

National Association of Estate Planners & Councils

ROBERT G. ALEXANDER

WEBINAR SERIES

December 9, 2015· Welcome

Next Webinar:

Wednesday, January 20, 2016, 3:00pm ET

A Year in Review: An Estate Planners Perspective

Howard M. Zaritsky, JD, LL.M., AEP® (Distinguished) & John O'Grady

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Asset Protection for Tax Qualified Plans

Strategies for Protecting and Integrating Retirement Plan Accounts Into the Estate, Financial and Asset Protection Plan

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National Association of Estate Planning Council Dec 9, 2015 Webinar

Course Objectives

- Understand how ERISA, federal, bankruptcy and state law protections overlap – and the gaps
- Bust common myths and misconceptions
- Lose fear of using trusts with qualified plans
- Provide a checklist of actionable ideas and steps to ensure protections for such accounts

Course Theme

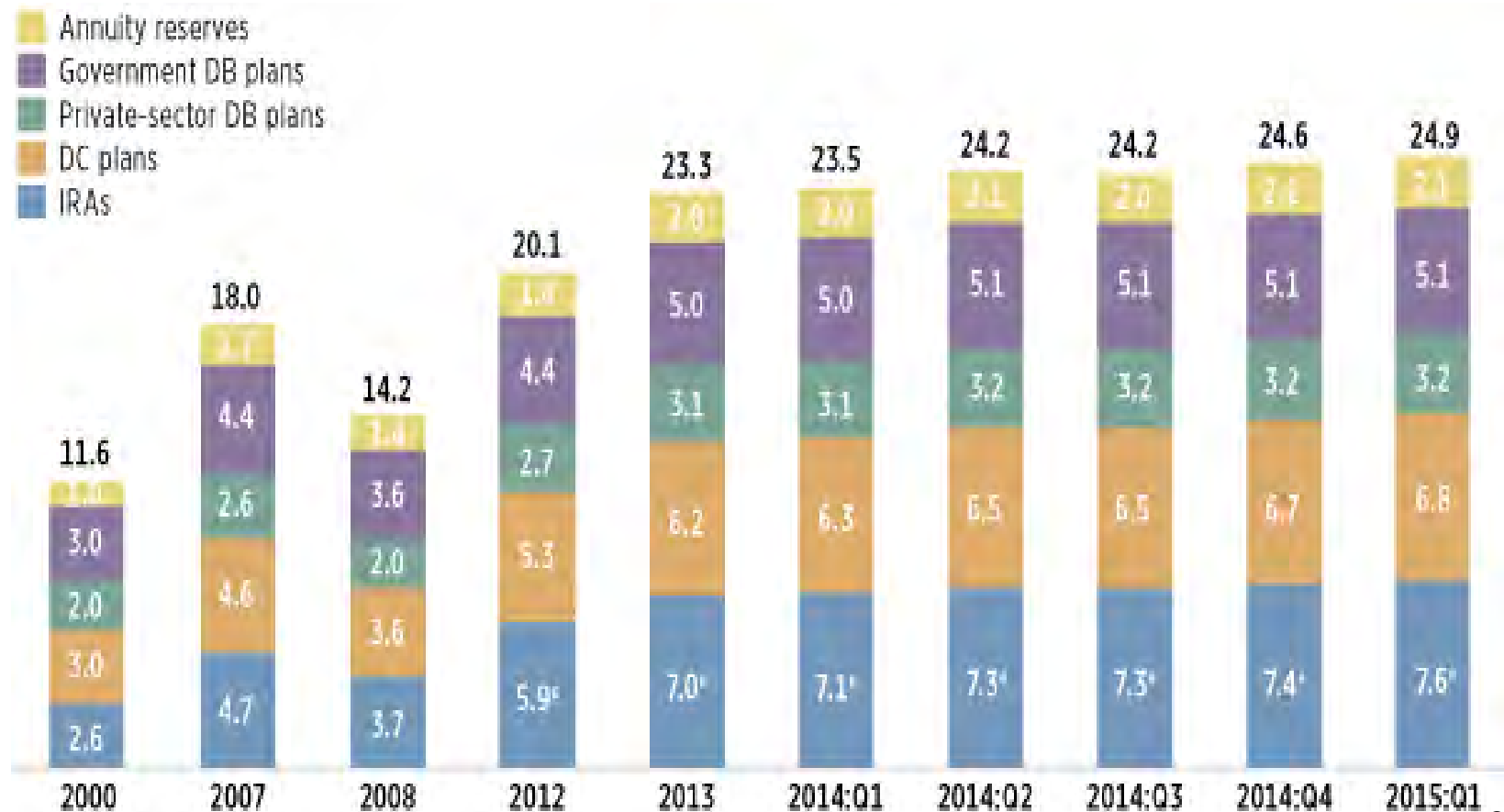
“We hold these truths to be self-evident: that all accounts are *not* created equal, that they are endowed by their Creator with certain *alienable* rights, that among these are the power to defer, avoid or shift taxation and shelter assets from creditors - That to secure these rights, attorneys are endowed with certain powers to arrange such accounts as necessary for the public good.”

Agenda for Course

- I. Value of estate/IRA planning after ATRA
- II. Overview of state law protections
- III. Overview of ERISA protections
- IV. Overview of bankruptcy protections
- V. Inherited account protections after *Clark v. Rameker*
- VI. Explain “conduit” and “accumulation” trusts and trustee IRAs/IRA annuities; “standalone IRA trusts”
- VII. Asset protection strategies to embrace - and avoid
- VIII. Importance of checklist for trust drafting and post-mortem administration for tax and asset protection

I. Value of IRA Planning – “It’s where the money is!”

U.S. Total Retirement Market (source: Investment Company Institute-www.ici.org)
Trillions of dollars, end-of-period, selected periods



