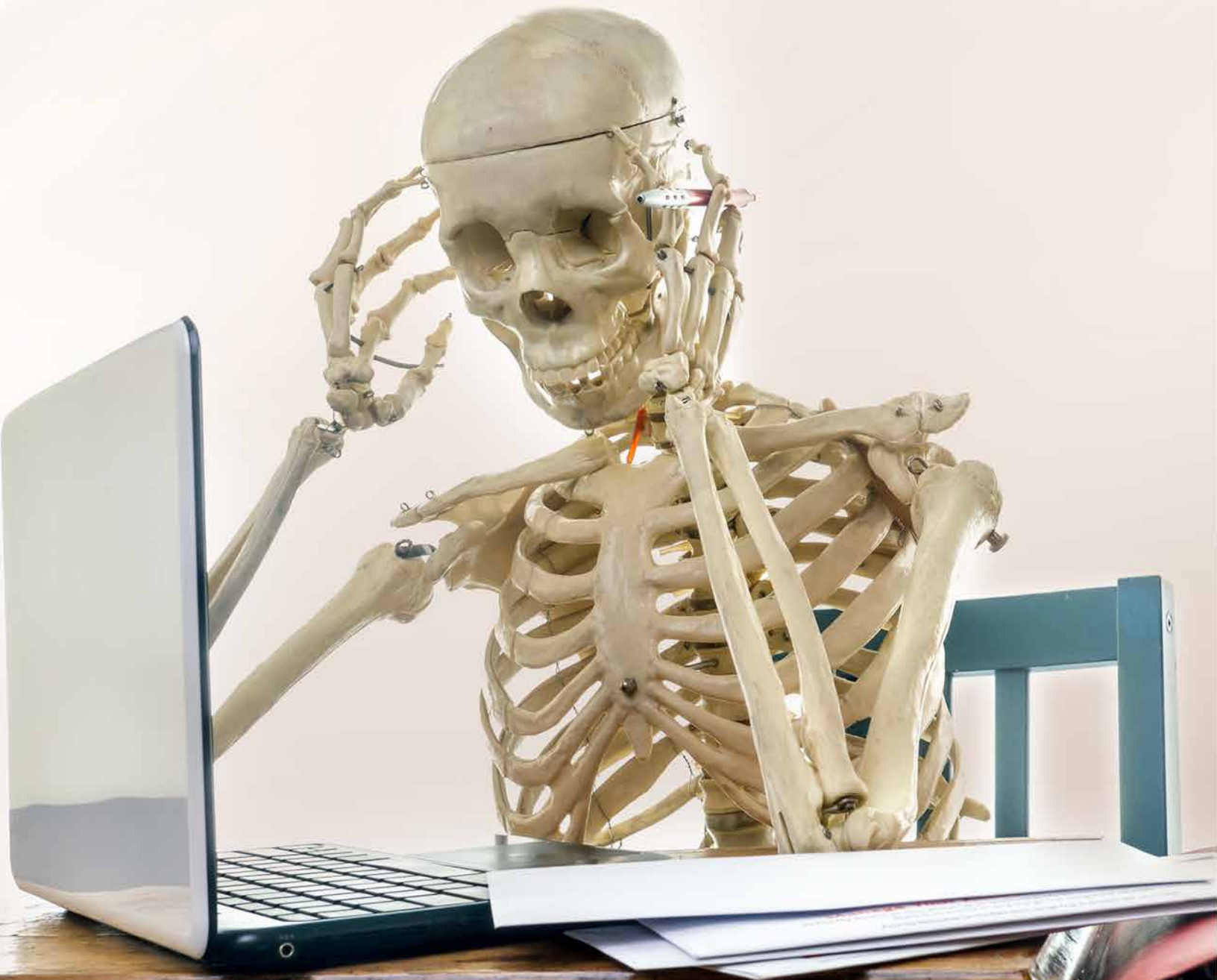


# BE WAR Y OF TRANSFER ON DEATH ACCOUNTS

By Joel A. Mendler



Other states have provided low-cost and automatic methods to transfer securities and security accounts of a decedent without the necessity of a succession proceeding through revocable beneficiary designation forms indicating “payable on death” (POD) or “transfer on death” (TOD).<sup>1</sup> The Louisiana Legislature rejected TOD beneficiary designations for securities and security accounts on six separate occasions, including in 2020.<sup>2</sup> Nevertheless, many brokers representing Louisiana residents have opened security accounts with TOD beneficiary designations, as well as accounts titled as common law tenants in common (TIC), joint tenants (JT) or joint tenancy with rights of survivorship (JTROS). In *Succession of Schimek*,<sup>3</sup> the 4th Circuit Court of Appeal upheld a TOD beneficiary designation, noting that the Louisiana Legislature had neither explicitly authorized nor specifically prohibited TOD transfers for securities accounts. However, in *Succession of Angus*,<sup>4</sup> the 2nd Circuit Court of Appeal recently refused to recognize a TOD beneficiary designation.

Louisiana enacted new TOD legislation for securities effective as of and applicable to registration of securities beginning in 2022.<sup>5</sup> A registering entity is protected from liability for reregistering the security or transferring the security account in the name of the designated beneficiary of the deceased owner, provided it acts in good faith reliance (as defined in R.S. 10:1-201) on (a) the registration beneficiary form; (b) the statute; and (c) on information provided to it by affidavit of the deceased owner’s succession representative, or by the surviving beneficiary or by the surviving beneficiary’s representatives.<sup>6</sup> However, reregistration and transfer to the TOD beneficiary has no effect on ownership.<sup>7</sup> The registering entity’s protection from liability does not affect the rights of the succession representatives, surviving spouses, heirs, legatees, forced heirs or creditors in disputes between themselves and other claimants to ownership of the security and its value or proceeds.<sup>8</sup> Liability protection of the registering entity does not extend to a registration or payment made after it receives written notice from any claimant to any interest in the security objecting to the implementation of a registration in benefi-

ciary form.<sup>9</sup>

