

The ABCs of PODs, TODs, and JTWROS
Opportunities and Pitfalls in Estate Planning and Administration

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A. AVOIDING PROBATE WITH ASSET TITLING AND CONTRACTS

1. Joint Tenancy with a Right of Survivorship (JTWROS). Titling property among two or more owners as “joint tenants with a right of survivorship” means that the asset (a) belongs to all named owners while they are living, (b) on death, the property passes to the surviving joint owner.
 - a. Real Estate
 - i. Oregon. Oregon does not recognize real estate titled as JTWROS. ORS 93.180.
 1. Married co-owners are presumed to own real property as tenants by the entirety. ORS 93.180(1)(b).
 2. Unmarried co-owners are presumed to own property as tenants in common. ORS 93.180(1)(a). However, “a declaration of a right to survivorship creates a tenancy in common in the life estate with cross-contingent remainders in the fee simple.” ORS 93.180(2). AKA Erickson deed
 - ii. Washington. Ownership of real property as JTWROS is recognized in Washington. RCW 64.28.010.
 - b. Bank and Brokerage Accounts. An account may be titled among one or more owners with a right of survivorship, with the result that the asset will ultimately pass to the last surviving joint owner.
 - i. The issue arises when the owner names a co-owner to assist with asset management while living, but did not intend for the co-owner to have a ROS (the “convenience account”).
 1. In Oregon, on the death of an owner, the balance of the account is *rebuttably presumed* to belong to the surviving joint owner(s). ORS 708A.470(1); ORS 723.480(1) (credit union accounts.)
 2. In Washington, the account belongs to the surviving joint owner *unless there is clear and convincing evidence of a contrary intent at the time the account was created*. RCW 30A.22.100(3).
 - c. Community Property Note. In Washington, joint tenancy property held by spouses is presumed to be community property.
2. Tenancy by the Entirety. In Oregon, real estate owned jointly by married persons is presumed to be owned by them as tenancy by the entirety. Each spouse owns the “entire” property while both are living. Following the death of the first spouse, the surviving spouse owns the entire interest in the property.
3. Payable on Death/Transfer on Death (POD/TOD). This is a contractual means of naming a beneficiary of an asset that takes effect on the death of the last living owners. The named beneficiary does not have any ownership interest in or right to the property while living.
 - a. Real Estate: The TOD Deed! Oregon and Washington have both adopted the Uniform Real Property Transfer on Death Act (URPTDA). URPTDA provides a method for transferring real property on the death of the owner without probate by recognizing the option of recording of a transfer-on-death deed. A TOD deed

designates a beneficiary or beneficiaries who will acquire title to specified real property on the individual's death.

- i. Oregon: See ORS 93.948–93.979, effective January 1, 2012.
 - ii. Washington: See RCW 64.80, effective June 12, 2014.
 - b. Bank and Brokerage Accounts. On the death of the last account owner, the account passes to the living POD designee(s). If a POD designee predeceases the account owner, the account will pass to the other designee(s). If no POD designee survives the account owner, the account passes to the deceased owner's estate.
 - i. Oregon: ORS 708A.470(2), 708A.495.
 - ii. Washington: RCW 30A.22.100(4).
 - c. Stocks and Entity Ownership interests. The Uniform TOD Security Registration Act ("UTODSRA") has been adopted in Oregon (ORS 59.535 through 59.585) and Washington (RCW 21.25), as well as every other state. The UTODSRA authorizes the registration of a **security** which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner. The meaning of "security" is discussed below.
4. Beneficiary Designations. The custodian or administrator of certain assets may provide a contractual beneficiary designation for distribution of the asset on the death of the owner (or the insured). The terms of these beneficiary designations are governed by the contract. Typical examples:
- a. Retirement Savings Accounts: 401(k), IRA, Roths, etc.
 - b. Life Insurance
 - c. Employee Benefit Plans
5. Three-pronged Community Property Agreement. In Washington, married couples can use a three-pronged community property agreement as to (i) current property, (ii) property that may be acquired in the future and (iii) disposition of property at death. RCW 26.16.120.
- a. A Community Property Agreement trumps JTWROS with third parties (*Lyon v. Lyon* 100 W2d 409 (1983))
6. Revocable Living Trusts: Effective for avoiding probate, but not part of this discussion.
7. Affidavits. After death, affidavits can sometimes be used to transfer some property that would otherwise be subject to probate.
- a. Real Property Affidavits
 - i. Washington
 1. Transfer decedent spouse's interest in community property real estate to surviving spouse.
 2. Transfer unmarried decedent's interest (or non-community property interest) to heirs/devisees
 - ii. Oregon: Affidavit of Heirship
 - b. Small Estate Affidavits