I. Value of a “Stretch IRA”



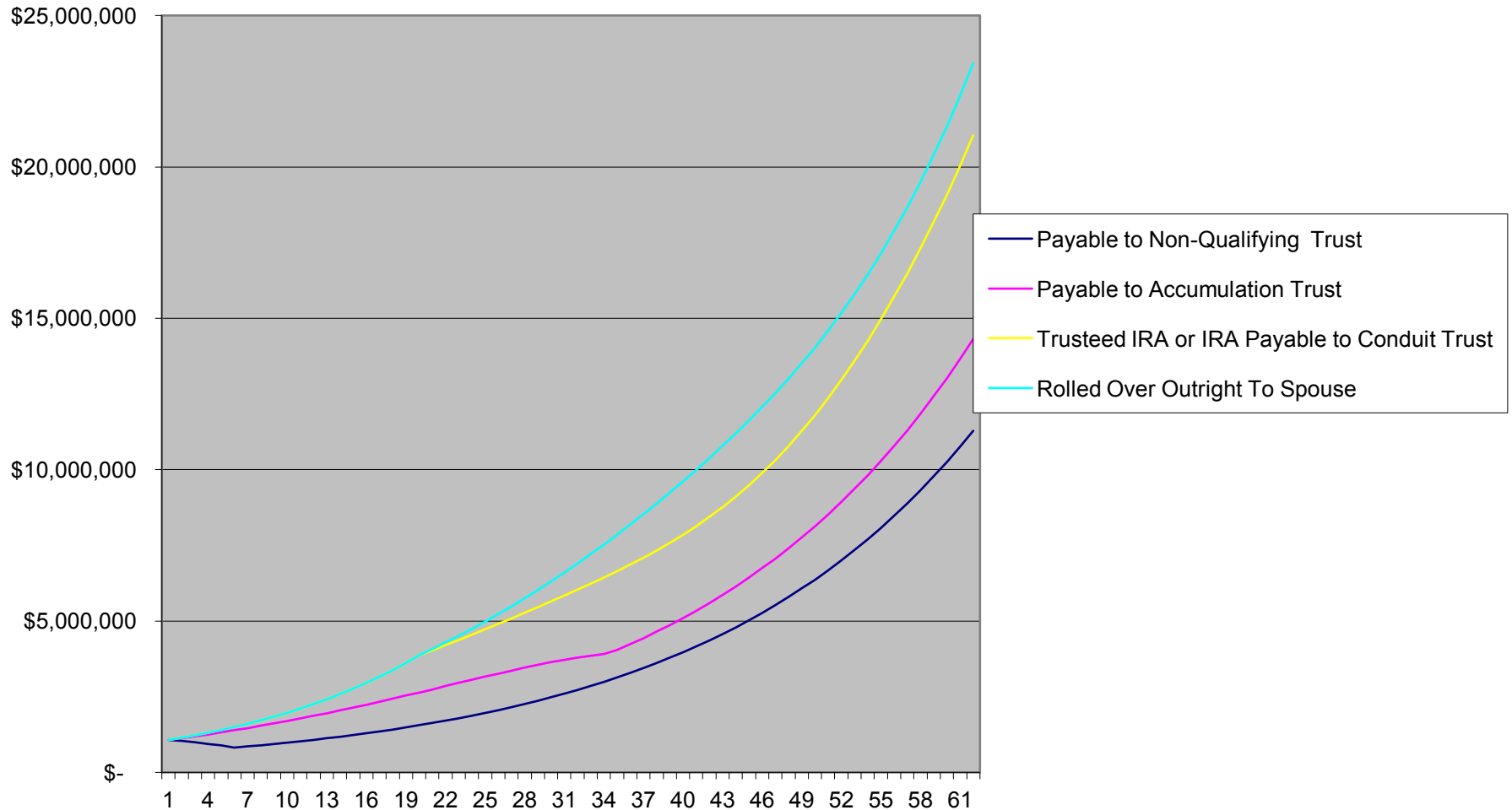
“ The most powerful force in the universe is compound interest.”

- Albert Einstein

He should have added “tax free”, or at least “tax deferred”....

I. Value of a “Stretch IRA”

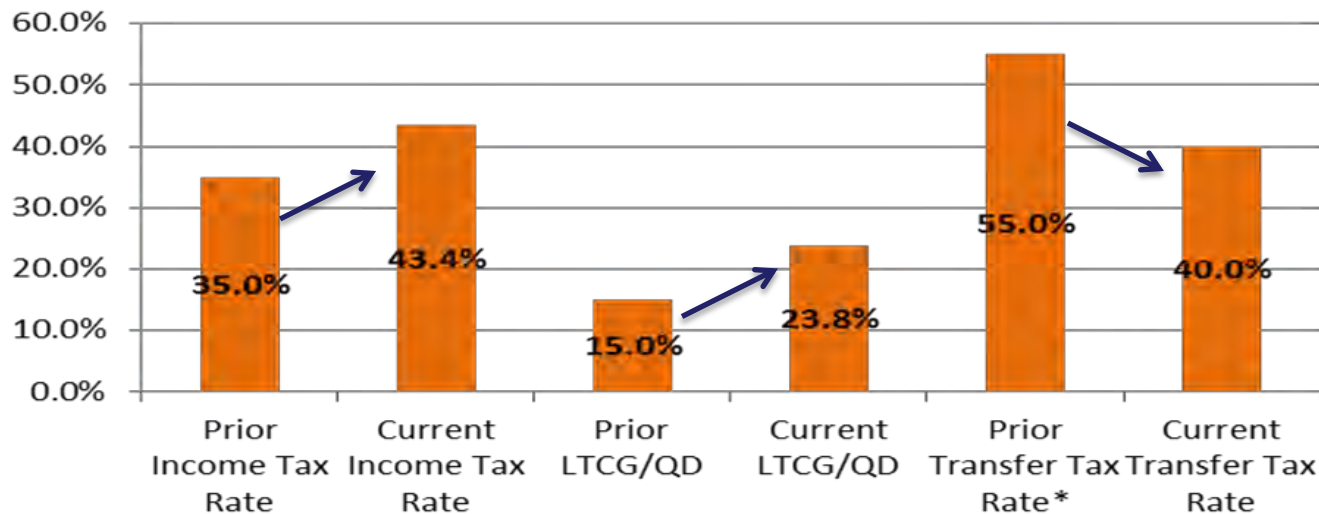
Four Options for Leaving \$1M IRA to 50 Year old widow: outright, conduit, accumulation, non qualifying trust (5 year rule)



I. Income Tax Planning for Estates?

- With the federal estate tax exclusion at \$5.43 million in 2015, indexed for inflation, plus double or more with portability, the number of estates paying estate tax is far, far less than 1% of the population, a few thousand returns nationwide at most. For the 99%+, it's the income tax!