Only individuals whose registration for a security shows sole ownership by one individual or multiple ownership by two or more with right of survivorship, rather than as joint community,<sup>10</sup> co-owners in indivision or tenants in common, may obtain registration in beneficiary form.<sup>11</sup> Registration can be shown by “transfer on death,” “TOD,” “pay on death,” “POD” or when registration is in the names of multiple owners by “joint tenants with the right of survivorship” or “JTROS.”<sup>12</sup> The registration does not constitute a donation *inter vivos* or *mortis causa* and remains revocable by the account owner.<sup>13</sup> The registration must be executed by the owner in authentic form or by act under private signature in the presence of two witnesses.<sup>14</sup> The registration statute applies even if the decedent designates a beneficiary by will.<sup>15</sup>

The terms and conditions under which the registering agent will receive requests for registration and the implementation of the registration may be contained in a contractual TOD beneficiary agreement (Agreement) separate from the specific beneficiary designations.<sup>16</sup> There is no standardized form. Often the customer does not read the Agreement before signing, along with all other documents necessary to open the brokerage account. Even if read, the TOD Agreement may be difficult to comprehend, and the customer may not understand its limitations and the alternatives. The employee of the registering agent is not equipped to explain its ramifications or render legal advice. The beneficiary designation and Agreement may have been offered a simple question as to whether the customer wants to designate someone to receive the account at the customer’s death.

There are numerous problems and risks associated with TOD Agreements.

**Ownership.** Unlike the TOD registration laws of other states, registration under Louisiana’s law will not necessarily confer ownership of the account in the beneficiary at the account holder’s death, despite the intent and expectation of the account holder. If the account owner dies intestate, heirs may make a claim against the beneficiary. If the account holder dies testate, leaving his or her estate to someone other than the beneficiary, the legatee may make a claim against the beneficiary. Should at-

torneys draft wills which provide a specific bequest of all TOD accounts to whoever is the designated beneficiary in case the attorney is unaware of any such accounts or if the client establishes such account after the will is executed?<sup>17</sup>

**Governing Law.** The Agreement generally provides that its validity, effect and enforcement are governed by the laws of another state, of which neither the customer, the registering entity’s employee nor even the customer’s lawyer has knowledge.<sup>18</sup> In a contested matter, this raises the *Schimek* contract, choice of law and state public policy issues.<sup>19</sup> The Agreement may specifically state that its governing law provision applies without giving effect to principles of conflicts of laws.

