



LUKINOVICH
A PROFESSIONAL LAW CORPORATION

Lukinovich, APLC has law offices in Metairie and Baton Rouge, Louisiana. Our areas of practice include estate planning, wills and trusts, business planning, wealth preservation, probate administration and charitable gift planning.

Our mission is to devote our best skills, efforts and resources to advise our clients enthusiastically and creatively to accomplish their business, tax, family and estate planning goals and objectives, and we offer superior personalized attention with the utmost regard for privacy and confidentiality.

Learn more about our areas of practice online:
www.lukinovichlaw.com

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Suggested Reading:

Jack Canfield, et. al's Classic
The Power of Focus

This book persuades the reader to focus on Strengths rather than Weaknesses & provides "Action Steps" to accomplish this.

False Assurances:

Expecting Jointly Titled Accounts or P.O.D.s to Transfer Funds Can Undermine Your Estate Plan



Daniel H. Bruni

In Louisiana, individuals planning to leave sums of cash deposited with a financial institution often choose one of two ways to do so: they may jointly title an account in their name and an alternate account holder's name or they may create a pay-on-death beneficiary designation for such an account. However, trusting in either mechanism alone, with no other planning, is misplaced trust, because such mechanisms may not be the last word in how such funds are transferred or to whom they belong.

Jointly titling an account in the name of the depositor and an alternate account holder often comes with unintended consequences. The individual who is the source of funds, typically the depositor, remains the true owner of funds deposited into a joint account. When the intent of jointly titling an account is to transfer the deposited funds to another individual, either upon deposit or at the depositor's death, uncertainties arise as to the true owner. The simple act of depositing funds into a joint account does not transfer ownership of those funds.

In the area of gifts, a typical scenario that calls into question ownership of funds is where cash deposited or held in a joint account is donated by the depositor to the alternate account holder. In order to complete a gift, a donor must irrevocably divest himself of the thing donated and intend to donate it. Merely depositing funds into an account with the alternate account holder (the intended donee) does not constitute a gift; the donor can still exercise control over the funds. But, once the alternate account holder withdraws funds, the gift is complete. Often a donor may express to a donee that funds are to belong to the donee, or that the donee is to withdraw the funds upon the donor's death; however, if funds are not withdrawn while the donor is alive, there is no demonstration of donative intent and therefore no completed gift. Ownership of deposited funds becomes more complicated when funds in the account are not expressly intended as a gift yet are still withdrawn by the

alternate account holder for his or her benefit. The issue of whether there is donative intent, a factual question, will arise, but also, under gift tax law, there may be a completed gift from the depositor to the alternate account holder, triggering application of gift tax rules. As these scenarios indicate, the simple act of withdrawing cash by an alternate account holder can call into question ownership of the funds and create unintended consequences.

Perhaps more concerning than a question of ownership with jointly titled accounts is the liability exposure to the depositor. Legal disputes may arise as to who is entitled to the funds, such as when the alternate account holder is being pursued by creditors. Assume, for example, the source of funds is a parent and the alternate account holder is a child who is a surgeon, and surgeon commits malpractice and is sued individually. The funds deposited in the joint account could be susceptible to the surgeon's creditors' claims. Several other scenarios can pose a risk, such as, where the alternate account holder commits bad acts, e.g., unauthorized use of funds or failing to pay taxes. Regardless of the ultimate outcome in such instances, the consequences of holding funds in a jointly titled account can be costly litigation, and possibly, the loss of those funds. As each of these different scenarios above illustrate, using a jointly titled account as the means by which to transfer funds to someone else, whether during life or after death, may result in serious, unforeseeable consequences, which is why we strongly urge clients either to complete transfers during life or to memorialize their intent concerning such accounts in a properly drafted will.

With respect to the use of pay-on-death ("P.O.D.") designations to transfer funds in an account, the law permits financial institutions, upon receipt of the depositor's death certificate, to distribute funds to any individual whom a depositor names in a properly executed P.O.D. designation. In 2016, changes to the P.O.D. statutes no longer require authentic act form; a valid P.O.D. designation may be created by a depositor signing before a bank manager and two witnesses. What has remained consistent in the statutes is the protection afforded the distributing financial institution. Each of the various P.O.D. statutes (one for each type of financial institution), found under Title 6 of the Louisiana Revised Statutes governing banks, expressly exculpates the financial institution from liability to the depositor's estate, any heir, or a surviving spouse and precludes any adverse claims against the financial institution by a creditor, heir, legatee, personal representative, or any other person on account of such payment. Each of the P.O.D. statutes also contain a provision that states it does not prohibit the rights of the same such persons to assert claims against the deceased depositor.

Thus, for example, an individual who has a child under the age of 24 – the child being a forced heir under Louisiana law – may deposit funds into a bank account and create a P.O.D. designation naming someone other than the child as beneficiary, possibly a caretaker. Upon the individual's death, the bank may pay that caretaker, regardless of the child's legal right to those funds. The executor of the individual's estate, having a legal duty to recover those funds for the forced heir, could not pursue a claim against the bank to recover the funds but may pursue the caretaker, the P.O.D. beneficiary. This scenario illustrates the risk of relying on a P.O.D. designation alone. Distributions under a P.O.D. designation are not unassailable. The statutes protect the financial institutions that pay P.O.D. beneficiaries but afford no protection to beneficiaries themselves or a decedent's rightful heirs or legatees. Many times, the beneficiary is not the one lawfully entitled to receive the decedent's cash under Louisiana law, and when this is the case and the conflict cannot be resolved, litigation is the likely result here as well.

Given the risks outlined above with using a jointly titled account or P.O.D. designation alone to transfer funds to a beneficiary, we strongly urge clients to mitigate risks associated with using these tools by, first, consulting with attorneys in our firm and other advisors to formulate a comprehensive estate plan, and second, either to make transfers during life to the intended beneficiaries of cash sums or to confirm in a properly executed will the intended recipients of certain sums under a P.O.D. designation. Doing so is a critical safeguard against unintended outcomes and provides a much clearer understanding of a decedent's last wishes.



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