Federal Tax Rate Changes



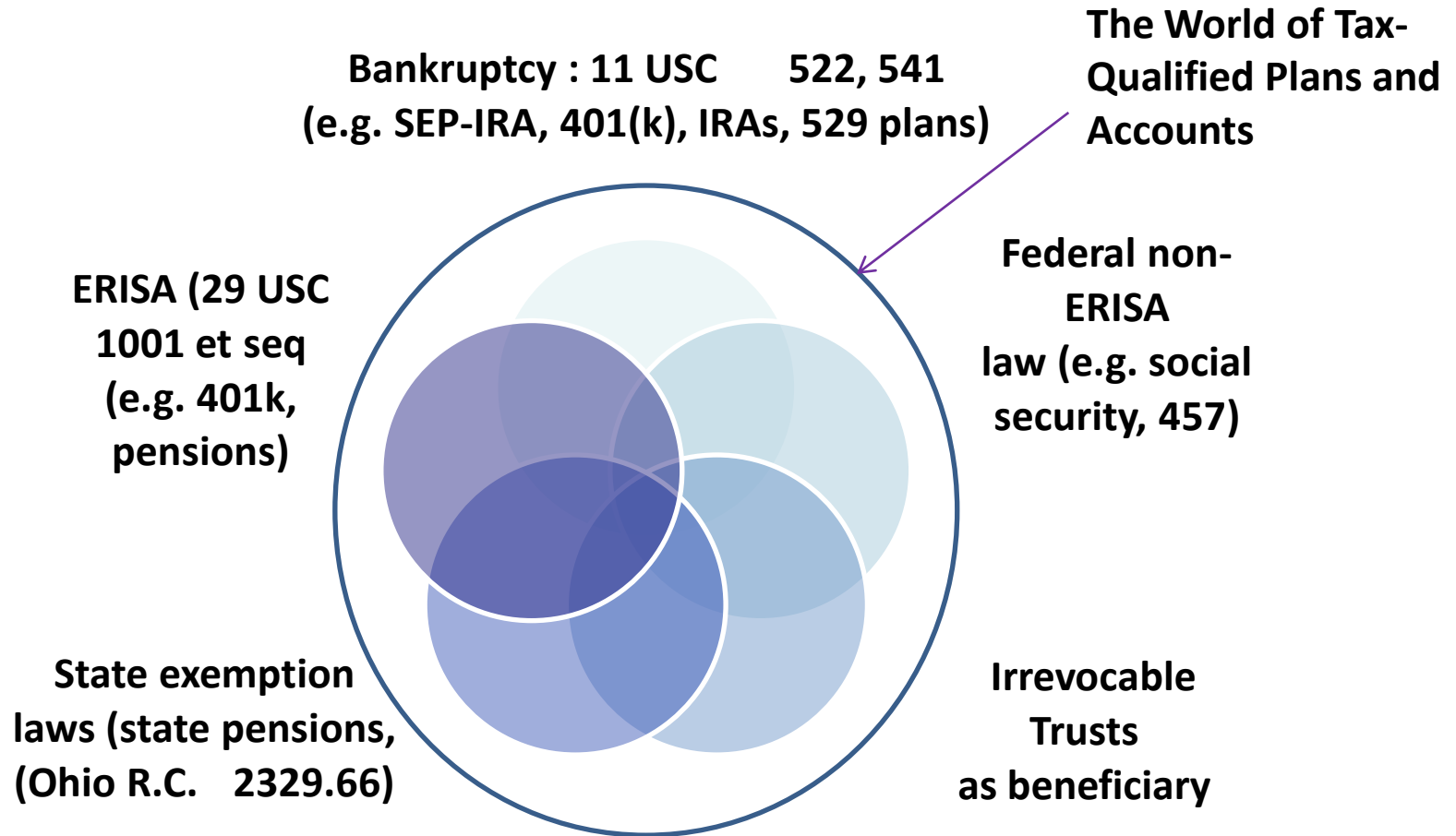
I. Value of Income Tax Planning

For “smaller” estates, there is still a lot of creative tax planning to be done:

- Maximizing state estate tax sheltering (in some states)
- **Ensuring the “stretch” deferral for inherited accounts**
- **Ensuring asset protection for any inherited accounts**
- Maximizing tax basis step up at second death and even at death of older relatives through creative use and planning with powers of appointment in trusts
- Maximizing the ability to avoid state income tax, shift income tax and maximize deductions through creative use and planning with trusts

(the latter two are subject of separate white paper)

II. Overlapping Asset Protection for Tax Qualified Plans



Mind the Gap

II. ROLLOVER CHART – Uniqueness of Roth, SIMPLEs

11/17/2014

| | | Roll To | | | | | | | |
|-----------|--|-----------------------------------|-----------------------------------|------------------|-----------------------------------|-----------------------------------|---------------------------------------|----------------------|--|
| | | Roth IRA | Traditional IRA | SIMPLE IRA | SEP-IRA | Governmental 457(b) | Qualified Plan ¹ (pre-tax) | 403(b) (pre-tax) | Designated Roth Account (401(k), 403(b) or 457(b)) |
| Roll From | Roth IRA | YES ² | NO | NO | NO | NO | NO | NO | NO |
| | Traditional IRA | YES ³ | YES ² | NO | YES ² | YES ⁴ | YES | YES | NO |
| | SIMPLE IRA | YES, ³ after two years | YES, ² after two years | YES ² | YES, ² after two years | YES, ⁴ after two years | YES, after two years | YES, after two years | NO |
| | SEP-IRA | YES ³ | YES ² | NO | YES ² | YES ⁴ | YES | YES | NO |
| | Governmental 457(b) | YES ³ | YES | NO | YES | YES | YES | YES | YES ^{3,5} |
| | Qualified Plan¹ (pre-tax) | YES ³ | YES | NO | YES | YES ⁴ | YES | YES | YES ^{3,5} |
| | 403(b) (pre-tax) | YES ³ | YES | NO | YES | YES ⁴ | YES | YES | YES ^{3,5} |
| | Designated Roth Account (401(k), 403(b) or 457(b)) | YES | NO | NO | NO | NO | NO | NO | YES ⁶ |

¹ Qualified plans include, for example, profit-sharing, 401(k), money purchase and defined benefit plans

² Beginning in 2015, [only one rollover](#) in any 12-month period. A transitional rule may apply in 2015.

