Three Reasons Why Joint Accounts May Be a Poor Estate Plan

Many people, especially seniors, see joint ownership of investment and bank accounts as a cheap and easy way to avoid probate since joint property passes automatically to the joint owner at death. Joint ownership can also be an easy way to plan for incapacity since the joint owner of accounts can pay bills and manage investments if the primary owner falls ill or suffers from dementia. These are all true benefits of joint ownership, but three potential drawbacks exist as well:

1. **Risk.** Joint owners of accounts have complete access and the ability to use the funds for their own purposes. Many elder law attorneys have seen children who are caring for their parents take money in payment without first making sure the amount is accepted by all the children. In addition, the funds are available to the creditors of all joint owners and could be considered as belonging to all joint owners should they apply for public benefits or financial aid.
2. **Inequity.** If a senior has one or more children on certain accounts, but not all children, at her death some children may end up inheriting more than the others. While the senior may expect that all of the children will share equally, and often they do in such circumstances, there’s no guarantee. People with several children can maintain accounts with each, but they will have to constantly work to make sure the accounts are all at the same level, and there are no guarantees that this constant attention will work, especially if funds need to be drawn down to pay for care.
3. **The Unexpected.** A system based on joint accounts can really fail if a child passes away before the parent.

Then it may be necessary to seek conservatorship to manage the funds or they may ultimately pass to the surviving siblings with nothing or only a small portion going to the deceased child's family. For example, a mother put her house in joint ownership with her son to avoid probate and Medicaid's estate recovery claim. When the son died unexpectedly, the daughter-in-law was left high and dry despite having devoted the prior six years to caring for her husband's mother.

Joint accounts do work well in two situations. First, when a senior has just one child and wants everything to go to him or her, joint accounts can be a simple way to provide for succession and asset management. It has some of the risks described above, but for many clients the risks are outweighed by the convenience of joint accounts.

Second, it can be useful to put one or more children on one's checking account to pay customary bills and to have access to funds in the event of incapacity or death. Since these working accounts usually do not consist of the bulk of a client's estate, the risks listed above are relatively minor.

For the rest of a senior's assets, wills, trusts and durable powers of attorney are much better planning tools. They do not put the senior's assets at risk. They provide that the estate will be distributed as the senior wishes without constantly rejiggering account values or in the event of a child's incapacity or death. And they provide for asset management in the event of the senior's incapacity.

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How To Make Your Funeral Wishes Known

How can you make sure your funeral and burial wishes will be carried out after you die? It is important to let your family know your desires and to put them in writing. Just don't do it in your will.

To help your family or close friends follow your wishes after you are gone, you can write out detailed funeral preferences as well as the requested disposition of your remains. In addition to explaining where you want your funeral to be held, the document can include information about who should be invited, what you want to wear, who should speak, what music should be played, and who should be pallbearers, among other information. Making these decisions ahead of time can not only let everyone know what your wishes are, it can also help your family members during their time of grief.

It may be tempting to include this information in your will, but a will may not be opened until long after the funeral is over. A will is best used for explaining how to distribute your property, not for funeral instructions. You can write your funeral and burial directions in a separate document or you may be able to put your wishes in your health care directive. Whatever you do, make sure your family knows where to find the information.

If you don't make your wishes known, the responsibility for determining your funeral and burial rests with your loved ones. If you are married, your spouse is usually in charge of making the decisions. If you are not married, the responsibility will likely go to your children, parents, or

next of kin. Disputes could arise between family members over what you would have wanted.

It is possible to make funeral arrangements ahead of time with a funeral home. However, be wary of pre-paid funeral plans. Consumers can lose money when pre-need funeral funds are misspent or misappropriated. A funeral provider could mishandle, mismanage or embezzle the funds. Some go out of business before the need for the pre-paid funeral arises. Others sell policies that are virtually worthless. For more on the dangers of pre-paid plans, click here.

For help with making your funeral wishes known, talk to your attorney.

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Dangers of Creating A Will Without Legal Assistance

People sometimes try to save money by not consulting with a qualified attorney when executing their will, instead using a pre-printed form or online program. A recent court case offers yet another example of the hazards of doing this. Deciding the long-running case, the Florida Supreme Court has ruled that money acquired by a woman after she used a form to execute a will should be distributed as if she had never made a will at all. A justice hearing the case called it “a

cautionary tale of the potential dangers of . . . drafting a will without legal assistance." *Aldrich v. Basile* (Fla., No. SC11-2147, March 27, 2014)

Ann Aldrich wrote her will on an "E-Z Legal Form." She listed several possessions and bank accounts that she intended to go to her sister unless her sister died before her, in which case they were to go to her brother. Ms. Aldrich's sister did indeed die before her, and Ms. Aldrich inherited additional money and property from the sister. However, Ms. Aldrich did not have a "residuary clause" in the original will and she never revised the will to account for this new property.

