Why You Should Check Your Beneficiary Designations

Understanding nonprobate transfers and ownership changes.

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Introduction

Why do you need a will?

Before you take the time to learn the valuable information this guide has in store for you about assets and your choices for beneficiaries, it's important for you to first focus on the value a will has for you and your family. This guide will show you how to effectively pass assets outside of the probate process. That does not mean that you don't need a will. A will is a cornerstone of an effective estate plan.

Even though you may have a significant portion of your assets in places that can pass outside of the probate process, a beneficiary designation will not be a sufficient solution for your entire estate. It's inevitable that you'll need a will to pass some portion of your estate to your beneficiaries after your death.

If you have children that you care for, your will is the legal document that affords you the opportunity to choose the person who will serve as a young child's legal guardian. A guardian looks after the day-to-day care of a child including decisions about his or her health, education, and nurturing.

Your will can also name a custodian to manage the money for a child if you choose. A custodian looks after the finances of the child, and leaves the rest of the child care to the guardian. Our *Cornerstones* will gives you the flexibility to name the same person as the custodian and guardian, or to name two different people. A will is the way to legally make that choice for your kids.

In addition to your will, our *Cornerstones* documents will provide you with a financial durable power of attorney, a health-care power of attorney, and a "living will" or health-care directive. All of these legal documents are crucial in creating an effective estate plan to protect yourself and your family in the unfortunate event of an accident or death.

Last but not least, this Guide features a "top-ten" list of common mistakes you should avoid.

So while we hope you take the time to read about WHY YOU SHOULD CHECK YOUR BENEFICIARY DESIGNATIONS and use the easy-to-read information and practical suggestions our guide has to offer, remember that this is meant to increase the value we offer you. And don't procrastinate any longer in securing the legal documents that *Cornerstones* can provide for you. For all of the promises you've made to take care of the people you love most, we hope we can help you by providing these documents and turn those promises into *Promises Kept*.

PROBATE • CUSTODIAN • GUARDIAN • HEALTH CARE DIRECTIVE • DECISIONS • CHILDREN

Action Steps

Here's a quick overview of some steps you would need to take to set up a beneficiary designation for the different types of assets that you may have. While we hope you'll take the time to read the full description, however this is a condensed version for your benefit.

Retirement Plans

❒ Be sure to check with your provider that you have properly named a beneficiary on your retirement plan.

❒ Does your current power of attorney allow your agent to change your beneficiary designation? Our *Cornerstones* power of attorney states this power.

Bank Accounts

❒ Ask your bank about its forms and procedures for adding a "Pay on Death" designation to your account.

Life Insurance and Annuity Contracts

❒ Be sure to check with each insurance company, and for each contract, that you have properly named a beneficiary on your life insurance and annuity contracts.

Securities Accounts

❒ Ask your fund or broker whether it provides a "transfer-on-death" registration.

Education Savings Plans

❒ Before you choose a 529 plan or Education Savings Account, read the disclosure and account documents to find out what happens to an account after the original account holder's death.

Federal or Military Benefits

❒ If you might be entitled to Federal or military benefits, read the forms and the government publications. If you are in military service, you also may ask your legal assistance officer for help.

Joint Ownership

❒ For your home and other real property, you have three options to explore:
1) Tenancy in common
2) Joint tenants with rights of survivorship
3) Tenancy by the entirety (some States)

❒ Do you know what your deed says?

Helpful Tip:

When there's an event (happy or sad) that changes your family - such as, a new birth, or a divorce, be sure to update your beneficiary designations. Don't assume that they change automatically, because in many cases they do not. And a bank, insurance company, or investment organization isn't responsible for what it doesn't know about.

Table of Contents

Why a significant portion of your estate doesn't go through probate.

If you're like most Americans, much of your estate doesn't go through a "probate" administration.

Example:

Jill's total estate is made up of a § 401(k) retirement plan account - $85,000, a death benefit under a life insurance contract - $150,000, CDs at her local bank - $25,000, and the balance in her checking account - $10,000.

Jill thought she did the right thing by making her will.

But how much of Jill's estate will be administered by her executor?

Maybe $35,000, or about 13%. The other 87% will be transferred according to beneficiary designations that Jill submitted to the employer that administers her retirement plan and the insurance company that issued her life insurance contract.

A significant portion of the money, property, and rights that most Americans have don't pass according to one's will. Usually, they're transferred according to a beneficiary designation or a title registration that says who the next owner will be.

This Guide explains some of the rules about how benefits and rights under:

- retirement plans,
- life insurance contracts,
- annuity contracts,
- bank accounts,
- securities accounts,
- education-savings accounts, and
- other contracts

can be transferred without going through your probate estate, usually following rules that allow you to name your beneficiary.

Also, a married couple usually own their home in a way that provides a survivor ownership, without a probate administration.

What kinds of property *must* pass by a beneficiary designation?

Retirement plan, life insurance, and annuity benefits almost always provide that remaining rights after your death pass according to a beneficiary designation.

What kinds of property *can* be transferred by naming a beneficiary?

For some other kinds of property, often including bank accounts, investment accounts, and education-savings accounts, you have an opportunity to name a beneficiary or successor owner.

Why use nonprobate transfers?

Some people choose to use beneficiary designations and other nonprobate transfers because they perceive that a nonprobate transfer will be quicker and easier than a probate estate's administration.

Sometimes, a person might use beneficiary designations and other nonprobate transfers to reduce the size of a probate estate, and thus reduce the amount of an executor's or personal representative's fees.