³ Must include in income

⁴ Must have separate accounts

⁵ Must be an in-plan rollover

⁶ Any amounts distributed must be rolled over via direct (trustee-to-trustee) transfer to be excludable from income For more information regarding retirement plans and [rollovers](#), visit [Tax Information for Retirement Plans](#).

II. Overview of state law protections

See the attached 50 state plus D.C. chart. These are applicable when in state court, sometimes still applicable in federal or bankruptcy court or possibly another state's court. Some notable holes in protection include:

- 1) SEP/SIMPLE/Deemed IRAs – may depend on circuit/state
- 2) Pension, 403b and 457 plans are often excluded or limited
- 3) Many states do not protect *non-deductible* contributions
- 4) Most states have alimony, child support, state tax, fraudulent transfer and recent (e.g. 90 day) contribution exceptions
- 5) Most states do not protect inherited plans (but, see AK, AZ, FL, ID, MO, NC, NJ, OH, SC statutes and comments)

III. Overview of ERISA protections

ERISA is a complicated area. In some respects, ERISA protection is stronger than state law, but in others respects it is not. Here are a few reasons and cases where ERISA protection is better than state law:

- 1) Clearly protected against state tax claims
- 2) No need to address conflict of laws, interstate issues, residency issues of various state exemptions
- 3) No difference for non-deductible contributions
- 4) Unlike a few states, unlimited protection
- 5) Should in theory protect inherited plans, but recent case law is to the contrary

III. Overview of ERISA protections

Here are a few reasons and cases where ERISA protection is not necessarily better, and often worse, than state law:

- 1) Protection does not apply for SEP/SIMPLE, owner only, partners-only, owner/partner and spouse only plans
- 2) Prenup cannot control spousal interest
- 3) Cannot disinherit spouse (depending on plan, after one year marriage)
- 4) Federal tax levy, criminal restitution, alimony and child support can still reach such accounts (MVRA, QDRO).
- 5) No protection extended once funds are out of the plan!
- 6) Tax liens against them may survive bankruptcy

IV. Overview Bankruptcy Protections

Bankruptcy courts both incorporate state and ERISA protections, but also supplement and supplant them:

- 1) Uniform unlimited protection for most retirement accounts established by debtor (401k, pension, 403b, IRA, Roth), regardless of state law exemptions.
- 2) Contributory IRAs (e.g. \$2,000/yr, now \$5,500/yr) are limited to \$1,245,745 (will adjust for inflation in 2016), plus more if justice requires – who has such accounts? SEP-IRA owners. But state may provide unlimited protection.
- 3) Becomes much more complicated for inherited accounts post - *Clark v. Rameker*
- 4) Remember that some debts are not dischargeable!

IV. Gaps in Coverage

- 1) Debt may not be dischargeable, or discharge denied
- 2) New residency limits the “pull an O.J.” move to Florida
- 3) If not in bankruptcy, ERISA may deny and preempt state protections for SEP-IRA, SIMPLE IRA, deemed IRAs
- 4) ERISA protection can disappear for small business when only owner/partner/spouse are participants. Again, there is a risk that the lack of coverage may preempt and deny state law protections for these accounts when not in bankruptcy! See discussion of *Lampkins/Diguilio* cases.
- 5) State 403(b) protection is spotty (see chart), and some plans, such as a hospital, are unclear whether ERISA protects. Roth/nondeductible IRAs spotty in some states
- 6) Pledging IRA assets for loan, prohibited transactions can be raised by creditor, NOT just the IRS or DOL!

IV. Gaps in Coverage

- 1) Qualified annuity protection will generally piggy-back onto whatever protection the plan affords. However, non-qualified annuities are not afforded protection under the broad protections afforded qualified plans.
- 2) Non-qualified annuities may receive state law protections, but often this state protection is illusory or has gaps in coverage, so don't just check the state statute, but check for any cases reported under the state statute.
- 3) Other tax qualified accounts and assets, e.g., life insurance, Coverdell ESAs, 529 plans, are discussed in the outline and may also have state law protections. 529 plans also have significant bankruptcy exclusion.

V. Impact of Clark v. Rameker

Clark v. Rameker.



The Supreme Court

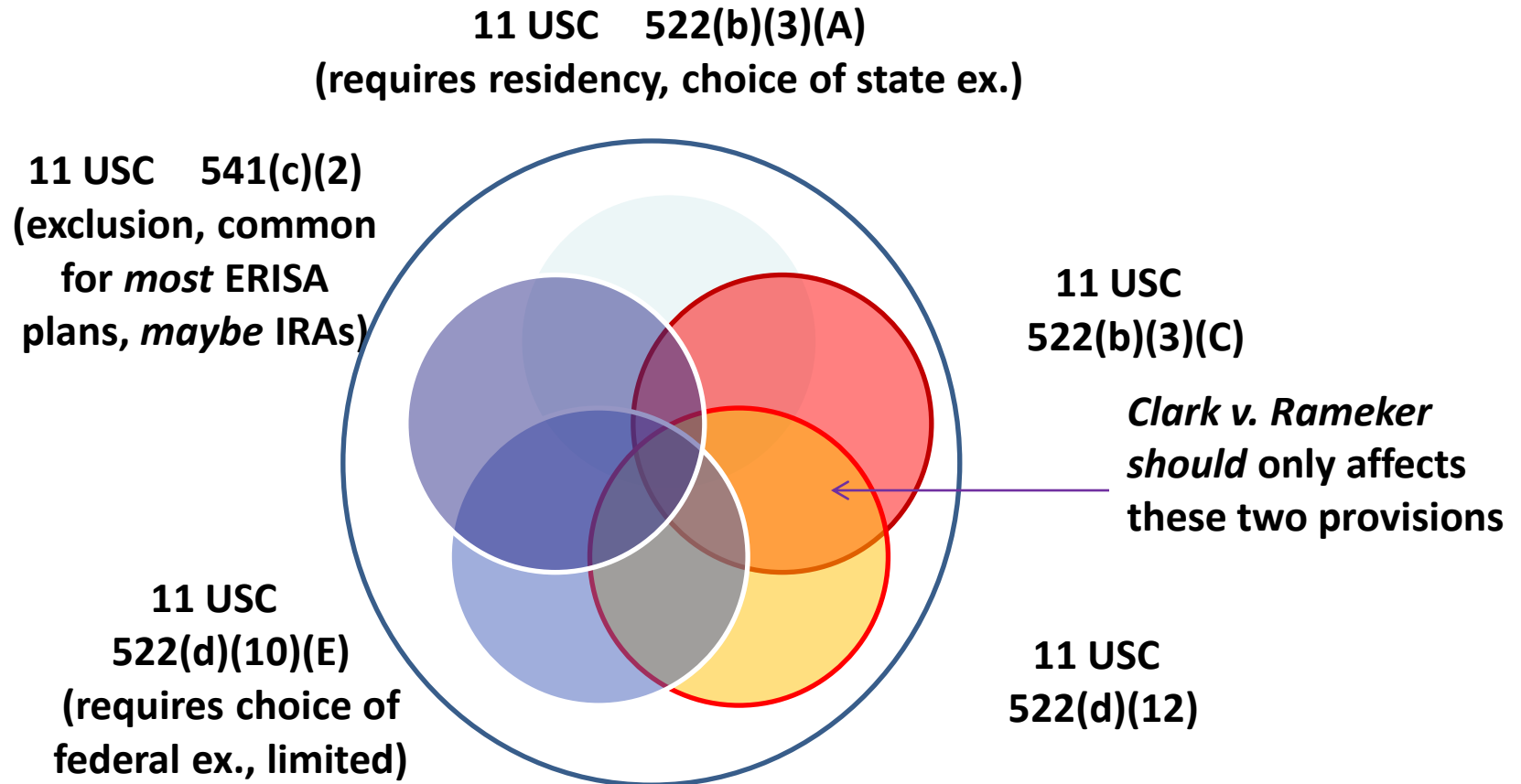
unanimous declares that the Bankruptcy Code does NOT protect inherited IRAs (at least under § 522 (b)(3)(C).

