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MEMORANDUM ABOUT ASSETS THAT NAME A BENEFICIARY

I have written this memorandum to help you understand problems that my clients have experienced with assets that name a beneficiary who gets the asset upon your death.

There are different ways that you can wind up with beneficiaries designated on your assets. Frequently, bank personnel will suggest that you put your funds in these accounts. Florida Statute § 655.82 allows you to hold funds in a special kind of account called a "pay-on-death account." With this account you may hold funds in your own name and make them payable at your death to beneficiaries that you name. The bank personnel make this suggestion because upon your death these funds are paid directly to the surviving beneficiaries.

Also stock brokers or other investment advisors may have suggested that you hold assets in accounts that allow you to name beneficiaries.

I am sure that the bank personnel, stock brokers and other investment advisors think that their advice to hold your assets in beneficiary accounts is in your best interest, but they are not lawyers. They do not understand the problems that can be caused by this form of ownership. I have written this memorandum to make you aware of problems that can be caused by having assets that name a beneficiary.

Before discussing the problems, you should understand that owning an asset that names a beneficiary is highly preferable to holding the asset in joint names with your beneficiaries. This is so because with an asset naming a beneficiary, neither your beneficiary nor your beneficiary's creditors can take your funds while you are living. Even if you can trust your beneficiary, joint ownership can cause you to lose your assets to the joint account holder's creditors.

With that said, here are some typical problems with assets that have beneficiary designations:

Nullifies Effect of Power of Attorney. In my legal opinion, this is the most serious problem with assets that name beneficiaries. You may have given someone you trust (called "attorney in fact" in this memorandum), a power of attorney to handle your affairs if you become incapacitated. The beneficiary designation on an asset may keep your attorney in fact from being able to use that asset for your care unless your guardian has a court declare you incapacitated and starts a guardianship.

Florida Statute § 709.08(7)(b)5 prohibits your attorney in fact from creating, amending, modifying, or revoking any document or other disposition effective at your death. Among other things, this prohibition keeps your attorney in fact from using assets with a beneficiary designation for your care. If the asset with a beneficiary is needed for your care, the attorney in fact would have to have a court declare you incapacitated and start an expensive guardianship which is what you were trying to avoid in the first place.

Additionally, one of the main reasons that my clients give a power of attorney to a trusted person is so that if they become incapacitated, the attorney in fact can qualify them for Medicaid as soon as possible. Medicaid will pay for your nursing home bill and medical expenses when you run out of money. Your attorney in fact may be able to use your power of attorney to shelter your assets so that so that they are not all used on the nursing home before Medicaid starts paying.

One of the methods used to shelter your assets if you become incapacitated is for your attorney in fact to make gifts. Your assets can't be given away all at once, but there are gifts that can be made without the risk of Medicaid refusing to pay your nursing home and medical bills. Unfortunately, the Florida law does not allow the attorney in fact to make these gifts from assets that have a designated a beneficiary. Therefore your attorney in fact may have to have the court declare you incapacitated and start a guardianship so the court can order that the assets that name a beneficiary can be used for your care.

Assets May Not Be Distributed as You Intend. There are other problems with the assets that name a beneficiary. The basic problem is that changing circumstances can result in your assets being distributed in a way that you would not want. With pay-on-death accounts, when circumstances change, the Florida Statutes will decide where the funds go instead of you making the decision.

Incorrect Distribution When One Beneficiary Dies. The overwhelming majority of my clients leave their assets to their loved ones, per stirpes. In part this means that if a beneficiary dies before you, his or her children will take that gift in equal shares. However, if you name more than one beneficiary on a pay-on-death account and one of the beneficiaries dies, Florida Statute § 655.82(3)(a) requires that the other beneficiaries named on the account take the share of the deceased beneficiary. Not the children of the deceased beneficiary as most people would have it.

Incorrect Distribution When Sole Beneficiary Dies. To solve the foregoing problem, some people open a separate pay-on-death account for each of their beneficiaries. This apparent solution presents even greater problems if the beneficiary dies before you. In this case, the children of the deceased beneficiary still will not receive the funds. Rather, in accordance with Florida Statue § 655.82(3)(b) the funds are payable to your estate and divided in the proportions provided for in your Will or by statute if there is no Will. This causes the children of the deceased beneficiary to receive less than you intended because they would be sharing what should have been theirs with your other beneficiaries.

Some Beneficiaries May Lose Everything. Another problem with the separate pay-on-death accounts for each beneficiary is that one or more children can receive nothing while others get their full share. An example of when this can happen is if you become incapacitated and a pay-on-death account must be liquidated for your care. The beneficiary of the account that was liquidated obviously gets nothing. The beneficiaries of the accounts that did not have to be liquidated before your death, get their full shares.

Incorrect Distribution When Will Is Intended to Control. Another problem with these accounts is that many people don't understand that these gifts are paid in addition to gifts in their Will. This often results in some beneficiaries receiving much more than you intended.

Funeral Expenses and Debts Not Paid. Many people believe that their debts, including burial expenses, are paid out of funds held in their pay-on-death accounts. This is not the case. These funds are paid directly to the beneficiaries with no provision for payment of your funeral expenses or debts. I know that it's hard to believe, but it is common for one or more of the beneficiaries to refuse to pay their share of these expenses after your death. Also beneficiaries that may have been willing to pay these expenses are unable to do so because of incapacity or some other legal problem.

Shortsighted Solution. Some people have the attitude that if circumstances change, they will simply change the beneficiaries on the assets. This is fine if you are able to do this, but you may be incapacitated when circumstances change. In this situation you would not be able to make the changes you would have wanted. It is shortsighted to assume that you will be able to solve the problem in the future.

Advice. Consequently, my advice is that you not use pay-on-death accounts for estate planning unless you speak to me first about the circumstances.