# Structuring IRA Trusts in Estate Planning:
# Strategies for Minimizing Taxes and Preserving Assets

Note: throughout this outline, I often refer to IRAs only to simplify reading. Unless otherwise noted, however, most considerations apply to 401k, 403b, 457 or other qualified plans equally. Those inheriting qualified plans that do not permit a "stretch" can transfer account via trustee to trustee transfer to an inherited IRA.


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## Appendix


Comparison Chart of Estate Planning and Trust Options for IRAs/Retirement Plans

Treasury Regulations §1.401(A)(9)-4, -5 re "See Through Trusts", i.e. Conduit/Accumulation Trusts

Article: *Using Separate or Standalone Trusts as Beneficiaries of Retirement Plan Benefits*,

Article: *Trusteed IRAs: An Elegant Estate Planning Option*, Trusts and Estates, Sept 2009

Article: *Clark v. Rameker: Supreme Court holds inherited IRAs are not protected in bankruptcy: Are spousal inherited IRAs and even rollovers IRAs threatened as well?*

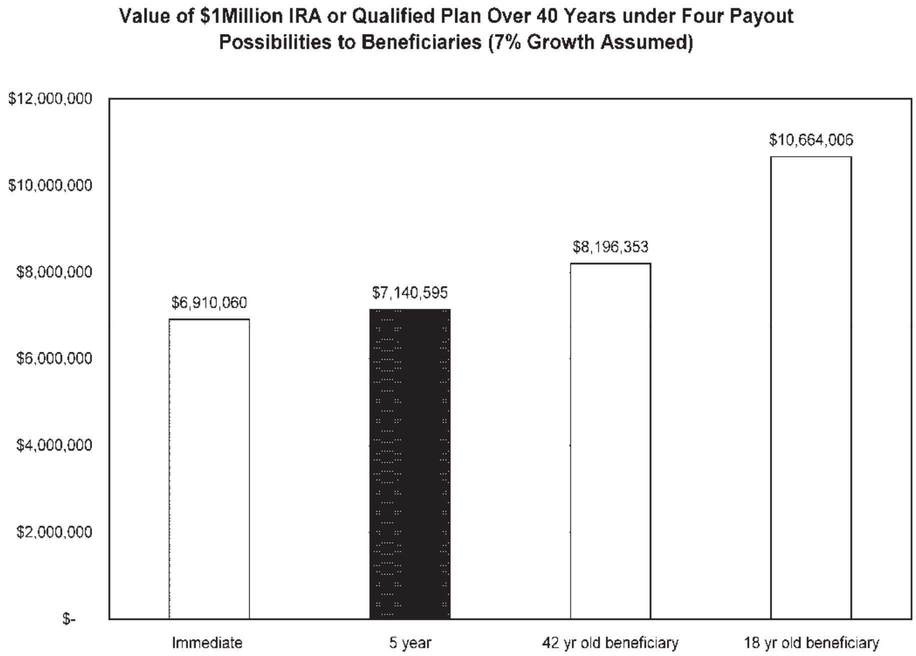


**Edwin P. Morrow III, J.D., LL.M. (tax), CFP®**
**Wealth Specialist, Key Private Bank Family Wealth Advisory Services**
**(937) 285-5343**
**edwin_p_morrow@keybank.com**

# I. The Value of the "Stretch"

*"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 or avoid 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."*

Everyone agrees that tax deferral is valuable, but the precise value is difficult to quantify, especially with stretch IRAs. Many factors are speculative: Would a beneficiary ever get divorced, sued or spend all the money? What will future state and federal tax rates be for the beneficiary? Will they move to another state? Could estate or inheritance tax be a factor? What will future investment returns be? What are the mix of investments and the tax rate and return for each? What inflation should be assumed? What rate of turnover on taxable investments? Using some reasonable assumptions (7% growth on investments both inside and outside of the IRA, 35% bracket without factoring in 2013 tax increases), the chart below shows the potential impact of tax deferral at the end of forty years (the contrast would be greater for longer periods) by contrasting a $1Million IRA passing at death to 1) beneficiaries with no "stretch" (immediate distribution), 2) beneficiaries with deferral over five years, 3) a 42 year old beneficiary with maximum deferral over the 42 year old's life expectancy and 4) an 18 year old beneficiary with maximum deferral over an 18 year old's life expectancy.




At the end of forty years (when the IRA accounts will have been completely distributed to the 42 year old – the life expectancy under the tables being to age 82), the amount in the taxable accounts where the IRA was fully "stretched" ($8,196,353) far exceeds the value where funds were taken out and put in taxable accounts ($6,910,060 if immediate, or $7,140,595 if deferred for 5 years). The long-term savings illustrated by these numbers (over a $1 million) exceeds the current value of the IRA itself (not backed out for present value).

If instead, we use the same assumptions, but change the beneficiary to an 18 year old, this leads to an even greater difference (more than $3Million) due to greater tax deferral, even with the same 40 year time horizon for comparison (note, however, that long-term savings may even be greater since an 18 year old is permitted 65 years of deferral rather than the 40 years illustrated on this chart).

## II. Why use a trust (or trusteed IRA) at all?

1) Ensure the "stretch" really happens by protecting beneficiaries from themselves, their poor investments, spending habits or spousal influence. An AXA study cited by Professor Chris Hoyt at Heckerling concluded that 87% of children liquidate an inherited IRA within one year of death. Not only does this "blow the stretch", but it also may lead to commingling what would otherwise remain separate property with marital property for divorce purposes. After all, how many 18 year olds inheriting a million dollar IRA voluntarily spend only 1/65 ($13,485) in the first year?