- i. Washington – personal property worth less than \$100,000 (RCW Chapter 11.62).
 - ii. Oregon – personal property worth less than \$75,000 and real property worth less than \$200,000 (ORS 114.505-114.560)
- c. DMV Affidavit of Inheritance for vehicles
- d. Bank Accounts Affidavit options.
 - i. Oregon – available if all accounts in Oregon are less than \$25,000. ORS 708A.430.
 - ii. Washington credit union accounts under \$1,000. RCW 11.62.030.

B. CREDITORS

1. General Observations. Avoiding probate does not mean that assets are protected from the decedent's creditors! In fact, with limited exceptions, non-probate transfers are subject to the decedent's liabilities, claims by creditors and taxes.
 - a. In Washington, the liability of a beneficiary of a non-probate asset is covered by RCW 11.18.200. This statute states that *unless specifically exempted, a beneficiary of a nonprobate asset that was subject to satisfaction of the decedent's general liabilities immediately before the decedent's death takes the asset subject to "liabilities, claims, estate taxes and the fair share of expenses of administration..."*
 - b. Oregon does not have a similar comprehensive statute, but explicit exemptions from the liabilities of a decedent (or their estate) are similar to those in Washington.¹
2. Life insurance proceeds. The death benefit of a life insurance policy is protected from claims against the decedent's creditors so long as the proceeds are paid to a beneficiary other than the insured or their estate.
 - a. Oregon: ORS. 743.046.
 - b. Washington: RCW 48.18.410.
 - c. Life insurance proceeds are not exempt from estate tax. IRC Section 2044. Protecting life insurance proceeds from estate tax requires planning to keep the proceeds out of the decedent's estate for tax purposes, such as by having the policy owned by and payable to an irrevocable life insurance trust.
3. Retirement Plans (401(k)s, IRAs, etc.). If the owner of a retirement plan completes a beneficiary designation naming a beneficiary other than their estate as the beneficiary, the asset will pass to the beneficiary with protection from claims by the *decedent's* creditors.
 - a. Oregon: ORS 18.358. Protection extends to the "beneficiary," which includes the person for whom the retirement plan is provided and their spouse.
 - b. Washington: RCW 6.15.030.
 - c. Retirement plans are not exempt from estate tax.

¹ For a comprehensive discussion, see Daniel C. Re, *The Right of an Unsecured Creditor to Recover Property from a Decedent's Nonprobate Property*, Oregon Estate Planning and Administration Section Newsletter, January 2009.

- d. We are focused on claims and liabilities of the decedent, not of the beneficiary. In 2014, the U.S. Supreme Court ruled that an inherited IRA is not protected from the *beneficiary's* creditors in bankruptcy (Clark v. Rameker, 573 US 122 (2014)). This is consistent with most other inherited assets. Once the assets become the property of the beneficiary, the property is subject to claims by the beneficiary's creditors. Creditor protection for a beneficiary is achieved with tools that are beyond the scope of this presentation, such as a spendthrift trust.
4. Tenancy by the Entirety. Real estate held by spouses as tenants by the entirety in Oregon passes to the surviving spouse by operation of law.
 - a. A spouse may convey or encumber their interest in property owned as TBE. However, the creditor's interest in the property is subject to the survivorship rights of the non-debtor spouse. *In re Odegaard*, 31 BR 718, 719 (Bankr D Or 1983); *Brownley v. Lincoln Cnty.*, 218 Or 7, 10, 343 P2d 529 (1959).
 - i. If the debtor spouse dies first, their interest in the property ends at death, as does any claim to the property by a creditor of the debtor spouse.
 - ii. If the non-debtor spouse dies first, the debtor spouse continues to hold the property subject to claims by their creditors.
 - b. The creditor protection offered property owned as tenants by the entirety is a significant benefit. As of January 1, 2022, this protection can be retained if real property owned as tenants by the entirety is transferred to a joint revocable trust or to a revocable trust for each spouse. ORS 130.518.
 5. TOD Deeds. If property passes by TOD deed:
 - a. A beneficiary takes the property subject to all conveyances, encumbrances, assignments, contracts, mortgages, liens and other interests to which the property is subject at the transferor's death (URPTDA Section 13(b), ORS 93.969(2), RCW 64.80.100(2)).
 - b. In Oregon and Washington, the property is subject to claims if the decedent's probate estate insufficient to pay all claims. In Oregon, the proceeding for any such claim must be initiated within 18 months of death. ORS 93.973. In Washington, claims must be filed within 24 months of death. RCW 64.90.100(2).
 - i. This extended claims period can be an issue if the beneficiary is looking to sell real estate acquired by TOD deed within 18 or 24 months.
 - ii. Title companies initially indicated that they would not be able to provide title insurance until this period for potential claims had run. Now, title companies seem to be willing to look at the facts and consider providing insurance during the claims period.
 6. TOD/POD Securities: Registration in beneficiary form does not limit the rights of creditors of security owners against beneficiaries and other transferees. ORS 59.575(2); RCW 21.35.045(2).