Example:

Example: Francine lives in Florida. Because none of Francine's relatives is a Florida resident, none is eligible to serve as her estate's personal representative. Instead, Francine's will names a Florida bank.

Francine's estate is about $1 million. Francine knows that Florida law lets a personal representative take a commission of 3% on the first $1 million. If all of her estate passes through a probate administration, that's a commission of $30,000 – for what Francine feels is a routine set of clerical tasks.

Instead, Francine uses beneficiary designations and other nonprobate transfers so that very little money will pass through her probate estate.

If a State law or your written agreement sets a personal representative's fee as a percentage of your probate estate, the size of that estate makes a difference in how much the fee is. Even if the fee isn't set that way, probate judges who review whether a personal representative's fee is reasonable usually consider whether a fee would be a too-large percentage of the estate.

Retirement Plans

For many people, retirement benefits – including a pension, § 401(k), § 403(b), § 457(b), SEP, SIMPLE, or IRA – form the biggest part of one's wealth. Are your retirement benefits worth as much as your house? More? And if you're like most people, your investments in retirement plans likely are a lot more than your investments outside of retirement plans.

Retirement plans set their own rules for what to do if any benefits remain after a participant's death. Unless you read the documents, you might not what those rules are. If you guessed that these rules follow your State's law, you'd be wrong most of the time. For example, an IRA goes by the rules stated in the IRA documents. If anything has to be "filled in" by a State's law, often it's not your State's law; instead, it's the law of the State in which the IRA custodian is located.

Example:

Example: Samantha lives in Seattle, Washington. She owns an IRA, using an investment manager in Boston. When Samantha opened this IRA, she named her husband as beneficiary. Samantha recently divorced him. Samantha thought about changing the beneficiary designation, but didn't bother; she had read that Washington law "automatically" revokes a beneficiary designation that names a former spouse.

Will the people who Samantha wanted to benefit be surprised when they learn that Massachusetts law governs this IRA? Does Samantha know what Massachusetts law says about whether a divorce does or doesn't change a beneficiary designation? Wouldn't it be a lot easier for Samantha to fill-in and mail a "fresh" beneficiary-designation form?

Does a retirement plan benefit pass by a participant's will?

No. A retirement plan includes a provision by which a participant may name his or her beneficiary or beneficiaries. The beneficiary designation applies, even if your will states a contrary disposition. Your employer or retirement plan administrator applies the plan's terms, looking only at the documents on file with the plan administrator. A will doesn't override a beneficiary designation.

Does a divorce revoke a beneficiary designation under a retirement plan?

See Page 20, Section 12.

May a trust be a beneficiary under a retirement plan?

Many (but not all) retirement plans permit a participant to name a trust as a beneficiary.

Caution: A beneficiary of a trust won't be a *designated* beneficiary under a retirement plan's minimum-distribution rules unless the trust meets conditions and certifies to the plan administrator information specified by the Federal tax regulations and plan rules.

To make a correct beneficiary designation, you should name the trustee, as trustee of the trust, as beneficiary. The trust must be legally in existence (or completed such that it would be legally in existence on the trustee's receipt of money or property) *before* you make the beneficiary designation.

Spouse's Consent Rights

Your surviving spouse might have rights to your retirement benefit in one of the following ways:

- survivor-annuity or spouse's-consent rights provided by the retirement plan [see below]
- elective-share rights under State law [see Page 19, Section 12]
- community property rights under State law [see Page 19, Section 12]].

What benefits does a retirement plan provide to a participant's spouse?

For a payout that begins *before* your death, an employment-based retirement plan often provides – sometimes because Federal law requires it, and sometimes because the plan chooses to do so - a qualified joint and survivor annuity. If so, the plan typically provides that your benefit will be paid as a joint and survivor annuity unless you specifically choose a different payout and your spouse consents.

For a payout that begins *after* your death, an employment-based retirement plan often provides a qualified preretirement survivor annuity or an alternate survivor benefit. Again, you can't avoid providing these death benefits to your spouse unless he or she consents.

Although these rules generally are required for a retirement plan governed by ERISA [see Page 26, Section 15] or that's tax-qualified under Internal Revenue Code § 401, many other kinds of employment-based retirement plans have similar rules.

To-do: Before you choose against a survivor annuity, make sure that you understand what benefits your spouse would be giving up. Read the plan's explanation of what payout is provided for a qualified joint and survivor annuity or "QJSA", or a qualified preretirement survivor annuity or "QPSA". Be especially careful if your retirement plan subsidizes a survivor benefit.

Some kinds of retirement plans may omit both kinds of survivor annuity if the plan provides that, unless you make a qualified election with your spouse's-consent, the benefit that remains after your death belongs to your surviving spouse.

What's a qualified election?

A retirement plan might include a provision that assures your surviving spouse some retirement income after your death, and usually must include a provision that assures a survivor benefit if you die before you receive or begin a payout. A typical plan permits a participant to "waive" one or more of these benefits. To do so, you must deliver to the plan administrator a *qualified election*. Ordinarily, such an election has no effect unless your spouse consents to it. Also, your qualified election must meet several form, content, and procedure requirements. Some of these rules are set by law, and your plan's administrator may make additional rules.

What must a spouse do to consent to a participant's qualified election?

In addition to meeting other requirements, a spouse's-consent to your election must

- be in writing;
- name a beneficiary that can't be changed without the spouse's-consent, or expressly consent to your beneficiary designations (without further consent); and
- state that your spouse understands the effect of your election and his or her consent.

Further, under most plans a consent has no effect unless it's witnessed by a notary public.

These requirements must be strictly complied with. A premarital agreement can't be a spouse's-consent.