After Ms. Aldrich herself died, the court had to determine who would inherit the property Ms. Aldrich received after she wrote the will. Her brother argued that he was entitled to all her property, but Ms. Aldrich's nieces (the daughters of a second brother who had died) maintained that the property should pass through intestacy – according to state law for those who have no will. The case wound its way through the courts. A trial court ruled for Mr. Aldrich, but an appeals court reversed that ruling, and Mr. Aldrich appealed.

The Florida Supreme Court has determined that although the will made it clear that the property listed was to go to Ms. Aldrich's living brother, the will did not say anything about property acquired after the will was written. Because the will had no residuary clause or general bequests that could include the inherited property, the court held that the after-acquired property will have to pass under Florida's laws of intestacy.

A concurring judge noted that the case was "a cautionary tale of the potential dangers of utilizing pre-printed forms and drafting a will without legal assistance."

The irony is that using a boilerplate will form not only frustrated Ms. Aldrich's testamentary intent, but ultimately cost her estate far, far more than a simple consultation with

an estate planning or elder law attorney would have.

To read the court's decision in the case, click here.

For Consumer Reports' conclusions on do-it-yourself wills, click here.

For an ElderLawAnswers White Paper on letting a computer plan your estate, click here.

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Disinheriting A Relative

You may feel that you have given one child more during your life, so he or she should get less in your will. Or you may want to cut out an heir altogether. Whatever the reason, disinheriting a close relative—especially a spouse or a child—can be complicated.

It generally is not possible to completely disinherit a spouse. Even if you don't leave your spouse anything in your will, most states have laws that keep a spouse from losing everything – usually the spouse is entitled to one-half or one-third, depending upon whether you have children. If you live in a "community property" state, your spouse already owns half the community property. Also, the definition of your "estate" varies from state to state; in some states it includes only your probate estate and not trusts, retirement accounts, life insurance or other assets. In some states, all or part of these "non probate" assets are included in the spouse's share.

Even if you don’t completely disinherit your spouse, he or she can choose between taking what the will provides or taking what the law in your state says a spouse should receive in any case (the “statutory share,” usually one-third to one-half of the estate). The only solution is to enter into an agreement with your spouse in which you each waive the right to receive anything from the other’s estate.

Disinheriting a child is a different story. You will need to check with an attorney in your state to find out what is required. Louisiana is the only state that does not allow an adult child to be disinherited. While other states do not require that you leave anything to your adult children, there may be laws that protect minor children. For example, in Florida you are required to leave your house to either your spouse or a minor child, if they are living. In addition, there are often laws that protect children born after a will was written. To be safe, even if you are leaving a child nothing, you should specifically mention the child in the will. It may also help to state the reason the child is getting nothing or a reduced amount. If you don’t mention a child at all, the state may conclude that you did not intentionally exclude the child.

Disinheriting a close relative can cause fights among family members. Squabbles over wills can drag on for years and prevent your heirs from receiving their inheritance, so if you are planning on disinheriting someone, it is important to take as many precautions as possible and consult with an elder law or estate planning attorney.

May Someone With Dementia Sign a Will?

Millions of people are affected by dementia, and unfortunately many of them do not have all their estate planning affairs in order before the symptoms start. If you or a loved one has dementia, it may not be too late to sign a will or other documents, but certain criteria must be met to ensure that the signer is mentally competent.

In order for a will to be valid, the person signing must have "testamentary capacity," which means he or she must understand the implications of what is being signed. Simply because you have a form of mental illness or disease does not mean that you automatically lack the required mental capacity. As long as you have periods of lucidity, you may still be competent to sign a will.

Generally, you are considered mentally competent to sign a will if the following criteria are met:

- You understand the nature and extent of your property, which means you know what you own and how much of it.
- You remember and understand who your relatives and descendants are and are able to articulate who should inherit your property.
- You understand what a will is and how it disposes of property.
- You understand how all these things relate to each other and come together to form a plan.

Family members may contest the will if they are unhappy with the distributions and believe you lacked mental capacity to sign it. If a will is found to be invalid, a prior will may be

reinstated or the estate may pass through the state's intestacy laws (as if no will existed). To prevent a will contest, your attorney should help make it as clear as possible that the person signing the will is competent. The attorney may have a series of questions to ask you to assess your competency. In addition, the attorney can have the will signing videotaped or arrange for witnesses to speak to your competency.

For more information about preventing a will contest, click here.

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