

Joint And POD Accounts: Weapon of Choice Of Transferees When Exerting Undue Influence?

by James F. McDonough, Jr. on October 1, 2013

Will contests alleging undue influence are not uncommon. A will was, for many years, the only means of transmitting property from a decedent to an heir. New forms of ownership were created as the result of the public's disdain for will contests and delays in transferring property through probate. The result was new forms of ownership that were designed to provide the survivor with immediate access to the bank or brokerage account. Transfer on Death (TOD), Payable on Death (POD) and joint tenancy with the right of survivorship (JTROS) accounts pass property by operation of law outside of the probate estate. Life insurance and retirement benefits are similar in that property passes in accordance with the beneficiary designation contained in form that may be filed by mail or on-line.

A person exerting undue influence will find it easier to be named as a beneficiary of a POD, TOD or JTROS account rather than by will. When a charge of undue influence is leveled, the courts use a similar analysis to that in a will contest. Typically, when the moving party is able to demonstrate that certain factors are present, a presumption in favor of undue influence arises which must then be rebutted. Undue influence is presumed when a person having a confidential relationship actively secures or procures the instrument of transfer and is a beneficiary of such a transfer. The person is able to prevail upon the donor because of the donor's ill health, frailty, lack of capacity.

A recent Florida case, *Estate of Kester*, examined the traditional factors, however, it is difficult for a reader to determine how much weight the court assigned to each factor in arriving at its conclusion. Despite being named agent under a power of attorney, the defendant was not the only child with a close relationship to the decedent. In addition, the decedent changed the beneficiary designations independently of the defendant.

In a New Jersey case, *In re Estate of Bagno*, the Appellate Division examined the use of joint accounts. Under N.J.S.A. 17:16I-5(a), the surviving joint account holder is entitled to the account unless there is clear and convincing evidence of a different intention at the time the account is created. A party may prove by the preponderance of the evidence that the surviving account holder had a confidential relationship with the donor. Once there is a presumption of undue influence, the burden of persuasion shifts to the survivor.

The Appellate Division evaluated the relationship between donor and donee, the donor's physical and mental health, the donor's reliance on the donee for care, whether the donee is a substantial beneficiary, whether account was created openly or in secret, whether the account is at variance with donor's estate plan or previous estate plans. One factor that is especially important is whether the donee assisted in establishing the account or was the account created with the help of others.

It is particularly troublesome to see an estate plan upset by a subsequent change resulting from a POD account or a beneficiary designation. Typically, the change drains the estate of liquidity or shifts the tax burden disproportionately to property passing by the will.

One constant and recurring theme in estate planning is the abuse of trust placed in agents under a Power of Attorney or in persons having a confidential relationship with a transferor. An analysis of the facts and circumstances surrounding an account designation is similar to that of a will and is just as costly.