Other rights of a spouse

Even if a retirement plan's survivor benefit or spouse's-consent right explained above doesn't apply, your surviving spouse might have rights to your retirement benefit under other law. See Pages 19-20, Section 11.

Life Insurance and Annuity Contracts

Does a life insurance or annuity contract benefit pass by a person's will?

No. An insurance contract includes a provision by which a holder or "owner" may name his or her beneficiary or beneficiaries. The beneficiary designation applies, even if your will states a contrary disposition. Generally, a will can't override a beneficiary designation.

Does a divorce revoke a beneficiary designation under an insurance contract?

See Page 21, Section 12.

Bank Accounts (pay-on-death designation)

Most States have laws that permit banks, credit unions, and other financial institutions to keep accounts that provide for survivorship ownership, a payable-on-death designation, or both.

These laws recognize that there are different reasons why a depositor might add another person to an account. A depositor might want only to enable account transactions by a family member or friend as a convenience, without creating any ownership or survivorship rights in that person. But another might intend to reflect lifetime ownership of the account by more than one person. And either might want to pass the account's balance to another person at all owners' death or his or her death.

State laws try to provide these choices, without expecting an account holder to understand the legal terms of concurrent or survivorship ownership. Under these laws, either a single-party account or a multiple-party account may include a payable-on-death or "POD" beneficiary designation.

To-do: Ask your bank about its forms and procedures for adding a "POD" designation to your account

If you're a party to a multiple-party account (for example, you and your spouse maintain a joint account) a "POD" designation usually doesn't pass any money until the death of the last surviving owner. However, some laws and account documents permit an account's owners to specify that survivorship doesn't apply.

Securities Accounts (transfer-on-death registration)

Almost all States have laws that allow you to register your ownership of a security or a securities account in beneficiary form.

> Some brokers call this transfer-on-death or "TOD" form because the State laws are based on the *Uniform TOD Security Registration Act.*

This can include mutual fund shares and securities entitlements under a "brokerage" account. On your death (or the death of the last of a security's or an account's owners), an issuer, transfer agent, broker-dealer, or other securities intermediary can transfer your securities directly to your named beneficiary.

> **Caution**: Nothing requires a securities intermediary to offer TOD registrations, and some don't. Ask your fund or broker whether it provides this convenience.

If all you really want is a nonprobate transfer at death, a TOD registration can be a convenient alternative to a complicated joint tenancy. Because a joint tenancy involves sharing ownership currently, it can fall apart if a co-owner gives investment directions you don't want, fails to cooperate, or becomes disabled, incapacitated, or insolvent. A registration in beneficiary form doesn't affect your full control of your securities during your life.

Even if you live in Louisiana or Texas (two States that haven't adopted a TOD-security-registration law), you still can use a securities issuer's TOD-registration plan. Another State's law can apply if the person that registers the securities – for example, your broker – is located in that State.

> *Example*: Tess lives in Texas, which doesn't have a TOD-security-registration law. But her investments are with Vanguard funds and Vanguard Brokerage Services. Vanguard's Directed Beneficiary Plan provides that Pennsylvania law governs.

A TOD registration ends when the registered asset is sold or transferred.

Education Savings Plans

Most qualified tuition program (§ 529 plan) accounts and most § 530 Coverdell education savings accounts or ESAs provide a method for transferring "ownership" or contract rights that's similar to a beneficiary-designation regime or transfer-on-death security registration.

Sometimes, a plan uses different language for this. For example, a few popular § 529 plans provide for what the plan calls a Successor Account Owner. It's important to pay attention to the language in the account documents. Although the documents, tax law, or both might refer to a "beneficiary", that might refer to the child or potential student who's the intended subject of the education savings – and isn't necessarily the person who has rights to get money from an account.

***To-do**:* Before you choose a § 529 plan or ESA, read the disclosure and account documents. If you won't read the whole document, at least look at the table of contents and try to find the part that says what happens to an account after the original account holder's death.

Federal or Military Benefits

Benefits for U.S. Government employees or military service members have their own rules. These rules usually are provided by Federal law or regulations, and often completely ignore State laws.

To-do: If you might be entitled to a Federal or military benefit, read the forms and read the government publications. If you're in military service, you also may ask your legal assistance officer for help.

Joint Ownership

Until this part, we've focused on beneficiary designations. Under a retirement plan, a life insurance contract, an annuity contract, most education-savings accounts, and some investment accounts, you have an opportunity to name your beneficiary who might become entitled to whatever benefits remain available after your death. But these beneficiary regimes usually don't affect your ownership during your life.

For other property, you might have chosen joint ownership.

There are three kinds of such concurrent ownership:

1) Tenancy in common [see below]
2) Joint tenants with rights of survivorship [see Page 14, Section 13]
3) Tenancy by the entirety [see Page 14, Section 13]

None of these forms of ownership is available for a retirement plan account or benefit.

Disposing of your home and other real property

The law classifies property into two kinds: *real* property and *personal* property. Real property is land, the buildings on it, and anything that's attached to land so that it can't be taken out without hurting the land. Personal property is everything else.

If you're not the sole owner of an item of real property, chances are that your ownership is in a form that already provides for what happens on your death. If you look at your deed and see a title phrase like "as tenants by the entireties", "as joint tenants with the right of survivorship", or "as community property with the right of survivorship", it's likely that on your death your spouse gets (or the other co-tenants get) the whole property (or your portion of the property) – without you saying a word in your will.