C. TAX CONSIDERATIONS

1. Estate tax – IRC § 2040: Inclusion of joint property in the decedent owner's estate.
 - a. Unmarried joint tenants (or non-US citizen surviving spouse)
 - i. Gross estate includes full value of joint tenancy property minus the portion contributed by the surviving owner with funds that were not received (as a gift) from the decedent
 - ii. If joint tenants acquired property by gift or inheritance, then included value is the value of the property divided by the number of joint tenants
 - b. Married joint tenants (surviving spouse is US citizen)
 - i. If held as tenancy by the entirety, one-half of the value is included in decedent's estate
 - ii. If held as joint tenants by spouses, and there are no other joint tenants, one-half of the value is included in decedent's estate
 - iii. Above rules do not apply to pre-1977 purchases. If deceased spouse was sole contributor, 100% of the value is includable in estate and you get 100% basis step-up. *Hahn v. Commissioner*, 110 TC 140 (1998) acq. AOD 2001-06 (commonly referred to as the Gallenstein rule)
 - c. Note, with joint tenancy property, you cannot claim marketability or fractional interest discounts. *Estate of Young Wayne-Chi*, 110 TC 297 (1998)
 - d. Be cautious if surviving spouse is not a US citizen. The federal estate tax marital deduction is not available for outright transfers to non-citizen spouses.
 - i. Can do a post-death QDOT to remedy but it is better to plan ahead.
 - ii. Washington QTIPs require spouse to be a citizen. Oregon OSMP does not.
2. Basis Step-Up
 - a. When contemplating inter vivos transfers, including titling as joint owners with a right of survivorship, weigh the estate tax and other considerations with the loss of the step-up at death
 - b. No basis step-up if inherited assets were gifted to decedent by inheritor (or his/her spouse) within 1 year of death. IRC §1014(e)
3. Estate tax apportionment.
 - a. If no provision in Will/Trust, Washington and Oregon law apportions estate tax to interests that pass by survivorship, beneficiary designation, and payable or transfer on death designations.
 - i. Beware the situation where the executor filing the estate tax return has to chase after beneficiaries to get reimbursement for estate taxes. State law does provide a procedure but can be expensive and time consuming.
 - b. If Will/Trust apportions estate tax to residue, make sure that is the result you want if non-probate/trust assets pass to different beneficiaries.
 - i. Also consider potential for increase in total tax if residue bears tax liability and passes to charity or spouse.

4. Gift Tax. Consider the gift tax implications of jointly titling an asset with a right of survivorship.
 - a. Real estate
 - i. TOD deed is revocable and not a gift
 - ii. Titling real property with survivorship rights with non-contributing joint owner is a gift.
 1. The value of the gift differs in Washington and Oregon
 - a. Washington – Joint tenancies have the incidents of severability. RCW 64.28.010
 - i. If state law allows either party to sever their interest, value of gift is proportionate interest in property. Reg. 25.2511-1(h)(5).
 - b. Oregon – Survivorship interest cannot be severed by one owner. *Holbrook v. Holbrook*, 240 Or 567 (1965)
 - i. Value of gift must be determined actuarially. PLR 8417097
 - b. Bank accounts
 - i. Adding non-contributing co-owner to account is not a gift if you can unilaterally withdraw the property. Gift occurs when non-contributing co-owner withdraws funds. Reg. 25.2511-1(h)(4).
 - c. Gifts to a Non-Citizen Spouse: If jointly titling with a non-citizen spouse, remember that the annual marital deduction for gifts to non-citizen spouses is limited to \$175,000 per year.
 5. Income taxation of jointly owned property. The recognition of taxable income is proportional to the ownership of an asset.
 - a. If married and file taxes jointly – simple, report income on joint return.
 - b. If married and file separately, it depends on whether the asset is community property. If it is, each spouse reports ½ of taxable income. If it is not community property, each spouse reports the proportion related to their interest.
 - c. Unmarried co-owners report the income in proportion to their interests in the asset.
 - i. Banks will only send the 1099 to one owner. That owner then reports 100% of the income on his/her return but lists the joint owner's portion as a nominee distribution. Owner then issues a 1099 to the joint owner reporting the joint owner's share of income and files a Form 1096.

