

The Lawyer's Revenge, Part 2

by:

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We have previously written about the vast contribution made to the financial well being of the legal profession by persons who attempt to write their own wills, with or without with the help of a “canned” legal form system such as LegalZoom.

New evidence has recently emerged suggesting that the only thing that may be more lucrative for the legal profession than a do-it-yourself will is the use of joint bank accounts for “probate avoidance.”

Example:

In *In re Estate of Hemphill*, No. 2014-CA-00479-COA (Feb. 9, 2016) Elva Mae Hemphill, aged ninety-nine, died without a will. The bulk of her estate comprised five certificates of deposit and a checking account, all totaling well over \$600,000.

As of April 6, 2007, Elva Mae's sisters were joint owners of her various certificates of deposit and savings account. On that day, Elva Mae signed a power of attorney appointing her niece and nephew-in-law (Geraldine and Larry) as her attorneys-in-fact. The power of attorney instrument provided that Geraldine and Larry were “not allowed to personally gain from any transaction” that either of them executed on behalf of Elva Mae; that “all assets should remain separately owned if at all possible”; and that Geraldine and Larry were not to commingle their funds with Elva Mae's or receive any “compensation” for serving as attorneys-in-fact. Nevertheless, Geraldine and Larry redeemed or liquidated Elva Mae's CDs and savings accounts, used the proceeds to purchase new CDs and deposited other funds into a checking account with Geraldine, Larry and Larry's wife (another of Elva Mae's nieces) named as joint owners. Thus, these assets all passed to Geraldine, Larry and Larry's wife, leaving Elva Mae's sisters with nothing. Another of Elva Mae's nieces was appointed administrator of her estate and, on behalf of the estate, filed suit against Geraldine, Larry and Larry's wife to recover the funds.

The chancery court dismissed much of the estate's case on the ground that the estate did not have standing to sue for recovery of funds attributable to Elva Mae's CDs and savings account since they had been jointly held with Elva Mae's sisters, and therefore they, and not the estate, were the proper plaintiffs. The Court of Appeals reversed that chancellor and held that Elva Mae's surviving sisters were not the proper parties to challenge transactions executed in violation of the terms of the power of attorney. The Court said that a power of attorney is nothing more than one form of a principal-agency relationship in which the attorney-in-fact owes certain duties to the principal. However, an agent is not liable to third parties for breaches of the duties that he owes to his principal. Thus, Elva Mae's surviving sisters would not have been the proper parties to challenge transactions executed in violation of Elva Mae's power of attorney. Geraldine and Larry owed those duties and obligations to Elva Mae, not her sisters. Elva Mae could have sued Geraldine and Larry during her life, and that right passed to her administrator upon her death.

The Court of Appeals held that the estate had standing to challenge **all** transactions executed in violation of the power of attorney.

Elva Mae had entered into some similar banking transactions on her own. With regard to those transactions, the estate relied on the presumption of undue influence arising from a confidential relationship to argue that those funds should be turned over to the estate as well. The chancellor and the Court of Appeals determined that the defendants had successfully rebutted the presumption of undue influence raised by the confidential relationship in this case by clear and convincing evidence.

Elva Mae had wanted to avoid probate and to ensure that people who “never set foot in [her] house” would not get her money. She stated, “I’m gon’ fix it where nobody won’t get it, except the ones I want to have it.” Instead, and despite her wishes, her estate was administered in court, and there was (no doubt) expensive litigation to determine who would get her money, and most likely, a large hunk of her assets did not wind up the hands of her intended beneficiaries.

The Solution:

What should Elva Mae have done? Any one of several options were available. First, she could have kept all her money in her own name and allowed her agents under her power of attorney to use her funds for her care and support. Then, she could have prepared a will leaving the funds at her death to her intended beneficiaries. Yes, there would have to be an administration of her estate, but it would have been simple and uncontested. Second, to avoid probate, she could have used pay-on-death (“POD”) accounts, clearly stating who her death beneficiaries should have been. These should have been created by her, not through her attorneys-in-fact. The Court found that she was legally competent to do so. To prevent anyone from challenging her decisions, she should have had will drawn up leaving her estate to those same individuals. Even if it might never become necessary to probate the will, the fact that it could be probated would be a discouragement to anyone who might attempt to challenge the pay-on-death accounts, and greatly decrease the likelihood of success of such a challenge. Third, Elva Mae could have created a revocable trust and transferred all her assets into it, naming testamentary beneficiaries. Her named successor Trustee(s) would use the funds to care for Elva Mae during her lifetime and distribute the remaining funds to her named beneficiaries after her death. If done correctly, probate would be avoided.

The use of joint accounts (other than between spouses who share the same financial risk) for estate planning is a recipe for disaster. They invite misunderstandings, bitter feelings and litigation. Almost everyone is guaranteed to be dissatisfied. For example, let’s suppose that Elva Mae actually had a will naming her sisters as her legatees. Some years after signing her will, Elva Mae decides that Geraldine, a niece who lives nearby, should be able to help her with account business and so she asks the bank to add Geraldine’s name to the account. The bank offers Elva Mae a joint account with Geraldine, which they sign. Some time later, without changing her will, Elva Mae sells her house and deposits the proceeds into the joint account pending decision on another investment. Unfortunately, Elva Mae dies unexpectedly, and Geraldine becomes the survivor and apparent owner of the entire account. This raises many questions. Why did Elva Mae establish the joint account? Would she have deposited the sale proceeds from her home into this account if she had known Geraldine could claim the account balance as her own, despite the terms of Elva Mae’s will? Did Elva Mae really just want a “dual signature” arrangement on her account so Geraldine could help her with her financial affairs if she became incompetent? Was Elva Mae aware that she was giving Geraldine ownership rights when she requested that she be added to her account? Were there other options available to Elva Mae? Were they explained to Elva Mae? How can these questions be answered now that Elva Mae is gone?

Another problem arises if more than one individual is named as joint owner with the depositor. In that case, under state law, the survivors all own the account equally; however, any one of them can withdraw the entire account. Also, the bank or another creditor of any one of the joint owners can seize the entire account. For example, Elva Mae adds Geraldine and Larry to her account. Unbeknownst to her, Larry has taken out a loan from the bank, which gives the bank a lien on all of his accounts in the bank. If the bank takes the account to satisfy Larry's loan, then Geraldine could sue Larry to recover her share of the account, but Larry probably won't be able to pay.

Where the depositor does not intend the other individual to have current ownership rights in the account, or be able to withdraw the entire account during the depositor's life or after death, but only wants the other individual to be able to write checks to assist the depositor with her financial affairs, then the solution would seem to be an "agency" or "convenience" account with an additional "pay on death" feature. For example, the account might be styled:

Payable to Elva Mae Hemphill. Additional
authorized signatory: Larry D. Ferris; p.o.d.
Geraldine Covington, Larry D. Ferris and Catherine
Ferris.

The bank may or may not require the "agent" to be the named agent under a separate power of attorney.

The Moral of the Story:

In order to save a modicum of attorney's fees and avoid "complication," many people choose "self-help" of some kind or another in the area of estate planning. Unfortunately, the evidence continues to pile up that by doing so, their intentions are not carried out, their loved ones fight, and their estate is depleted by the very thing they sought to avoid in the first place—attorneys' fees. But, God bless them, they are the legal profession's best friends.