Cornerstones: Because many married couples (and other co-owners) own their homes under a tenancy that provides a survivorship, our *Cornerstones* inquiry doesn't ask you to specify a particular disposition just for your home or other real property. If your real property doesn't "automatically" transfer based on the ownership title or applicable law, whatever you own on your death is part of your estate.

Tenancy in common

What's a tenancy in common?

A tenancy in common refers to property ownership by two or more persons, in equal or unequal undivided shares. Each person has an equal right to possess the whole property. None of the persons has a right of survivorship. This form of property ownership provides no probate avoidance. But you might want to use a tenancy in common if you want your will to pass your share of the property that remains on your death.

Joint tenants with rights of survivorship

What's a joint tenancy?

A joint tenancy refers to property ownership by two or more co-owners who take the same undivided interests at the same time by the same writing and with the same right of possession. A joint tenancy differs from a tenancy in common because each joint tenant has a right of survivorship to the other's share. In some States, the survivorship right must be stated in the conveyance; otherwise, the tenancy will be presumed to be a tenancy in common.

Some people call a joint tenancy a "poor man's will". The survivorship feature passes the property to a co-owner without probate.

Tenancy by the entirety

What's a tenancy by the entirety?

A tenancy by the entirety is a form of concurrent property ownership that recognizes the special unity of a married couple.

A tenancy by the entirety may be created only if required unities of title, interest, possession, time, and person (a valid marriage) all exist. Along with other requirements, two persons may become cotenants in a tenancy by the entirety only if they are legally married. In some States, there is a presumption or "default" rule that spouses take property in a tenancy by the entirety. Under a tenancy by the entirety, unlike a joint tenancy, each of the two persons owns *all* of the property. However, neither spouse acting alone may dispose of the property. A tenancy by the entirety ends on the death of either spouse or on the divorce or other dissolution of the marriage.

Of those States that recognize tenancy by the entirety as an available form of property ownership, some allow it only for real property (such as a couple's home). Other States allow a tenancy by the entirety for both real and personal property (such as, mutual fund shares).

> **Caution**: Many financial-services provider don't permit a tenancy by the entirety for a bank account, securities account, or insurance contract.

Why might a person want to own property as a tenancy by the entirety?

A married person might prefer tenancy-by-the-entirety ownership simply because it reflects his or her beliefs about the nature of marriage.

Because neither spouse alone may dispose of the property [see above], a tenancy by the entirety might provide useful protection against creditors' claims. For example, if only one of the two married persons is a bankrupt, a bankruptcy trustee generally may not reach property held as a tenancy by the entirety.

What rules might restrain a person from using a tenancy by the entirety?

You might be unable to transfer money or property into a tenancy by the entirety for one or more of the following reasons:

- State law doesn't recognize a tenancy by the entirety.
- State law doesn't recognize a tenancy by the entirety for personal property.
- State law precludes a conveyance of property into a tenancy by the entirety.

Some States recognize a tenancy by the entirety only for *real* property (for example, your home), and a married couple may not hold *personal* property (property other than land and the buildings fixed onto the land) as a tenancy by the entirety. In some States, one spouse who solely owns property may not convey that property into a tenancy by the entirety.

Rules common to most beneficiary designations

Laws differ not only based on whether Federal or State law applies and which State's law applies but also based on the kind of contract or property involved. There are variations for each of the different kinds of beneficiary designations, title designations, and other instructions explained above. But some rules are more-or-less common for most kinds of beneficiary designations.

> **Caution**: Always read the documents. For a retirement plan, read the plan documents. For a life insurance or annuity contract, read the contract (sometimes called a policy). For a transfer-on-death securities registration, read the securities issuer's or broker-dealer's plan.

Who may make a beneficiary designation?

For a retirement plan, ordinarily only the original participant may make a beneficiary designation. For a life insurance or annuity contract, usually the contract holder may make a beneficiary designation.

A POD, TOD, or other beneficiary designation applies only to as much of a bank or securities account as the designation's maker owns.

Sometimes, a beneficiary might be permitted to name a further contingent beneficiary if the deceased contract holder had not designated all of the remaining benefit. But don't count on it: make a complete beneficiary designation that contemplates the possibility that your first-choice beneficiary doesn't survive you.

May a plan administrator accept a beneficiary designation made by an agent?

A plan administrator may accept a beneficiary designation made by your agent under a power of attorney, but isn't required to do so. Typically, a plan administrator will decline to act unless the power-of-attorney document expressly states a power to change beneficiary designations.

> ***Cornerstones***: A *Cornerstones* power of attorney gives your agent a power to change beneficiary designations.

May an insurer or bank accept a beneficiary designation made by an agent?

An insurer may (and sometimes must) accept a beneficiary designation made by an agent under a power of attorney. For most contracts not held under a retirement plan, State law governs whether an insurer or bank may or must permit the actions of an agent under a power of attorney.

May I name my dog or cat as a beneficiary?

No. A beneficiary must be a person, whether a human being or a nonnatural person (for example, a company), that can indorse a negotiable instrument - such as the check that pays the retirement plan or insurance benefit.

For many people, living with a pet is an important and comforting part of life and providing for the care of the pet is a real concern. Although it's usually more effective for a pet owner to plan for the care of the pet in the pet owner's will, some people might have insufficient probate property to provide for the pet's care and instead may use a beneficiary designation.

You can't give any part of your estate to a non-human animal. However, you may leave a sum of money to a person, along with a request that the money be used for the pet's care. Choose a caretaker you trust, because in most States the caretaker has no legal obligation to use the money to care for the pet animal. If there is no suitable relative or friend who would take your pet, you might consider a charity that cares for or places companion animals.