D. OTHER CONSIDERATIONS

1. Beneficiary Predeceases the Owner. The distribution if a beneficiary is deceased may not reflect the donor's intent.
 - a. TOD/POD fails if the named beneficiary is deceased. The asset goes to the owner's estate.
 - i. It may be possible to name a contingent beneficiary, but this does need to be done in the registration or beneficiary designation.

- ii. UTODSRA does allow for naming of a beneficiaries descendants. If a security is registered in beneficiary form and none of the named beneficiaries survive the (last living) owner, the security belongs to the estate of the (last living) owner. ORS 59.565; RCW 21.35.035.
 - b. Right of Survivorship: fails because there is no survivor. (The surviving joint owner became the sole owner on the death of the last living beneficiary.)
 - c. Beneficiary designations – often allows for distributions to a deceased beneficiary’s descendants. Default will depend on the contract governing the benefit.
 - d. In any event, the owner’s estate plan should be consistent with any joint titling, registration in beneficiary form or beneficiary designation. Specific gifts of an asset that is registered in beneficiary form or has a beneficiary designation should confirm the intent regarding the transfer of the asset.
2. Liquidity for estate administration.
- a. The apparent simplicity of having the bulk of a decedent’s assets pass by survivorship or beneficiary designation can be illusionary.
 - b. Will the fiduciary have access to funds to cover expenses of last illness, debts, funeral, income taxes, estate taxes, and other administration costs?
3. Government benefits: Make sure adding a co-owner or beneficiary designation doesn’t impact qualifications for government benefits.
4. Closely held business interests. Can closely held business interests be registered in beneficiary form?
- a. The UTODSRA authorizes the registration of a **security** which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.
 - b. UTODSRA defines “security” as a “share, participation, or other interest in property, in a business, or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security, and a security account.” (UTODSRA Section 1(9), ORS 59.535(9), RCW 21.35.005(9)).
 - i. According to the comments to the UTODSRA, the definition of “security” is derived from UCC Section 8-102. The UCC specifically provides that an interest in a partnership or limited liability company is not a security except in certain situations.
 - ii. As a result, there is uncertainty as to whether interests in closely held LLCs and partnerships are securities covered by the UTODSRA.
 - b. Stock in a closely held corporation is a security, therefore, the option exists to register a stock certificate in beneficiary form.
 - c. Rules applicable to registration in beneficiary form.
 - i. Only an individual owner (or individual co-owners with a right of survivorship) may register a security in beneficiary form. (ORS 59.540, RCW 21.35.010).

- ii. The named beneficiary may be any person (individual, corporation or other legal entity, ie., a trust) (ORS 59.555, 59.535(1), (4); RCW 21.35.025, 21.25.005(1), (4)).
 - iii. Registration in beneficiary form is a contractual agreement between the owner and the registering entity as to how the property that is registered in beneficiary form is to be transferred on the death of the owner.
 - iv. Registration in beneficiary form has no effect while the owner is living. (ORS 59.560; RCW 21.35.030)
 - v. Registration in beneficiary form avoids probate. (ORS 59.575; RCW 21.35.045(1)).
- d. Registration in beneficiary form does not override the terms of an ownership agreement, including restrictions on transfer or buy-sell provisions. Any such contractual terms will be effective as of the transfer pursuant to the registration in beneficiary form, as they would be effective upon a transfer pursuant to a probate proceeding.
- e. If you like the idea of registration in beneficiary form and want to do it with LLC or partnership interests:
 - i. Consider including terms in your LLC/Partnership ownership agreements that specifically permit owners to register their ownership in beneficiary form. Adapting the language from UTODSRA to your form agreement would be a good place to start.
 - ii. Even if not part of the ownership agreement, an agreement among an owner, the other members and the entity approving the registration in beneficiary form for an LLC or partnership interest is likely a contractual agreement to honor the registration on the death of the owner.