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Memo to Banks & Credit Unions Regarding Retitling of Personal Cash Accounts into Revocable Living Trust

1. Objective

The purpose of this memorandum is to provide guidance to banking professionals when a client of my law firm requests a bank or credit union to retitle personal cash accounts into a revocable living trust for estate planning purposes. This includes checking, savings, and money market accounts, plus any certificates of deposits. This memorandum does not apply to business accounts, annuities, or tax-deferred retirement accounts.

After reviewing this memorandum, if you have any questions or need to clarify something, please contact me by email or text message. I want to make sure you have all the information you need to complete this task as efficiently as possible.

2. Process

Your financial institution likely has established policies for how to accomplish this task, and I understand that. This makes it difficult for me to counsel clients regarding the specific procedures they will encounter because the procedures are not consistent among the many banks and credit unions. For example, your financial institution may have its own preference for how to title an account in a trust name. This is perfectly acceptable, although the titling should be substantially similar to this format: **[Trustee Name], Trustee of the [Name of Trust] dated [Date of Trust]**.

When completing forms regarding the trust, please make note:

- **Terminology.** A person who establishes a trust is usually called the "Trustor." However, the words "Trustor", "Grantor" and "Settlor" are interchangeable. A person who manages a trust is called a "Trustee." It is normal and customary for the same person to be Trustor and Trustee of a revocable living trust. A successor Trustee is named in the document to serve in the event of the Trustor's extended mental incapacity or death.
- **Tax Identification Number.** A revocable living trust uses the social security number of its Trustor as the tax identification number during the Trustor's lifetime. This means that any income is reported on the Trustor's personal Form 1040 income tax return. If the trust has two Trustors married to each other, either social security number is permissible as long as the married couple files a joint tax return each year.
- **Trust is Revocable.** A revocable living trust is revocable by the Trustor during the Trustor's lifetime. This means that the Trustor may amend, restate, or cancel the trust.

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- **Please keep existing account numbers, whenever possible**. You should retitle existing accounts and not transfer funds to new accounts unless your financial institution has a policy requiring new accounts. Although there are some notable exceptions (for example, Chase Bank), most major banks and many smaller banks and credit unions will permit re-titling of existing accounts when (1) the Trustor and existing account owner are the same person, and (2) the trust uses the social security number of the Trustor as its tax identification number. If you believe your financial institution requires opening a new account, please verify this with your legal department before proceeding. This is not a common policy, unless for example, a person is attempting to retitle an individual account into a joint trust with Co-Trustees. Then a new account would be expected.
- **Trustees may act independently**. When a revocable living trust has Co-Trustees, either Trustee may act independently.
- **Please remove existing Pay-on-Death Designations, if necessary.** When re-titling accounts to a revocable living trust, it is essential that you revoke or eliminate any existing Pay-on-Death designations. It is legally impermissible for a trust account to also name a Pay-on-Death beneficiary.
- **Please keep existing checks, unless customer requests otherwise.** When an existing personal account is retitled into a revocable living trust, it should be the client's option whether to order new checks with the trust name pre-printed above the address. There is no legal reason why checks need to include any reference to the trust, so ordering new checks is unnecessary.

However, if your financial institution is unable or unwilling to retitle accounts, or if the process is unduly burdensome to the customer, an alternative approach is to name the revocable living trust as Pay-on-Death beneficiary. This method will at least achieve probate avoidance, assuming that is the primary objective. But please strive to retitle accounts whenever possible as this approach will achieve more estate planning objectives. See my explanation in Part 4 for more information.

In summary:

Plan A	Retitle account into name of revocable living trust.
Plan B	Keep existing account and titling the same, but name revocable living trust as Pay-on-Death beneficiary.

Another compromise method you might consider proposing is to use Plan B for the checking account and Plan A for the other accounts. This works well if the customer has multiple direct deposits or auto-debits set up with a primary checking account and prefers not to tinker with them.

3. Certification of Trust

In order to facilitate the process of retitling accounts into trusts, the State of Arizona enacted a law, effective January 2009, permitting a customer to supply a Certification of Trust instead of supplying a copy of the entire trust document. *See A.R.S. §14-10813.* I provided my client with a generic Certification of Trust document, which meets the requirements of the Arizona statute, and instructed my client to present a copy to you.

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Whether your financial institution accepts the Arizona certification form is a different matter. Your financial institution may have its own customized certification form, which is an acceptable banking practice. Some rogue financial institutions, however, will disregard Arizona law and request a copy of the entire trust document. If this is your employer's standard practice, my client may choose to comply, but please understand that my client may resist or complain about this considering Arizona law. If my client still refuses to cooperate, a compromise solution is to find out from your legal department what specific information it is hoping to examine. This approach may work, especially if you inform the legal department that the customer is willing to submit copies of relevant pages from the trust document. Legal departments often respond by asking for copies of (a) the first, or "title" page, (b) the last, or "signature" page, (c) the article listing each power of the Trustee, and sometimes (d) the successor Trustee provisions.