Cornerstones: A *Cornerstones* will allows you to give money to the person who accepts your pet animals.

May I name a charity as a beneficiary?

Yes, many retirement plans, insurance contracts, and investments permit you to name a charity as a beneficiary.

May I make a beneficiary designation that doesn't provide for my child?

In the United States, only Louisiana and Puerto Rico have a forced-share provision for a decedent's children. Everywhere else, you may "disinherit" your children, except that States require a modest family allowance (which varies by State) for your children if there is no surviving spouse.

Different law may apply for members of a Native American Indian tribe. However, a Native American Indian tribe's law usually applies among members of the tribe, and often can't be enforced against a person outside the tribe.

Caution: If you live in Louisiana, Puerto Rico, or a nation other than the USA and want to make a beneficiary designation that doesn't provide for your children (after providing for your spouse), get an expert lawyer's advice.

Why might a divorced person not want to name his or her young child as a beneficiary?

You might not want to name your young child as a beneficiary if doing so might put money in the hands of the child's other parent - your former spouse.

A payer wants to be sure that a payment is a complete satisfaction of the contract. Ordinarily, a beneficiary's deposit or negotiation of a check is the beneficiary's acceptance that the claim was paid.

A *minor* is a person still young enough that he or she can't make a binding contract. While State laws vary, most end a person's minor status at 18. Usually, a minor's emancipation from his or her parents doesn't change the minor's lack of power to make binding contracts. Before a child reaches age 18 (or the other age of competence to make binding contracts), a guardian may disaffirm an agreement or promise the child made. After a child reaches age 18 (or the other "full age"), he or she may disaffirm an agreement or promise he or she made before he or she reached the age of competence to make contracts.

If State law applies, a payer won't take the risk that a payment isn't a complete satisfaction of plan or contract obligations. Even if Federal law preempts State law, a plan administrator might be concerned that a court would fashion a Federal common-law rule. Thus, plan administrators, employers, and payers almost universally are unwilling to pay benefits to a minor.

To facilitate payment in these circumstances, most retirement plans and insurance contracts permit payment to a minor's guardian or to a *Uniform Transfers to Minors Act* custodian. If you named your child as a beneficiary (rather than naming as beneficiary a custodian), a plan administrator or payer is likely to honor a claim made by the child's guardian. If a child's other parent is living, most courts would appoint the parent as the child's guardian, and usually State laws presume that a parent is a child's natural guardian.

If you don't want your child's other parent to get the child's money, name as your beneficiary a custodian under a State's *Uniform Transfers to Minors Act*.

What happens when a beneficiary designation is contrary to an external agreement?

A plan administrator pays according to the plan's provisions, and need not consider external documents. For an ERISA-governed retirement plan, ERISA preempts State laws that otherwise might affect who gets a plan benefit.

An administrator of a non-ERISA retirement plan also pays according to the plan's provisions, and ordinarily need not consider external documents (other than a court order that applies to the administrator). However, once a non-ERISA plan has paid the plan beneficiary, a person who has rights under an external agreement may pursue remedies under State law.

> ***To-do***: If you're relying on a court order that prohibits someone from changing his or her beneficiary designation, or that requires a person to make and keep a particular beneficiary designation, don't rely on the court order alone. Don't assume that the person will obey the court order. And don't assume that you can hold a retirement plan administrator, insurance company, bank, or broker responsible because it allowed the person to make a beneficiary designation that was contrary to his or her duties under a court order. Talk with your lawyer about more ways to protect the benefits you expect.

May an executor participate in a court proceeding about a disputed benefit?

Often, no a personal representative of your estate may participate in a court proceeding concerning a disputed benefit only if the personal representative in good faith claims that the benefit belongs to the estate. But without a claim of right to the benefit, a personal representative has no claim that a court will consider and thus no standing to participate in a court proceeding.

Spouse's Rights

Your surviving spouse might have rights to a benefit in one of the following ways:

- survivor-annuity or spouse's-consent rights provided by the plan [see below]
- elective-share rights under State law [see below]
- community property rights under State law [see Page 20, Section 11].

These rights might make some or all of your beneficiary designation invalid. And if a named beneficiary gets a benefit that belongs to your spouse, a court might require your named beneficiary to "hand it over" to your surviving spouse.

Retirement plan survivor benefits or spouse's-consent rights

For an explanation of these retirement plan rules, see Page 6, Section 3.

Elective-share rights

What is an elective-share law?

In almost all States that don't provide community property [see Page 20, Section 11], your surviving spouse may elect to take a share of your property, even if your will and other transfers had not provided for your spouse.

How much is an elective share?

In many States, a surviving spouse's elective share is one-third of the decedent's estate. In a few, it's one-half. In Colorado, Hawaii, Kansas, Minnesota, North Dakota, South Dakota, Tennessee, Utah, and West Virginia, the elective-share percentage increases under a schedule based on the duration of the marriage. A typical schedule has an elective-share percentage that ranges from 3% for a marriage that lasted one year to 50% for a marriage of 15 years or more.

Does nonprobate property count in the estate on which an elective share is computed?

Some States compute an elective share only on probate property. But many States now provide that an elective share is computed on an "augmented estate" that includes several items of nonprobate property. Florida, New York, North Carolina, Pennsylvania, and other States have detailed rules for counting this augmented estate.

Community property

What's community property?

Community property is a term that lawyers use to refer to a regime that treats each item of property acquired by either spouse during a marriage and while both spouses are domiciled in a community property State [see Page 20, Section 11] as owned equally by each spouse. Income derived from separate property might be separate property or community property based on the kind of property that produced income and which States' laws apply. Under a community property regime, each spouse's ownership exists presently, notwithstanding that the other spouse currently holds title to or has control over the property. Generally, a retirement benefit is community property if contributions were made while the participant was married and domiciled in a community property State.