**Spouses.** If a community account or security is solely in the name of one spouse who designates someone other than his or her spouse as TOD beneficiary, the surviving spouse would have to assert a claim against the TOD beneficiary to recover the surviving spouse’s community interest. The recovery may be complicated if the TOD beneficiary resides in another state. Even if the account initially was the owner’s separate property, commingling over time may convert all or part of the account into community property.<sup>20</sup> The Agreement may require notarized spousal consent if the spouse is not the sole TOD beneficiary and may permit the consenting spouse to revoke such consent any time before the account owner’s death. Upon the account holder’s death, the spouse’s waiver of a community interest may constitute a gift for gift tax purposes to the TOD beneficiary. If the spouse is the TOD beneficiary, some estate tax planning flexibility may be lost if it would be more advantageous to apply the deceased owner’s available estate tax exemption amount to the transfer since an outright transfer automatically qualifies for the unlimited marital deduction. Finally, the use of a TOD beneficiary may preclude the use of the alternate valuation date to reduce federal estate taxes.

**Divorce.** The Agreement may provide upon divorce either that the TOD beneficiary designation in favor of the former spouse is automatically revoked or may provide that it remains in place until the account owner submits a new beneficiary designation. If the Agreement is silent,

there may be a conflict of laws issue.<sup>21</sup>

**Minors.** If the TOD beneficiary is a minor, the Agreement may require the appointment of a tutor by the court or the appointment of a custodian under the UTMA<sup>22</sup> upon execution of the Agreement or upon the account owner's death, resulting in additional delays and costs.<sup>23</sup> Alternatively, the Agreement may grant the registering entity the right to make payment to someone else for the minor's benefit. In any event, the minor will have unfettered access to the account upon attaining the age of majority.

**Incapacitated Beneficiaries.** The Agreement may have similar provisions for payments to incapacitated beneficiaries upon the account owner's death as applied to minors. However, if the incapacitated beneficiary, whether spouse, children or others, receives or is likely to receive means-tested governmental benefits, such as SSI and/or Medicaid, payment under the TOD designation could jeopardize benefits.

**Contingent Beneficiary.** Agreements often have confusing or nonexistent alternate designations if the TOD beneficiary predeceases the account owner or disclaims the account. The Agreement may provide that, if the beneficiary predeceases the owner, the account is paid back to the deceased account holder's estate or, in the case of the death of one of multiple beneficiaries, the deceased or disclaiming beneficiary's share shifts to the other beneficiaries or to the deceased or disclaiming beneficiary's descendants. The Agreement may have a special survivorship provision. Again, these provisions are rarely discussed with the customer.

**Change of Beneficiary.** The Agreement may preclude any guardian or conservator of the account holder from changing the TOD beneficiary or may recognize or allow a legal representative to change it, but only with court approval.

**Dispute Resolution.** The Agreement may contain binding arbitration provisions for disputes between the account owner and the registering entity or may grant the registering entity the right to require all parties, including other claimants, to adjudicate disputes by arbitration or other methods acceptable to it before transferring funds while freezing the account until it receives a court order.

Although TOD accounts may be appropriate in certain circumstances, they should be coordinated with the client's overall estate plan. Clients should be advised that the TOD beneficiary designation does not guarantee ultimate ownership of the brokerage account in Louisiana. Attorneys advising on estate plans should review all current beneficiary designation forms for nonprobate assets, particularly any TOD Agreement accompanying a TOD beneficiary form. Over time, changes in the value of TOD accounts and family situations may frustrate the client's original intent, but the client may fail to modify the TOD arrangement or, if modified, without the assistance of an experienced estate planning attorney. Nonprobate assets may constitute a significant part of the client's assets and liquidity. Access to cash to pay the decedent's bills, expenses and taxes by the succession representative may become problematic, resulting in conflict and litigation between the decedent's heirs, legatees or creditors and the TOD beneficiary as to responsibility.<sup>24</sup> A properly drafted will or, if probate avoidance is desired, a properly drafted revocable or irrevocable *inter vivos* trust, all with the advice of competent legal counsel, may offer more flexibility to clients than TOD Agreements.