Impact on spouses, and spousal rollovers, uncertain.

Impact on inherited non-IRAs still uncertain.

Impact on debtor-created, non-inherited accounts negligible, but there may yet be some impact.

V. Overlapping Bankruptcy Protection for Tax Qualified Plans Post-*Rameker*



Mind the Gap

V. Post-*Rameker* cases

In re Andolino:

Despite *Rameker*, the court found that the debtor's inherited IRA should be *excluded* from the estate under 11 USC § 541(c)(2), even though it would not have been *exempted* under § 522(b)(3)(C). Follows 3rd Circuit case of *Yuhas*.

Lesson: don't give up on protecting inherited IRAs if you don't have a trust or trustee IRA, which is ideal. You may still have a case for protection, especially in 3rd circuit.

Although 541(c)(2) requires a "trust", and most IRAs are not technically trusts, *Andolino* and other cases have found that it is close enough. You may have better 541c2 argument if the IRA happens to be a trust agreement.

V. Post-*Rameker* cases

In re Scalera, 521 B.R. 513 (W.D. Pa. 2014)

Despite *Clark v. Rameker*, debtor's inherited IRA was permitted an exemption and protected, *because the trustee failed to timely object*. The debtor got lucky.

Lesson: it can't hurt to ask for the exemption!

V. Post-*Rameker* cases

In re Baker, 2015 Bankr. LEXIS 2465 (July 28, 2015)

Despite favorable Florida state law, and despite potential ERISA protection for an inherited pension plan, the court found that *Clark v. Rameker* controlled the debtor's inherited pension payments and it must be included in the bankruptcy estate. There was no discussion of potential arguments that *Clark v. Rameker* should not apply

Lesson: don't expect a court to consider nuances that might apply to *Clark v. Rameker*, state or ERISA law! The debtor did not appear to even argue those points (at least from the written opinion). Again, had the dad left the pension in trust for daughter, the case would be clear!

V. Post-*Rameker* cases

In re Karn, 2014 Bankr. LEXIS 3299 (Bankr. N.D. Ohio 2014). Score a surprising win for debtors, and note another surprising advantage of IRAs over other qualified plans in some circumstances. Debtors withdrew \$38k from an IRA and deposited it (after w/h) in sole proprietorship account (traceable) – did not do a 60 day rollover. Held – still exempt! Despite trustee argument per *Clark* that funds were no longer “retirement funds”. See the cases in outline about why ERISA protection ends once out of the plan, but in many states, state law protections may continue if traced! Even if commingled! Note this case would probably NOT have protected an ordinary pension payment

Lesson: Courts may be expanding *Clark*, but not inevitable!

V. Post-*Rameker* cases

In re Kizer, 539 B.R. 316 (Bankr. E.D. Mich., Oct 2, 2015)

Debtor was denied an exemption for his interest as “alternate payee” via QDRO in his ex-wife’s (she was *not* deceased) University of Michigan and TIAA-CREF annuity retirement accounts (there was also a 403b that probably would have been disallowed an exemption but was granted under a minor catch all provision). The court found that *Clark* controlled because it was *substantially similar to an inherited account because he could not add to funds and he took out funds w/o paying penalty!!* The debtor should have argued that the accounts were EXCLUDED per § 541(c)(2)

Lesson: Courts and bankruptcy trustees are stretching and expanding *Clark v. Rameker*, ignoring § 541, 522(b)(3)(A)!

V. Inherited plans Post-*Clark*

Does your Inherited Plan qualify for bankruptcy protection?

→ first, does it qualify for 541(c)(2) exclusion? (even IRAs may qualify – see *In re Andolino (NJ)*, and states such as KS, NY and others that may lend to *Andolino excl.* argument

X → *Clark* now precludes 522(b)(3)(A) or (d)(12)

→ does it qualify for 522(b)(3)(A) exemption if state protects inherited accounts? (i.e. meets residency, elects state ex.)

→ does it qualify for 522(d)(10) (E) if federal exemptions chosen, limited to “reasonably necessary for support”?

V. Spousal Options Post-Clark

Spousal options to protect inherited retirement plans/IRAs?

→ first, does it qualify for 541(c)(2) exclusion (e.g. ERISA)? If so, spouse can keep in plan, or rollover to spouse's own qualified plan, if existing and permitted, without issue

X → *Clark* now questions 522(b)(3)(C) or (d)(12) if an IRA, and creditors may use UFTA/548 arguments to avoid rollover if state does not protect 522(b)(3)(A). Spouse can rollover to spouse's own qualified plan or IRA and *likely* protected.