In a separate-property regime, which applies in 41 States and all U.S. territories and possessions other than Puerto Rico, an item of property normally belongs to the person who paid for it, earned it, or otherwise acquired it. Although property owned by a married person becomes subject to *equitable distribution* on a divorce or other marital dissolution, the property belongs completely to the person who owns it until a court makes an order that divides or distributes the property.

Which States are community property States?

Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Puerto Rico, Texas, Washington, and Wisconsin are the USA's community property States.

Alaska allows married people to choose a separate-property regime or a community property regime. The separate-property regime applies unless the married couple agree to use a community property regime. If the couple choose community property, the spouses may use a written community property agreement or trust to vary some of the State law provisions that otherwise would govern their community property.

Community property law varies considerably from State to State. For example, if contributions to a retirement plan were made before you were married but investment earnings accrued after the marriage, some States would classify all the retirement benefit (including investment earnings) as separate property, while others might classify those investment earnings that accrued after the marriage as community property.

About marriage

As explained above, an important restraint on a beneficiary designation is a spouse's rights. Of course, these rights turn on a spouse showing that he or she was married to you. Although many people are accustomed to marriage certificates, sometimes it's unclear whether a marriage existed or whether two people were spouses.

Common-law marriage

Even without any other ceremony, two people might be spouses if they wrote, spoke, or otherwise exchanged the words necessary to make an informal or common-law marriage. Currently, Alabama, Colorado, the District of Columbia, Iowa, Kansas, Montana, New Hampshire, Oklahoma, Rhode Island, South Carolina, Texas, and Utah recognize a common-law marriage made in the State. In the 1990s, Georgia, Idaho, Ohio ended common-law marriage. Pennsylvania ended common-law marriage for marriages after January 1, 2005. Because of the recognition that States give to the laws of other States and other nations, it's possible for a common-law marriage to exist anywhere in the United States. Although the States that recognize informal marriage are the minority, Americans' mobility enables informal marriages. Even a weekend or one-day trip across State lines could result in a marriage. Further, among those States that currently don't recognize common-law marriage, almost half allowed it at a time when people still living now might have married.

Also, States recognize a marriage made according to a Native American Indian law or custom.

Same-sex marriage

A same-sex couple might be spouses in some States but not in others. A same-sex couple who are legally married under a relevant State's law might nevertheless not be spouses if a Federal law requires or permits that a retirement plan or other contract not recognize their marriage.

Divorce

Does a divorce revoke a beneficiary designation under a retirement plan?

Whether a divorce revokes a beneficiary designation turns on whether Federal or State law governs the retirement plan.

If the retirement plan is an ERISA-governed plan, ERISA preempts State laws. Only the plan's terms will govern whether a divorce or other circumstance has any effect on the plan beneficiary designation.

If the retirement plan isn't an ERISA plan (that includes a State or local government employer's plan and most church plans), State law might apply. In many States, a divorce won't revoke a beneficiary designation that names the ex-spouse. In other States, a statute might provide that a divorce or annulment makes the former spouse not a beneficiary, except as otherwise provided by a court order. Even when the relevant State has such a statute, it might not apply if the plan has contrary provisions, and many plans include a provision that a divorce or anything other than the plan's beneficiary designation form has no effect on the beneficiary designation. Further, the law of the State in which a participant resided when he or she died isn't necessarily the governing law.

> *Example*: Jane bought an IRA that uses a Delaware bank as the IRA custodian. The IRA Agreement states that it will be governed according to the laws of Delaware. If Delaware law applies, a divorce doesn't revoke a beneficiary designation of a former spouse.

Even if applicable law "automatically" revokes a designation of a former spouse, State law will protect a payer that pays the named beneficiary unless the payer had received a court order restraining payment or at least a written notice that states a dispute about who is the lawful beneficiary.

A qualified domestic-relations order doesn't preclude you from continuing a beneficiary designation that provides for your former spouse.

> ***To-do***: After a divorce, remember to change or confirm your beneficiary designations

Does a divorce revoke a beneficiary designation under an insurance contract?

Retirement plan rules won't apply for a life insurance or annuity contract that isn't held under a retirement plan. In many States, a divorce won't revoke a beneficiary designation that names the ex-spouse. In other States, a statute might provide that a divorce or annulment makes the former spouse not a beneficiary, except as otherwise provided by a court order. Remember, the law of the State in which you reside when you die isn't necessarily the governing law.

Even if applicable law "automatically" revokes a designation of a former spouse, State law will protect a payer that pays the named beneficiary unless the payer had received a court order restraining payment or at least a written notice that states a dispute about who is the lawful beneficiary.

> ***To-do***: After a divorce, remember to change or confirm your beneficiary designations.

Checking your beneficiary designations

Why check beneficiary designations?

Many Americans die with several "wills" - maybe one that looks like a "last will and testament", and a dozen others that were filled-out on standard forms. For most people, the forms - that is, beneficiary designations and title records - dispose of more money and property than your will does.

Your right to name a beneficiary is a valuable right. And it's part of your financial planning. You wouldn't want to lose a valuable opportunity just because you were neglectful. Besides, checking your beneficiary designations might remind you about financial-planning steps that you need to take.

√ ***To-do***: Having more money and property pass outside your probate estate sometimes can save money on an executor's commissions or fees. See the example at Page 4, Section 2, and think about whether reducing these fees might help (or hurt) the people you want to give your money and property to.

