Price & Farrington's Estate and Tax Planning *Fast*Facts

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Estate, Tax and Family Wealth Planning for Advisors and Clients

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Estate Planning Pitfalls: *Powers of Attorney; Joint Tenancy; IRA Errors*

The Pitfalls of Powers of Attorney and Joint Tenancy Titling

A durable general power of attorney (DGPOA) allows the person creating the document (the "principal") to name a trusted agent who can act on the principal's behalf in almost any situation. But because of the risk of abuse, many banks will scrutinize a DGPOA carefully before allowing the agent to act on the principal's behalf, and sometimes banks will refuse to honor a DGPOA. In a recent Florida case, Bank of America (B of A) rebuffed an agent's request that funds be withdrawn from the principal's account. The agent fought back in court and just won a $64,000 judgment against the bank.

The facts. Clarence Smith, Sr. named his son, Clarence Smith, Jr. as his agent under a DGPOA. When his father no longer wanted to manage his own finances, he asked Clarence Jr. to step in as his agent. Clarence Jr. reviewed his father's account activity and became suspicious about some withdrawals from a bank account that Clarence Sr. owned jointly with a friend from his retirement community.

Acting as his father's agent under the DGPOA, Clarence Jr. asked B of A to transfer $65,000 from the account into a new account that listed only his father as the owner. Before doing so, B of A contacted the other person named on the account. When she told the bank that she did not want the funds withdrawn and also accused Clarence Jr. of stealing his father's money, B of A refused to honor Clarence Jr.'s request. The other account owner then withdrew all of the funds from the account and placed them in her own account, effectively preventing Clarence Sr. from accessing his own money. Clarence Sr. died several weeks later.

The outcome. Clarence Jr. sued Bank of America under a Florida law that imposes penalties on financial institutions that refuse to honor reasonable requests from agents named in properly executed DGPOAs. In November, 2009, after a week long trial, a Florida jury returned a verdict against the bank and awarded $64,142.00 to Clarence Sr.'s estate. The jury found that B of A had not acted reasonably when it rejected Clarence Jr.'s request, even though the joint owner of the bank account had not agreed to the release of the funds.

Bank of America plans to appeal. "We believe that neither the facts nor the law support the verdict," a bank spokeswoman said.

The lesson. While this case clearly illustrates the conflicts that can arise through the use of a DGPOA, it also raises the issue of the proper use of joint bank accounts in estate planning. Under most state laws, when two or more people own "joint" bank accounts, each of them has the right to the entire account, no matter whose money is actually in the account. While joint accounts can often be useful, sometimes — as in this case — joint owners or their agents can disagree about the use of funds in the accounts. When that happens, the party who makes it to the bank first often wins — not a good outcome.

In this case, Clarence Jr. might have gotten lucky (pending an appeal by B of A) because the bank's assess-

Charles P. Farrington and Glenn D. Price

Happy Holidays from all of us at Price & Farrington!

Our best wishes to you and your family for a safe and joyous Holiday season.
We hope your New Year is filled with health and happiness!

Glenn D. Price
Chuck Farrington

ment that "neither the facts nor the law support the verdict" could be proven to be correct.

The moral? Look to a qualified estate planning attorney to explain the pros and cons of joint ownership, draft an effective DGPOA and assist family members when disputes arise so that the outcome isn't messy and expensive.

For a short, sweet and still very relevant discussion of this issue, see our January 2002 FastFacts: "Titling Assets in Joint Tenancy: The Best Advice is Usually "Beware".

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The Pitfalls of Improper IRA Beneficiary Planning

An account holder of an IRA died before his ***required beginning date*** (RBD), that is, the date before he was legally required to begin taking distributions from his IRA.

The account holder's beneficiary designation was: ***"as stated in Wills"***. The account holder's estate plan was designed around a revocable living trust. He also had a pour-over will as a backup document. Under the living trust, specific bequests of real estate were made to certain beneficiaries and the balance of the trust assets was to be divided and distributed among eight individuals.

Seasonal Offerings

■Why does Christmas always come just when the stores are so crowded?

■He's a man of rare gifts; hasn't given one in years.

■Sign in a big store: "Five Santas, No Waiting!"

■Christmas bills are the real mourning after.

■We got the kids something nice for Christmas: their own apartment.

■The guy is so cheap; he sends one Christmas card out each year—in the form of a chain letter.

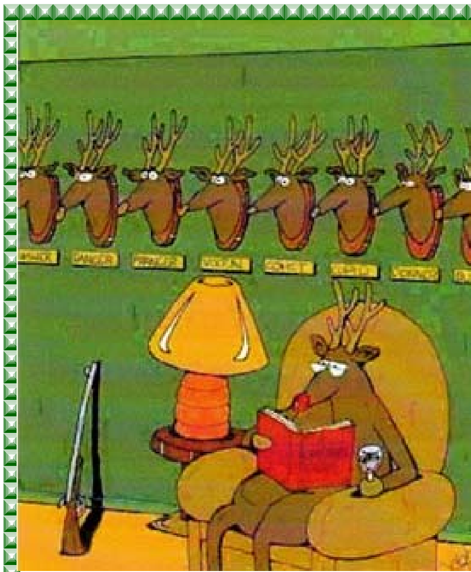
■Oh, Honey, you gave me just what I needed to exchange for what I wanted.

The trustee pursued and got a state court order confirming that the proper interpretation of the beneficiary designation was the eight individual beneficiaries of the revocable living trust. In short, the court order had the effect of moving the beneficiaries of the revocable living trust into the IRA beneficiary designation as though they were direct beneficiaries under the IRA beneficiary designation.

The stakes of this private letter ruling were high. If the state court order was recognized by the I.R.S., the eight beneficiaries could each have separate IRAs and take the ***required minimum distributions*** (RMDs) over the life expectancy of the oldest named beneficiary. If, on the other hand, the language of the IRA beneficiary designation ("as stated in wills") was interpreted to specify that the ***estate*** was the beneficiary, *the entire IRA would be required to be distributed out within five years of the account holder's death.* This would eliminate any possibility of a long-term, tax-deferred ***stretch out*** of the IRA over the *oldest* beneficiary's life expectancy, thereby gutting the value of the IRA as an effective long-term tax-deferred, wealth-building tool.

The I.R.S. relied heavily on Regulation 1.401(a)(9)-4QA1, which states: ***"The fact that an account passes to individuals under a will or otherwise under applicable state law does not make that individual a designated beneficiary unless the individual is designated as a beneficiary under the plan."***

Relying on the above, the I.R.S. said that the court order was meaningless for RMD purposes. Therefore, the estate would be treated as the plan beneficiary and the five-year rule applies, *forcing the distribution of the entire IRA over a period of five years.* (I.R.S. Private Letter Ruling 200846028).



All of the other reindeer *used* to laugh and call him names...

The moral of this tale? ***The proper use of IRA beneficiary designations is a critically important component of our clients' estate, tax, asset protection and wealth-transfer planning. The designations must be consistent with the client's estate planning goals and must be drafted properly to avoid disastrous outcomes. Clients should always work with a knowledgeable estate planning attorney and financial advisor. [See our April, 2006*** **Fast-Facts:** ***"The IRA Inheritance Trust:A New Strategy to Protect Your Family"]*** ▣

Give your family the best holiday season and New Year's gift: a comprehensive, updated estate plan that reflects your family's circumstances, wishes and goals, designed for you by an experienced estate planning attorney. We're here to help.

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