## FOOTNOTES

1. Every state had adopted some version of the Uniform Transfer on Death Security Registration Act. At least 29 states, along with the District of Columbia and the U.S. Virgin Islands, have some form of Transfer on Death Deed legislation for real estate, of which 19 have adopted the Uniform Real Property Transfer on Death Act. See Gerry B. Beyer, "Transfer on Death Deeds Survey" prepared by the American College of Trust and Estate Counsel (updated 2/20/2021).

2. Certain financial institutions in Louisiana are authorized by statute to offer TOD beneficiary designations on accounts. La. R.S. 6:314B (banks); La. R.S. 6:1255 (savings banks); La. R.S. 6:653.1 (credit unions); La. R.S. 6:766.1 (savings associations). These statutes were designed primarily to protect the financial institutions from claims and liabilities and do not prohibit any right of forced heirs, spouses, creditors or any other person who may have rights or claims to make claims against the TOD beneficiary.

3. 2019-1069 (La. App. 4 Cir. 6/10/20), 302 So.3d 78. The court noted that the issue was one of contract law and choice of law and neither community property nor forced heirship rights were involved. See also, La. R.S. 10:8-102 and 10:8-107 cited at fn. 17 in Schimek.

4. 54,180 (La. App. 2 Cir. 1/2/22), 333 So.3d 555. The court distinguished Schimek, in which the dece-

dent executed the designation after he executed his will and confirmed his beneficiary designations via a letter after the TOD form was executed.

5. La. R.S. 9:1711, *et seq.* (Act No. 167 of 2021 Regular Session) known as the Louisiana Uniform Transfer on Death Security Registration Act.

6. La. R.S. 9:1711.6C.

7. La. R.S. 9:1711.5A; La. R.S. 9:1711(1).

8. La. R.S. 9:1711.6D.

9. La. R.S. 9:1711.6C.

10. See La. R.S. 9:1421 (joint community securities account).

11. La. R.S. 9:1711.1.

12. La. R.S. 9:1711.3.

13. La. R.S. 9:1711.4.

14. La. R.S. 9:1711.3.

15. La. R.S. 9:1711.5B.

16. La. R.S. 9:1711.7.

17. Louisiana does not permit incorporation by reference in wills. Succession of Ledet, 170 La. 449, 128 So. 273 (1930); Succession of Perritt, 52,210 (La. App. 2 Cir. 8/15/18), 253 So. 3d 861, *writ denied*, 18-1525 (La. 11/20/18), 256 So.3d 994.

18. La. R.S. 9:1711.2.

19. The Angus court stated that the TOD form contravened Louisiana law and public policy and that the choice of law provision embedded in a preprinted form does not change the nature of the community funds.

20. See, e.g., Lane v. Lane, 375 So.2d 660 (La. App. 4 Cir. 1978), *writ denied*, 381 So.2d 1222 (1980).

21. Since the registration is contractual and not considered a *mortis causa* transfer, automatic revocation under La. Civ.C. art. 1608(5) would not apply. See also, La. R.S. 9:2047.

22. Louisiana's UTMA is found at La. R.S. 9:571-773.

23. Although a parent may be the natural tutor of a minor child, the parent still may have to be appointed by the court to handle the minor's funds. La. C.C.P. arts. 4061 and 4262. A surviving parent may expend, without court approval, the fruits of a child's property for the benefit of the family. La. Civ.C. art. 230.

24. See, La. Civ.C. arts. 1419-1421 (estate debts) and La. Civ.C. arts. 1424-1425 (administration expenses)

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