4. Explanation

A revocable living trust is a popular alternative to the traditional will as the main component of an estate plan. Because assets owned by a revocable living trust bypass the court-supervised probate process, the primary benefit of a revocable living trust is to avoid probate court interference upon the extended incapacity or death of the trustmaker. Other secondary benefits include (1) robust contingency planning, (2) freedom to choose a preferred fiduciary, (3) ability to restrict or protect inheritance for the beneficiaries, (4) enhanced privacy, and (5) the opportunity to unite the allocation of inheritance into one controlling document.

To achieve the desired estate planning benefits, a client who establishes a revocable living trust must then retitle – or "fund" – personal cash accounts of substantial value into the name of the trust. This is especially important if the combined value of the client's cash, non-retirement investments, personal effects, and equity in automobiles exceeds $200,000.

This is a better approach than, for example, naming a child as joint owner because:

1. <u>Exposes the parent's assets to the child's creditors</u>. If the child is sued, the child must disclose the joint account to the court and plaintiff's attorney. The burden falls on the child to convince a court that the child contributed nothing and that the account really belongs to the parent. Similarly, the account would be a reportable asset if the child filed for bankruptcy.

2. <u>Eliminates the fiduciary duty a child would otherwise have</u>. A child as joint owner has no fiduciary duty to manage the account in the best interest of the parent. By naming a child as a trustee, the fiduciary duty is maintained so that misuse of funds by the child remains a crime punishable by law.

3. <u>Parent loses full control of the account</u>. Although intended to facilitate a child helping the parent, a controlling child or the jealousy of other siblings could spoil the arrangement. Similarly, if the child needs money, there is nothing to prevent the child from taking it without permission.

4. <u>Assumes the child will behave like a Saint</u>. The parent can only hope the child "does the right thing" and uses the joint account to pay estate bills and then shares it with other beneficiaries as directed in the parent's estate planning documents. The child's attorney would be correct under the law to counsel the child otherwise.

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5. Creates potential eligibility penalties upon application for ALTCS. The parent must report gifts made within the prior 5 years when applying for nursing home benefits through the ALTCS program (Arizona Long Term Care System – Arizona's version of Medicaid). Naming a child as joint owner may be interpreted as a gift that triggers a penalty and delays the start of benefits.

The revocable living trust is also a better approach than, for example, naming children as Pay-on-Death beneficiaries because:

1. Fails to account for potential incapacity of owner. A Pay-on-Death designation provides no benefit if the parent becomes incapacitated. The parent must instead rely on a durable power of attorney, which is unreliable, or a conservatorship proceeding, which is expensive, time-consuming and public.
2. Fails to deal with unusual situations. A Pay-on-Death designation does not permit the level of customization sometimes needed for unusual or unexpected situations. For example, a Pay-on-Death designation provides no flexibility if the beneficiary is too young to inherit, disabled, addicted to drugs, receiving needs-based government benefits, gets divorced, or is a spendthrift. In fact, naming a minor child as Pay-on-Death beneficiary is never a good idea.
3. Eliminates many planning options. A Pay-on-Death designation eliminates alternative distribution options upon death. For example, the parent may wish to transfer the account into an asset-protected inheritance trust for a beneficiary, rather than grant outright ownership. An inheritance trust can protect a beneficiary's inheritance from an ex-spouse and judgment creditors.
4. Works awkwardly when there are multiple beneficiaries. A Pay-on-Death designation often makes the estate administration process more difficult when there are multiple beneficiaries. It is better for cash accounts to be made available to the successor Trustee or Personal Representative, so that final expenses and debts can be paid without having to seek reimbursement from other Pay-on-Death beneficiaries.

Therefore, I suggest you personally refrain from advising any customer to name a child as joint owner of an account or add a Pay-on-Death designation unless the customer requests it. Your suggestion may actually constitute the unauthorized practice of law and create potential liability for your employer. For more information about this and other related estate planning topics, please explore the many articles on my law firm website.

5. Certificates of Deposit

Before retitling a certificate of deposit into trust, please inform the customer whether your financial institution will consider the change in account name to be an "early withdrawal" that incurs a penalty fee. Generally, this should not be a problem because the customer's social security number and trust's tax identification number are the same. But if a fee would be charged, you might suggest waiting to retitle the certificate of deposit until its maturity date.

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