Folks:

Take-Away: Transfers-on-death designations are useful in some situations, but they are not appropriate in every case.

Background: Transfer-on-death (TOD) arrangements are popular for bank accounts and securities because, in large part, they are neither dependent on a Will be admitted to probate, nor the length and complexity of a Trust to transfer wealth to an intended beneficiary. TODs are often the path of least resistance of estate planning attorneys who are directed by their client to 'keep it cheap and simple' since their utility is dependent solely on a death certificate. That said, while a TOD arrangement can be useful, they also can present some disadvantages that are often overlooked.

EPIC: The Michigan Estates and Protected Individual's Code (EPIC) adopted the Uniform Transfer on Death Security Registration Act. [MCL 700.6301- 700.6310.] This statute authorizes the transfer-on-death (TOD) that results from a registration of a security or an investment account in beneficiary form that is effective by reason of *contract* with respect to the registration between the asset owner and the registering entity. Key aspects of that statute include:

> **Contract:** A TOD is *not testamentary;* as noted, it is a contract. [MCL 700.6309(1).]

Creditors: The TOD arrangement will not limit the rights of creditors of the security owner against beneficiaries and other transferees under other Michigan laws. [MCL 700.6309(2).]

No Change in Ownership Until Owner's Death: Naming a TOD beneficiary on a registration in beneficiary form does not affect ownership of the security or the account until the owner's death. Such a registration in beneficiary form can be canceled or changed at any time by the sole owner or all the surviving owners without the consent of the beneficiary. [MCL 700.6306.]

Proof of Death: Upon the owner's death, or the last to die of all multiple owners, ownership of securities registered in TOD beneficiary form passes to the beneficiary or beneficiaries who survived all owners. On proof of death of all owners and compliance with any applicable requirements of the registering entity, a security registered in beneficiary form may be reregistered in the name of the beneficiary or beneficiaries who survived the death of all owners. Until the division of the security after the death of all owners, multiple beneficiaries who survive the death of all owners will hold their interests as tenants in common.

Failure to Survive Owner: If no beneficiary survives the death of all TOD account owners, the securities in the account will belong to the estate of the sole owner, or the estate of the last to die of all multiple owners. [MCL 700.6307.]

Advantages of a TOD Arrangement: Some of the advantages of a

TO arrangement include the following:

Simplicity: A TOD arrangement is simple to understand, as all that is normally required is the beneficiary must provide the owner's death certificate and proof of identity, e.g., a driver's license or passport, to the registering entity.

No Probate Fee: Since the transfer of the TOD assets occurs outside of the probate process, the probate estate's Inventory Fee will not include the value of the TOD assets.

Confidentiality: The TOD asset avoids being included in the owner's probate estate (or disclosed in his/her Will or Inventory); the account and the TOD account's assets will not become a matter of public record as part of the probate 'process.'

Immediate Access to Funds: A TOD account can be useful to serve as a post-death convenience account to give the beneficiary funds to cover expenses until a Personal Representative is formally appointed by the probate court and gains access to the decedent's assets. This may be helpful in those cases where the family might not otherwise be able to advance funds to cover estate administration expenses during that delay period before the Personal Representative is appointed.

Basis Step-up: Since the owner of the TOD account is treated as the sole owner until his/her death, the securities held in the TOD account will be subject to a 100% income tax basis adjustment to their fair market value as of the date of death, which might be advantageous to a surviving spouse.

Example: Fred and Wilma are married. They own almost all their assets jointly; their assets are held in a joint Trust. Fred is a rabid Donald Trump supporter who wants to invest in Home Depot; the owner of Home Depot is a major financial contributor to Mr. Trump's campaign. Wilma is on the other end of the political spectrum; Wilma is adamant that she will never own any Home Depot stock due to the support its key owner provides to Mr. Trump. If Fred decides to invest in Home Depot stock through their joint Trust, and Fred dies first, there will only be a 50% increase in the Home Depot stock. If Wilma is a woman of her word, and she will promptly sell the Home Depot stock shortly after Fred dies, Wilma will incur some capital gains and must pay income taxes. Instead, if Fred purchased the Home Depot stock in a TOD account, naming their joint Trust as the beneficiary, if Fred dies first, the Home Depot stock will be immediately transferred to the joint Trust. The Home Depot stock will have its tax basis adjusted to the date of Fred's death. Wilma, as the successor trustee of the joint Trust, will then sell the Home Depot stock and not incur any capital gain on the Home Depot stock's sale. [This is a silly example, but I suspect that many marriages are strongly divided by politics these days, and many strong emotions are expressed by refusing to support public companies that financially back one candidate over another.]

Disadvantages of a TOD Arrangement: Some of the disadvantages of a TOD arrangement include the following:

Piecemeal Planning: TOD designations are piecemeal, meaning that they are effectively asset-by-asset planning. A separate TOD designation will be required for each asset.

Every TOD Beneficiary Designation Must be Periodically Reviewed: Each time an estate plan is updated, the TOD designation will have to be reviewed and possibly updated. It will be important that the TOD designation is always monitored to confirm that it is consistent with the owner's estate plan.

Contingency Planning Frustrated: It is often a challenge to provide for contingencies, like the beneficiary predeceasing the account owner, when a short TOD beneficiary designation is used. Some TOD registering entities may accept a contingency in a TOD designation, but other registering entities may decline to allow contingencies, or may limit the number of contingencies.

Naming a Trust as Beneficiary: Some registering entities may not accept a Trust as the beneficiary in a TOD designation.

No Protective Trust 'Wrapper:' A TOD designation results in the beneficiary receiving the security outright, which means that the security will be subject to estate taxes on the beneficiary's death, and subject to the claims of creditors, ex-spouses, and Medicaid spend-down obligations.

Estate Complications: A TOD designation can result in tension and stress if the owner's estate does not possess enough liquidity to pay the owner's debts, expenses, taxes, or pre-residuary bequests. The TOD beneficiary may balk at contributing his/her share of the amount that is needed by the estate's Personal Representative. Thus, the Personal Representative may have to incur legal fees to gain access to some of the TOD assets needed to pay estate debts, taxes, and expenses. Moreover, since the recipient of a pre-residuary bequest is not treated as a creditor of the owner's estate, TOD assets cannot be accessed (or 'clawed back') from the TOD beneficiary to pay bequests.

Foment Disputes?: A TOD designation can also result in confusion. If the purpose of the TOD arrangement was to place funds in the hands of the TOD beneficiary to be used to cover expenses on the owner's death, the TOD beneficiary could turn around and claim that the TOD assets are his/her's, and then claim a reimbursement from the owner's estate, leading to more estate litigation.

Conclusion: Before individuals become overly enamored with the simplicity of TOD beneficiary arrangements, they also need to be made aware of the disadvantages that arise from the use of those 'direct-payment' accounts.

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