→ If spouses are concerned w/above UFTA/548 possibility, establish discretionary trusts as primary beneficiary. Clayton QTIP and disclaimer-based plan is also an option for spouses.

V. Non-Spousal Options Post-Clark

Non-Spousal options to protect inherited retirement plans/IRAs?

→ first, if owner can influence qualified plan adoption, amend the plan to allow beneficiaries to continue “stretch”. Any inherited qualified plan probably protected 541(c)/ERISA

X→ Non-spouses cannot rollover to own plan. State protection uncertain. Qualified disclaimers *not* good option.

→ Use trustee IRA or conduit trust if simplicity and no tax trapping at high rates desired. Use purely discretionary accumulation trust as beneficiary for best asset protection.

VI. Five ways to control IRAs

1. IRA Annuity with restricted payout options elected (uncertain creditor)
2. Trusteed IRA with trust distribution terms incorporated into the BDF (a simplified conduit trust saving 1041 filing)
3. **Conduit trust (Ex. 2 in 1.401(a)(9)-5)**
4. **Accumulation trust (Ex. 1 in Treas Reg. 1.401(a)(9)-5)**
5. Non-qualifying trust (which might even be a CRT), which only receives 5 yrs or “ghost stretch”

VI. Standalone IRA trusts post-ATRA

MORE compelling now post ATRA –

1. Powers of appointment and spray provisions are much more likely to be used in bypass trusts now for better income tax and basis planning. <http://ssrn.com/abstract=2436964>
2. Such provisions may be an income tax elixir, but are ***poison*** to “see through trusts”, especially accumulation trusts
3. Conclusion – leave IRA assets outright or to separate trust or subtrust, don’t mix, unless you are very careful (easier with conduits)

VII. Summarizing Asset Protection Tips

First, categorize your clients. Are they in the camp of:

- 1) optimize asset protection at all costs; or
- 2) optimize asset protection, but taxes are just as important or more so!

Some of the tips following are for both groups, but some would only be justifiable for the first group.

VII. Asset Protection Tips

Segregate and track distributions from any retirement plan, such as RMDs, but also disability insurance, life insurance, sale of homestead, unemployment, social security, disability benefits, worker's comp, deferred comp— in some states/jurisdictions, the state law **protections may be continue if traceable** – there is no apparent time limit! Federal law (**not** ERISA) may provide traceable protection as well (e.g. social security or other federal welfare). “The liquidity of the method of storage controls. For example, if otherwise exempt assets are placed in an illiquid form, such as an investment in real property, the exemption is lost. However, investments into easy to access forms, such as checking accounts, savings accounts, stocks, bonds, or cash, maintain exempt status. *In re Karn* quoting *In re Alam*. KY, MD, FL, OH, WA at least have favorable case law. KS has negative case. Depends on wording.”³²

VII. Asset Protection Tips

- Segregate questionable investments into separate IRAs – Chinese Wall the potential contagion of self-directed IRAs that invest in anything remotely directed or controlled by owner (see discussion in outline of prohibited transactions and how they blow up asset protection – avoid loans back and forth, or pledging of IRA assets)

VII. Asset Protection Tips

- Roth Conversion – when tax is paid from taxable non-protected accounts, the % of protected to non-protected assets exempt from creditors correspondingly increases – unlikely to be a fraudulent transfer
- Even better, Roth Segregation Conversion Strategy, if you have outside cash to pay the tax. If so, reevaluate your POA/will/trust! Not only for distribution language, but ability to recharacterize.

VII. Asset Protection Tips

- Back door Roth contributions for high income earners (where high income earner cannot contribute to Roth directly, but can contribute to non-deductible IRA) – BUT be careful, some states do not protect non-deductible IRA contributions!!! And – watch out for “cream in the coffee rule”.
- E.g. If my only IRA is a non-deductible \$5,500 IRA with a basis of \$5,500, my Roth conversion is tax-free. If I also have a \$200,000 IRA with \$0 basis, this must be considered when converting the \$5,500 IRA, so it would mostly be taxable. Possible solution, if I have a qualified plan that permits contributions, roll \$200,000 IRA to qualified plan. Be careful of timing.

VII. Asset Protection Tips

- Name a subtrust or separate trust directly as beneficiary *rather than a master living trust*, perhaps even make the trust irrevocable.
- This has several tax benefits, for conduits, naming subtrusts directly allow separate LE to be used, avoiding pecuniary funding, tax clauses, etc.
- Moreover, if the owner's estate is insolvent, under the vast majority of state laws, QRP/IRAs payable to a revocable living trust are subject to decedent's estate's creditors (see UTC), even without a pour up or transportation clause! This may even be the case for those states that protect inherited IRAs!

