death passing to the children of the deceased spouse at that time) or (iii) creditor protection planning. Further, a married person could have a Will which leaves amounts to beneficiaries other than (or in addition to) his spouse.

In all of these cases, if the couple sets up joint accounts and, per the *Holmes* case, any type of survivorship wording is included in the account agreement (which happens "automatically" with many banks and brokerage firms), then the estate plan of the first spouse to die will be thwarted because of the wording in the account agreement. Think about this: When people execute a Will in a lawyer's office, they know they are doing something serious and important. Do people have that same realization each time they sign a new account agreement at the bank? If not, they should.

Even persons who are not married to each other can create JTWRROS accounts. The question is, do they really intend for the other person on the account to become the 100% owner of the account on their death? Perhaps they only want the other person to help them with the account while they are living. It is not necessary to include the survivorship feature on an account merely for someone to be placed on the account for convenience. Remember that a JTWRROS account overrides the Will. This form of titling has *significant legal effect* and that effect should be fully evaluated when the account is opened.

**Other "Bad" Account Arrangements.** People who have a Will or Living Trust should also usually avoid these: Pay on Death (POD), Transfer on Death (TOD) and the "Totten trust" account ("Depositor as Trustee for \_\_\_ as Beneficiary"). These forms of titling should not be entered into lightly, and certainly not on the advice of the bank teller, unless she is an estate planning specialist.

**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.

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