What happens if I don't make a beneficiary designation?

A retirement plan or an insurance contract usually will provide for a "default" beneficiary designation that applies if you hadn't made a valid beneficiary designation. A typical provision pays the nondesignated benefit to the executor of your probate estate. That "default" provision might be safest for the benefit payer, but the most expensive for you and the people you care about.

Sometimes a default provision will be very different from what you would have expected.

Following a default provision almost always results in delays, sometimes long delays, in putting money into the beneficiaries' hands.

Don't let the people you care about suffer the inconvenience of requiring an administrator to figure out a plan's or contract's "default" provision. Instead, make, and keep up-to-date, your beneficiary designations.

Why read a beneficiary-designation form?

Administrators design beneficiary-designation forms anticipating the possibility that you might give incomplete or ambiguous instructions. For example, many forms say that – if a designation hasn't specified the shares – an account will be divided among all beneficiaries in equal shares.

A beneficiary form might include other "gap-fillers" or "default" provisions, some of which might be surprising to you. For example, a beneficiary-designation form might provide that a beneficiary change for one account will change the beneficiary for every account of a similar kind or with the same financial-services provider. Some § 401(k) or defined-contribution retirement plans provide as a "default" beneficiary the person or persons designated under a pension plan or even a life insurance plan. Because provisions of this kind might frustrate your intent, you should read each beneficiary-designation form.

What happens if beneficiary-designation records were destroyed? or lost?

After disasters such as the 1990s' Oklahoma City and World Trade Center bombings, 9-11-2001, and Hurricanes Katrina and Wilma, many people have become more aware of the possibility that paper records are easily destroyed. Many employers still keep beneficiary designations as paper records, and some retirement plan administrators have no computer-based backup of a beneficiary designation.

Even without a disaster, sometimes beneficiary-designations are lost simply because an employer or business moves to new offices.

To-do: If you think that there's any possibility that a record of a beneficiary designation you made was destroyed or lost, check on it. Even better, just make a "fresh" beneficiary designation. Try to get some proof that the administrator got it. Keep copies for yourself, and give a copy to each beneficiary.

Common Mistakes

People sometimes make beneficiary designations that they don't think through. Here's an explanation of some common mistakes.

1. **Failing to coordinate a beneficiary designation's provisions with those made in other nonprobate designations and a will.** Although a beneficiary designation's provisions need not be the same as those of your will or other dispositions, if they are different you should understand why you made different provisions and whether they are likely to add up to a combined result that you want.

2. **Making a beneficiary designation that a payer will refuse to implement.** Don't try to make a beneficiary designation that refers to terms that one may use in a will but are precluded by your retirement plan or insurance contract. A plan administrator's or insurer's interpretation of the beneficiary designation without the offending terms might result in a disposition quite different from what you would have wanted.

3. **Trying to name beneficiaries by writing "all my children, equally" or describing a class.** Whenever a beneficiary designation refers to information not in a payer's records, a plan administrator, insurer, bank, or broker may decide that you didn't make a beneficiary designation, or might allow a claimant an opportunity to name every person in the class and prove that there are no others. Since it's difficult to prove the nonexistence of an unidentified person, even the opportunity to correct such a beneficiary designation would result in significant frustration and delay.

4. **Neglecting to use a beneficiary's Social Security Number** (or Individual Taxpayer Identification Number), **especially for a daughter.**

> *Example*: Harold Smith named his three children – Reed Smith, Catherine Smith, and Alice Smith – as his beneficiaries, and used only their names. By the time of Harold's death many years later, Reed and Alice had married. Reed had no special difficulty claiming his benefit. But Alice Carpenter was required to submit proof that she is the same person as Alice Smith. Because an identifying number assigned by the Social Security Administration or Internal Revenue Service is unique, this burden could have been avoided had Harold put Alice's number on the beneficiary-designation form.

But you might want to balance this use of a clear identifier against concerns about a potential for identity theft.

5. **Naming a minor as a beneficiary without considering who the minor's guardian would be.** For example, a divorced person might not want to name his or her young child as a beneficiary if doing so might put money in the hands of the child's other parent - your former spouse. [See Page 17, Section 10] Instead, you might name a suitable trustee or custodian.

6. **Naming a child as a beneficiary without considering his or her prudence.**

> *Example*: Philip names his daughter, Britney, as a beneficiary. When Philip dies, Britney is 19 years old, and no longer is a minor under applicable law. Although Britney should pay her sophomore year's $25,000 tuition at the Newark College of Fashion Arts, Britney buys a new car, and then neglects to pay the second insurance premium. When the uninsured car is stolen, Britney has nothing left from her father's gift.

Consider your child's maturity, and consider whether it could help to choose a suitable trustee to manage the child's benefit.

7. **Forgetting to give a copy of the beneficiary designation to the beneficiary.** A plan administrator, insurer, bank, or broker has no duty or obligation to contact your beneficiaries to invite them to submit a claim. Indeed, many service providers particularly avoid doing so because such a communication might invite fraudulent claims. A beneficiary might not claim a benefit if he or she is unaware that he or she is a beneficiary. Likewise, a beneficiary might face difficulty in claiming a benefit if he or she doesn't where or how to submit a claim.

8. **Naming your estate as the beneficiary.** Some people think that naming your estate as the beneficiary is a way to avoid inconsistency in your estate plan. While such a beneficiary designation might fulfill a goal of avoiding inconsistency, it can be unwise for other reasons. Amounts paid or payable to a personal representative for the estate are easily available to a decedent's creditors. And a benefit's "run" through an estate might, because of accounting and timing differences, result in income taxes greater than the income tax that would result if the recipient received the benefit directly.

