JOINT ACCOUNTS WITH RIGHT OF SURVIVORSHIP

By Mary C. Burdette

A joint bank account “with right of survivorship” ("Survivorship Account") is held in the name of two or more parties, and, on the death of one party, the surviving party becomes the owner of all funds in the account. The funds pass outside the terms of the deceased party’s will as a “non-testamentary transfer.”

Survivorship Accounts have spawned a flood of litigation, frustrated carefully tailored estate plans, and in many cases, thwarted the owner’s true intentions. Despite detailed legislative and judicial attention, Survivorship Accounts continue to be problematic in Texas and should be used, if at all, with caution and advice of counsel.

Survivorship Accounts are governed by Sections 436-449 of the Texas Probate Code, originally enacted in 1979. During the joint lives of the parties to the account, the funds belong to them in proportion to the net contributions made by each. However either party may withdraw any or all of the funds, and the financial institution cannot be held liable for releasing funds to a party that were not “contributed” by such party.

A bank account will not qualify as a Survivorship Account unless the agreement is in writing, signed by the party who has died, and contains substantially the following “magic” language:

On the death of one party to a joint account, all sums in the account on the date of the death vest in and belong to the surviving party as his or her separate property and estate.

In the leading case of Stauffer v. Henderson, 801 S.W. 2d 858 (Tex. 1990), the Texas Supreme Court attempted to resolve the much litigated issues involving Survivorship Accounts. Stauffer provides that Probate Code Section 439 is the exclusive means for creating a Survivorship Account, there must be a written agreement signed by the decedent in order to create a Survivorship Account, and no extrinsic evidence of an intention to create such an account will be considered. Applying these rules, the Court held that the account agreement did not create a right of survivorship because it stated that the property was “payable to” or “may be withdrawn by” the surviving party, rather than stating that it would “vest in” or “belong to” the surviving party.

Unfortunately, neither the efforts of the legislature nor the Texas Supreme Court have stemmed the tide of litigation over Survivorship Accounts. An excellent summary of the many cases is contained in Appendix A to one of the leading articles on this subject written by Glenn M. Karisch, Multi-Party Accounts in Texas, which may be found on his web site at www.texasprobate.com.

Survivorship Accounts also can frustrate estate plans and thwart testamentary desires. Assets which pass by right of survivorship are not subject to the terms of a decedent’s will. This means that assets in a Survivorship Account are not available to fund a by-pass trust, which may result in an under funded by-pass trust. As a general rule, clients who use by-pass trusts in their wills should avoid Survivorship Accounts.
An elderly parent often desires to authorize a child or caregiver to sign on her account in order to assist with finances, but usually does not intend to transfer ownership or change her testamentary plan. Unfortunately, bank customers often do not understand estate planning and testamentary consequences of selecting a Survivorship Account. If a valid Survivorship Account agreement is signed despite the person’s desire to simply add a signatory to his/her account to assist with payment of bills, extrinsic evidence of a different intent will be inadmissible at the account holder’s death.

The “convenience account” authorized by Probate Code Section 439A provides a simple solution to many of these problems. This account places an additional name on the account merely for convenience and provides no ownership interest or survivorship right in the account. Unfortunately, and inexplicably, many banks do not even offer convenience accounts.

Due to the problems caused by Survivorship Accounts, they should be used only with proper legal advice. However, drawn to the seeming simplicity of Survivorship Accounts, many individuals are likely to continue creating them without such advice or a true understanding of the consequences of their choice. Estate planners should review bank signature cards as a routine part of estate planning. In addition, use of the Uniform Single-Party or Multi-Party Account Form provided in Probate Code Section 429A by more banks would go a long way to reduce the continuing litigation regarding Survivorship Accounts.

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