TRUST ADVICE E-NEWSLETTER
The Law Firm of Richard O. Barndt, J.D., LL.M. Tax

GIVING SOMEONE CHECK WRITING AUTHORITY ON YOUR LIVING TRUST OWNED BANK ACCOUNT

A common question asked frequently by our clients is how to allow a third person (someone who is not a trustee, such as an adult child) to access a client's bank account *now* (i.e., *before* the client is incapacitated or deceased). The question usually presents as follows:

"I put my bank account into my trust when you made the trust for me, but now I want to put my daughter's name on the account so she can sign checks, and my bank says I can't do that. What do I do now?"

The usual way to hold title to a bank account, when you have a living trust, is as follows:

Owner: JANE DOE, Trustee, JANE DOE FAMILY TRUST dated 2/2/2009

Co-Owner: None

Beneficiary: None

In this case the bank is correct. If a financial account is "owned" by a trust as described above, then ONLY the "trustees" (in this case, "JANE DOE") can have signature authority. Said another way, a trust CANNOT be a *joint owner* (or *co-owner*) with another entity or individual. So banks will not simply add a daughter as a joint owner along with the trust.

In our experience, most people presented with this problem, who do not obtain legal advice, simply remove the account from the trust and put the account in the client's and daughter's names, as a joint account as follows.

Owner: JANE DOE

Co-Owner: DAUGHTER DOE

Beneficiary: None

While this arrangement achieves the client's immediate goal of giving the daughter the ability to sign checks, make deposits, etc., this method does have negative implications.

Negative #1: If the daughter files for personal bankruptcy, she has to disclose her ownership interest in your account. You now have the burden of showing that her name was only put on your account for your convenience, and that all the money in the account was put there by you. Do you have all those deposit records readily available?

Negative #2: If the daughter is sued and a judgement is obtained against her (e.g., traffic accident that was her fault) then she has to disclose her ownership interest in your account when the judgement creditor comes collecting. Again, you now have the burden of showing that her name was only put on your account for your convenience, and that all the money in the account was put there by you.

Negative #3: Your married daughter becomes involved in a nasty divorce with her husband, and her husband's lawyer wants your account to be part of their marital property division since your daughter's name is on your account. Again, you now have the burden of showing that her name was only put on your account for your convenience, and that all the money in the account was put there by you.

Negative #4: If you change your mind and want to remove your daughter's name from your account, you will need to get her written consent for her removal. This is because her rights are equal to your rights. If she refuses, you will have to withdrawal all the money and deposit the money into a new account.

Negative #5: Assuming you have avoided these first four issues, then after your passing, your account now belongs to your daughter. However, if your trust leaves your trust assets to persons other than, or in addition to, your daughter, i.e., all three of your children equally, then you have a new problem. Legally your trust assets will be distributed equally to all three children, but this joint account is not part of the trust and will go *only* to your daughter as the surviving joint owner. How will this make the other two children feel? Even if your daughter agrees to split the joint account three ways and writes a check to each of her siblings for their equal interest, the Internal Revenue Service may conclude that your daughter has made a *taxable gift* to her siblings if the amounts of the check to each sibling exceeds the annual exclusion amount (currently $13,000 per recipient per calendar year for 2009), which would necessitate that your daughter file an IRS Form 709 gift tax return, having the effect of charging your daughter's federal estate tax exemption with the amount of these gifts that exceed the annual exclusion.

Is there a better way? YES. It is our recommendation that instead of removing the account from the trust and adding the daughter as a joint owner, that instead you keep ownership in your name as

trustee of your trust, and add the daughter (or other third person) as an "attorney-in-fact" to the account as follows.

Owner: JANE DOE, Trustee, JANE DOE FAMILY TRUST dated 2/2/2009

Co-Owner: None

Beneficiary: None

Attorney-in-Fact: DAUGHTER DOE

An "attorney-in-fact" is another word for "agent", a person appointed under a power of attorney. A power of attorney document creates a principal/agent relationship. The person giving the power, the principal, in this case, is *you*, as *trustee* of your trust. The attorney-in-fact (agent) is the daughter (or other third person). The attorney-in-fact's power is secondary to the principal's power, which means that you can revoke the power of attorney without the attorney-in-fact's consent (which is not the case with a co-owner).

In this case, you, in your capacity as *trustee* of your *trust*, can appoint someone as your agent to give that person access to and power over your trust owned bank account. You remain the only *owner* (as trustee) and maintain primary control over the account. This power will only effect the specific financial account listed on the power of attorney form. This arrangement has none of the negatives listed above.

A power of attorney automatically terminates upon the death of the principal, since this terminates the principal/agent relationship. This means that your attorney-in-fact's power over your account will automatically terminate at your passing. This will allow your successor trustee to take control of your bank account just like any other asset of your trust, thus avoiding the gifting problems discussed above in Negative #4.

In order to appoint an attorney-in-fact, you need to sign a power of attorney form. This is not the power of attorney form you received when you received your living trust. The power of attorney form you need is obtained directly from the bank, so you need to obtain it and sign it there. You need to take a copy of your trust with you and show them the following paragraph that is contained in the "TRUSTEE PROVISIONS" section of your trust:

"Employ Professionals: To employ any custodian, attorney, accountant, corporate fiduciary, investment counselor, **attorney-in-fact**, or any other agents or employees as the Trustee deems necessary to assist the Trustee in the administration of this trust. Reasonable compensation for all services performed by these agents and employees shall be paid from the Trust Estate out of either income or principal as the Trustee in the Trustee's discretion shall determine, and shall not decrease the compensation, if any, to which the Trustee is entitled. **The Trustee shall also be authorized to appoint an attorney-in-fact under a special power of attorney to act as a co-signatory on any bank accounts held in the name of the trust**."

This paragraph empowers the trustee to appoint an attorney-in-fact. The bank will not assume that your particular living trust contains specific language permitting the trustee to appoint an attorney-in-fact, so you need to make it easy for them and have this paragraph ready to show them. By presenting this trust language to the bank, they should be agreeable to proceed with your appointment of the attorney-in-fact, while keeping the account owned by you as trustee of your trust.