9. **Failing to make a beneficiary designation.** Although this observation might seem somewhat inconsistent with some just described, another common mistake is failing to make a beneficiary designation. If you're having a hard time making up your mind about a beneficiary designation, you're unlikely to have read a plan's or contract's terms carefully enough to understand the effect of its "default" provisions [see Page 22, Section 13]. Although a young person might assume that death is far away, the point of a beneficiary designation is to provide for the possibility of death. The risks of failing to make a beneficiary designation usually outweigh the risks of a less-than-perfectly-considered designation. And a typical plan or contract allows you to change your beneficiary designation at any time.

10. **Forgetting to review your beneficiary designation.** You should review your beneficiary designations every year, and whenever there is a significant change in your family or wealth.

Example: Martha named her husband, John, as her beneficiary under a retirement plan. Although Martha wanted to make sure that her children would be provided for, she trusted her husband to take care of the whole family. Martha and John divorced, and Martha neglected to change her beneficiary designation. After Martha's death, John submitted his claim to the plan administrator. The plan administrator followed the plan's terms, which don't revoke a beneficiary designation because of a divorce. [See Page 21, Section 12] The plan paid John, and he spent the money without considering any needs of Martha's children.

These examples and common mistakes are only a few of the many ways you might make an unwise beneficiary designation. Although we hope that death is far away, it's always possible. So you should use your valuable right to name a beneficiary, and think ahead.

Beneficiary & Asset Management Form

If you're like most Americans, much of your estate doesn't go through a "probate" administration. A significant portion of the money, property, and rights that most Americans have don't pass according to one's will. Usually, they're transferred according to a beneficiary designation or a title registration that says who the next owner will be. But these nonprobate property transfers don't get the protections that State law provides to guard against fraud or mistakes in making or administering a will. So you need to be careful in making beneficiary designations, and you should check them regularly.

- ☑ Use this form to check your beneficiary designations.
- ☑ Check them at least once each year. Set a regular date that you'll remember easily. We suggest setting your review along with your birthday, your wedding anniversary, the Friday or weekend after Thanksgiving (which is when many employers confirm your information for the next calendar year's health and insurance benefits), or some regularly recurring time that has meaning for you.

What I Own	**Asset Value**	**Who's my beneficiary now?**	**What company would my beneficiary send a claim to?**	**What website, telephone number, or address would I use to get the right form if I want to change my beneficiary?**
Pension				
401(k)/403(b)/457(b)				
IRA				
Roth IRA				
529 Plan				
Education Savings Account				
Employer Life Insurance				
Individual Life Insurance				
Annuity Contract				
Brokerage Account				
Bank Account				

This form is meant only to help you have a general awareness about beneficiary designations and some other nonprobate transfers. We based this form on law published as of July 2006. The law could change any time. We don't warrant the accuracy or completeness of any information.

Words used with a special meaning for this Guide

ERISA
Refers to the non-tax statutes made by the *Employee Retirement Income Security Act of 1974*, a Federal law that governs most nongovernmental employers' employee-benefit plans.

ERISA plan
Refers to a *retirement plan* (see below) that is governed by ERISA.

IRA
Refers to an Individual Retirement Account, an Individual Retirement Annuity, or a trust that's treated as an Individual Retirement Account.

Non-ERISA
Refers to a governmental plan, a church plan that hasn't elected to be governed by ERISA, or a § 403(b) contract or IRA that isn't held under a plan.

Nonprobate
Refers to property that is transferred or contract rights that are provided without a *probate* (see below) administration.

Participant
Refers to a participant (rather than a beneficiary or alternate payee) under a *retirement plan*, or the original participant, holder, or "owner" of an IRA.

Payer
Refers to a trustee, custodian, insurer, plan administrator, or other person responsible to decide or pay a claim under a retirement plan or insurance contract.

Probate
Although it isn't correct usage, this Guide uses the popular expression "probate" to refer to money, property, or rights transferred through a court-supervised administration or succession.

Retirement plan
For convenience, this Guide uses the words "retirement plan" to refer to a plan or arrangement that is a

- qualified plan under Internal Revenue Code § 401.
- cash-or-deferred arrangement under § 401(k).
- contract or account under § 403(b).
- Individual Retirement Account (IRA).
- Individual Retirement Annuity (IRA).
- Simplified Employee Pension (SEP) plan.
- Salary-reduction Simplified Employee Pension (SARSEP) plan.
- Savings Incentive Match Plan for Employees (SIMPLE).
- qualified governmental excess benefit arrangement under § 415(m).
- eligible deferred compensation plan under § 457(b).

Except for differences between ERISA and State law (some of which this Guide explains), beneficiary-designation rules apply in a similar manner to these different retirement plans.

State

This Guide uses the word "State" in its popular meaning to refer to the District of Columbia or a State, commonwealth, territory, possession, or similar jurisdiction of the United States of America. For example, although the District of Columbia isn't a State, law that applies to a person because he or she resides in the District is State law, as distinguished from United States law or Federal law that applies throughout the United States of America.

About this information

This Guide is meant only to help you have a general awareness about beneficiary designations. This isn't a substitute for getting your own advice. Even if you think you have useful information (and this Guide is far from complete), an expert lawyer could help you think about how the law relates to your particular facts and circumstances.

We don't give tax or legal advice. If you need advice, ask your expert lawyer.

We based this Guide on law published as of July 2006. The law could change any time. Although we tried to be careful, we don't warrant the accuracy or completeness of any information.

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