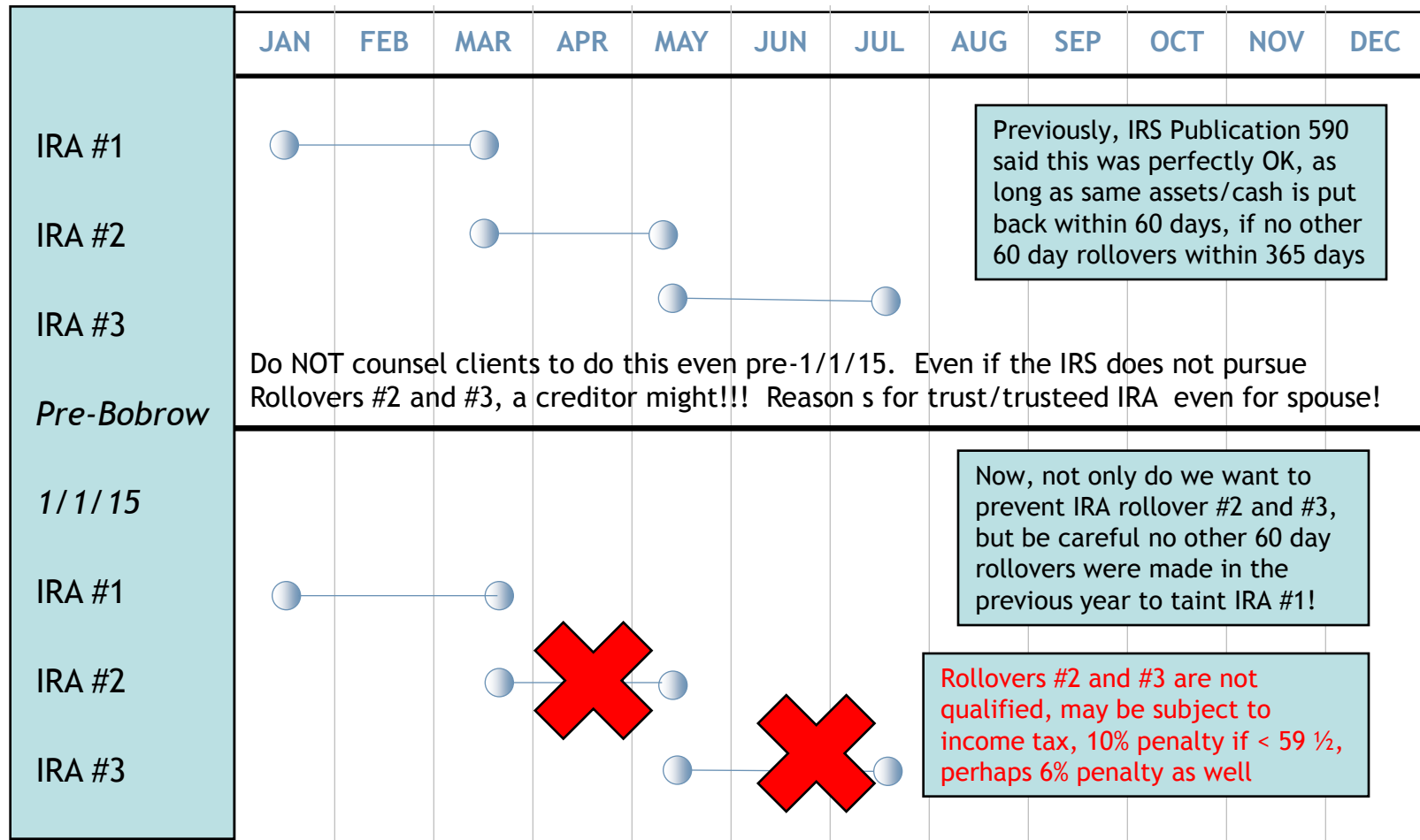
VII. Asset Protection Tips

- Spousal rollover – if spouse is solvent, no creditor problems: but, there are other tax reasons not to rollover immediately which include: spouse is under 59 ½, spouse is older than decedent spouse, who was younger than 70 ½ (delayed RMD), spouse is contemplating disclaimer.
- Again, for paranoid spouses in professions likely to be sued, name a discretionary trust to avoid potential various gaps in inherited plan protections.
- Clayton QTIP with discretion to distribute in kind, or disclaimer-based trust planning may be middle ground – default can be trust or outright..

VII. Asset Protection Tips

- **Never** use 60 day rollovers unless absolutely necessary – some states explicitly protect rollovers during this window, and from fraudulent transfer charges for re-contribution, but many are silent, plus there is simply more room to screw up (even for tax attorneys – see the *Bobrow* case), there is 20% withholding if from QRP, it could even adversely affect financial aid for college.

60 Day IRA Rollover Rules pre and post *Bobrow* Case and IRS announcement



Remember, you can do unlimited trustee to trustee transfers (direct rollovers) - these do not count!
 ALL post-mortem rollovers to inherited IRAs/trusts must be direct - no 60 day rollovers allowed! 39
 Post-mortem spousal rollovers may also be indirect, but is this merely a trap for the unwary?

VII. Asset Protection Tips

- Pay wrap/trustee fees attributable to IRA management from outside taxable accounts
- Example: John has \$2 million in IRA and pays \$20,000 trustee or wrap investment management fee. Paying this from outside taxable accounts allows more to grow tax deferred or tax free, allows more to be protected from creditors. In some cases (not for Roth), there may even be misc. itemized deduction.
- Beware cross-payments, such as paying Roth fee from traditional account!

VII. Asset Protection Tips

- Getting married? Move from ERISA to IRA if eligible. The REA has a prenup provision you don't want! IRAs don't. See Treas. Reg. §1.401(a)(20), A(3)(d).
- A divorce is a much more likely than a disastrous judgment from outside creditors!
- Getting divorced? Don't transfer w/o QDRO or pursuant to court order. IRC §408(d)(6). Get away from "alternate payee" status ASAP and roll into your own plan if possible. See *In re Kizer* case – if bankruptcy a possibility – consider exclusion/exemption status when dividing assets

VII. Asset Protection Tips

- Never use a series of substantially equal periodic payments (SOSEPPs, aka 72t provision) if concerned about asset protection. They are easy to mess up tax-wise and *Clark v. Rameker* may now apply to deny protection for these accounts. See discussion in outline.

VII. Asset Protection Tips

- Move non-protected ERISA accounts to IRA when possible
- Move SEP/SIMPLE to IRA, since these may not be protected in state court and be preempted by ERISA, so only provide good protection in bankruptcy – remember the SIMPLE 2 year rule
- Move non-ERISA 403(b) to an IRA, at least in many states there is better protection
- Move ERISA 403(b) that is not in form of a trust to an IRA in many circuits

VII. Asset Protection Tips

- Contribute employer stock comprising of net unrealized appreciation (NUA) to DAPT-CRT if diversification warranted – unlike other stock, the NUA portion won't get a step up at death. There are additional planning strategies for NUA – do not forget to address them in client's planning, and consider the possibility of exploiting NUA in trusts – the vast majority of trusts do not address NUA! NUA is unlimited, perpetual “stretch”, not just life expectancy!

VII. Asset Protection Tips

- If there may be a debt that is not dischargeable in bankruptcy, use small in state only bank for IRA if the state would otherwise protect from garnishment (see outline for conflict of laws, dynamics of protection between states)
- Are otherwise dischargeable federal taxes the potential debt? Consider moving from ERISA qualified plan excluded via 541(c)(2) to ordinary IRA
- Are state taxes the potential debt? Consider IRA to ERISA, which has better protection
- If non-dischargeable federal taxes are the issue, neither may help! But, see the IRM manual cites.

VII. Asset Protection Tips

- Keep rollover distributions in separate IRA from contributory IRA unless minimal, if your state does not allow unlimited protections, due to commingling obfuscating what portion the \$1,245,745 cap applies to.
- Durable power of attorney – does it enable changes to retirement plan or IRA beneficiary designation form (BDF) including executing a BDF naming children per stirpes or trust therefore, Roth conversions and recharacterizations, spousal rollover? Should major changes to dispositive provisions only be permitted with consent of parties?

VII. Asset Protection Tips

- Include a very limited lifetime power of appointment to spray income in trusts receiving retirement plan benefits (be careful – this violates “sole beneficiary” rule for spouses), only to individuals (not trusts) younger than power holder. For non spouse beneficiaries it allows shifting of income to lower bracket beneficiaries, and this is also a protected power in bankruptcy and at common law.
- As a general rule, be careful of any powers of appointment in see-through trusts – this is probably THE most common error I see in such trusts

VII. Asset Protection Tips

- Community property states: if IRA is community property in whole or in part, non-titled spouse should be clear to leave his or her share of IRA to surviving/titled spouse at death, else protection could be lost (and ½ taxable)
- Consider that post-nuptial agreements can be used to divvy up assets as part of an asset protection plan, provided no creditors on horizon/UFTA risk. Example: Working physician has \$2 million rollover IRA, her husband in non-risky profession has \$2 million taxable account. All CP. They agree to make each separate by agreement. This might improve asset protection (but, hamper step up if W dies first).

VII. Asset Protection Tips

- Remember – non-tax financial issues affect qualified plan v. IRA decision – 401ks are known to be more expensive, but may not be. Qualified plans may have subsidized options
- Don't ignore basic financial planning in “stretch” rollover or outright v. trust decision! If cash flow needs upon retirement would necessitate more than RMD be paid for lifestyle, then the maximum stretch is largely irrelevant. If RMDs would be paid out from IRA to trust to beneficiary, then higher brackets of trust are irrelevant.

VII. Asset Protection Tips

- File Form 5329 if there is anything potentially questionable, such as see through trust status post-mortem – this will at least start the statute of limitations on the 50%, 10% or 6% penalties. Mere filing of Form 1040 does not start the statute running.

VII. Asset Protection Tips

- Don't assume that the financial institution's BDF controls if an ex-spouse or someone not intended by the original owner is named and your client was the one intended. There are plenty of exceptions to the *Egelhoff* case.

VII. Asset Protection Tips

- Use a checklist for trust drafting/administration in this area – and buy Natalie Choate’s book
- Never use a 2503(c) trust or minor as beneficiary – if small, use UTMA custodian, if asset protection important, use a full trust as beneficiary.
- Convert fixed dollar gifts to fractional gifts in the BDF, since only fractional or percentage gifts can be treated as separate accounts for ADP rules post-mortem (if divided by Dec 31 of the year after death). This often recommended. However, ALSO do so in the trust for any specific bequests and staggered distributions in the TRUST. Why, because of *Kenan* GCM 200644020 income-triggering.

VII. Asset Protection *Tips I Don't Like*

- Transfer retirement plan/IRA to a domestic or worse, offshore asset protection trust
- Transfer all IRA assets to an offshore LLC
- Transfer IRA assets to any LLC and use as conduit to buy insurance, collectibles or other personal use assets otherwise prohibited directly.
- Brother-sister transactions with IRAs co-investing for valuation discount – true, siblings are not “disqualified persons” for PT rules, but a minefield.
- Any quid pro quo to get around PT rules. Joe and his sister Joan can't borrow from their IRAs, but their IRAs can lend to 3d parties, so they cause each of their IRAs to lend to the other.

VII. Asset Protection *Tips I Don't Like*

- Self-directed IRAs (a misnomer really) – investing in business with any control/involvement/services of owner/family – New Form 5498 will make this more on IRS radar. Watch for non-cash contribution of services under IRC §408(a)(1), and of course prohibited transactions §4975. Just because a sibling or paramour is not a “disqualified person” does not mean it is not a prohibited transaction.

VII. Asset Protection *Tips I Don't Like*

- Contracts to make a Will, postnups or community property arrangements, promissory notes that have division of the IRA at death as consideration for other bequest – be careful. E.g. I leave my IRA to my wife, but have a side contract that she must leave those assets to my children – does my wife really qualify for a rollover? Or I leave my estate including ½ of my CP including my wife's IRA to my trust, but no one cashes in the IRA, my wife signs a promissory note to fund the trust w/half the value of IRA.

VII. Asset Protection *Tips I Don't Like*

- Put more than taxable limits in QRP or IRA. Not only are there 6% annual penalties, but state statutes often fail to protect excess contributions— it is likely that bankruptcy court would follow suit. Worst case, disqualify the entire account!
- Toggling/decanting trusts post-mortem – it might work, but there are quite a few traps beyond the scope of the presentation – if asset protection is a concern, then use a simple accumulation trust.
- Hold back clauses, forfeiture clauses, trust protector clauses that can override conduit or outright distributions of QRP/IRA benefits – great for trusts, but NOT those designed to be see through trusts!

VII. Asset Protection *Tips I Don't Like*

- Making qualified charitable distribution payments from an inherited IRA payable to a trust, even if primary beneficiary authorizes. Not only does it probably not “work”, but could impair stretch and even asset protection because you’re allowing beneficiary to direct trust assets.
- Moving everything to ERISA plan, with higher costs, fewer 72t exceptions, not considering all the holes in ERISA protection. Don’t assume ERISA plans afford superior protection in all cases, as discussed.
- Separate IRAs for separate beneficiaries – overkill usually – but if litigation could delay dividing account by Dec 31 of yr after death, perhaps warranted.

VIII. Checklists for trusts for better tax and asset protection

- Use a checklist for trust drafting and administration in this area – and buy Natalie Choate's book. Bob Keebler's charts available online are also helpful for a good understanding of qualified plan tax rules.
- Consider using the above asset protection tips and traps as a checklist as well for clients who voice concern in this area – for marketing as well as simple due diligence.

Questions?

- Look for practical estate and asset protection planning book w. Alan Gassman early 2016
- I welcome any constructive criticism of any of the outline or charts, particularly from licensed practitioners in state that likely know their law much better than I.
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