2) Asset protection from creditors of beneficiaries: most states do not protect inherited IRAs. Inherited IRA protection in bankruptcy is uncertain as well, even for spouses.[1] Also, the IRA may have a clause in the agreement that jeopardizes the asset protection, or have been jeopardized through a self-dealing issue.[2]

3) Avoidance of estate and inheritance tax (both federal and state) by excluding proceeds from the beneficiary's estate and leveraging GST exclusion.

4) Trusts allow income tax shifting of ordinary income to lower bracket beneficiaries.

5) Possible avoidance of state income tax for beneficiary. For example: if trustee and situs is in FL/DE/WA/TX/etc and beneficiary lives in state with a state income tax, IRA distributions that accumulate in the trust (not K-1'd) may escape state income tax.

6) Keeping funds "in the family bloodline". The grantor can control where the assets go when the beneficiary dies and/or limit the recipients via terms of a special power of appointment. Not subject to beneficiary's spouse's elective share rights, kept as separate property for divorce purposes.

7) Ensuring funds are not counted for Medicaid/VA or other government benefits

8) Making it easier for estate/trust to collect any apportioned state or federal estate tax, or income tax

9) Avoiding botched titling/transfers by non-professional beneficiaries

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[1] Although the trend had been pro-debtor, the 7th Circuit recently bucked this trend. *In re Heidi Heffron-Clark (7th Cir. 2013). The Supreme Court recently upheld the 7th Circuit – see separate article*

[2] See *In re James L. Daley, Jr.*, 459 B.R. 270 (U.S. Bankr E.D. Tenn 2011), *Yoshioka v. Charles Schwab Corp*, 2011 U.S. Dist. LEXIS 147483 (N.D. Ca 2011) – the former case holding that a typical Merrill Lynch IRA agreement which grants the custodian a lien, even if no debt/loan is incurred or attachment ever made, still constitutes a prohibited transaction under IRC §4975 and eviscerates the IRA creditor protection; the latter case staying class action suit on similar issues with Schwab IRAs until the IRS/DOL rules on an exemption request to overrule Advisory Opinion 2009-03A, which declared such transactions to be prohibited. For an extensive outline on creditor protection issues for qualified plans, IRAs, 403bs, annuities, insurance, Coverdell ESAs and 529 plans, including discussion of prohibited transactions and the above cases, email the author.

## III. Why the lowly Beneficiary Designation Form (BDF) should be customized

1) Most IRAs default to the IRA owner's estate if no valid BDF is filed. Most qualified plans, however, do default to a spouse, and some even have children as contingent defaults.

2) Most IRA BDF's do NOT have a per stirpes default.

Example: I leave my IRA to my children Peter, Paul and Mary. Paul predeceases me. My IRA will go to Peter and Mary, 50/50, and Paul's children will NOT get 1/3.

Example 2: I leave my IRA 10% to my wife and 30% each to my 3 children from prior marriage. One of my children predecease. Under most IRA defaults, the IRA is now 20%, 40%, 40%; under many others, it is pro rata, and would be 13%, 43.5%, 43.5%. NEITHER would probably be desired by the client.

Solution: customize the BDF form. Print "see attached", and leave clear instructions as to what your client wants to have happen in the event a beneficiary predeceases or disclaims (a disclaimer disposition can be different).

3) **If you want the optimal "stretch" tax treatment, you have to customize the form**. This may also avoid inadvertently blowing up the IRA because of other drafting issues (see points 11-14 on the pre-mortem checklist), but may have some other drawbacks (see article in Appendix).

   **Example:** Dr. Do-Good wants to leave his IRA in trust for his current wife and 3 children from a prior marriage. He would like 50% to go to a bypass/QTIP trust for her, remainder to children, and 50% to his children at his death, in trust. Dr. Do-Good also has converted $500,000 of his IRA to a Roth IRA. He has set up subtrusts for grandchildren for these Roth IRA funds, thinking that they will get 70-80 years of tax-free growth. His wife is 60, his children are 42, 45 and 50, grandchildren ages 4, 6, 10, 12, 15.

   Accordingly, he names the Dr. Do-Good revocable living trust as 100% primary beneficiary of his IRAs, and puts his subsequent instructions in the trust.
   **This is a mistake. EVEN IF the trust is properly drafted** (discussed in subsequent sections). This is because the IRS will look to the oldest beneficiary of the trust, not just the oldest beneficiary of the SUBTRUST that it is ultimately going to, unless the subtrust is named directly on the beneficiary designation form.[3] Thus, all IRAs must be distributed based on the 60 year old wife's life expectancy.

[3] See Treas. Reg. § 1.401(a)(9)-4, A-5(c): "However, the separate account rules under A-2 of § 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit.", Treas Reg. § 1.401(a)(9)-8, A-2(a)(2), PLR 2003-17041

Solution: Dr. Do-Good changes his IRA BDF to name 50% to his revocable trust (or bypass trust), which will still use his wife's LE, but he names 50% to his children's subtrusts (which will use 42,45,50 LE, or 50 for all three subtrusts, depending on design), and he names his grandchildren's subtrusts as beneficiaries of the Roth IRA (now, 4-15 yr old LE, or depending on the trust design, 15 yr old's for all 5 subtrusts – still a much better result). Although this does not affect the share for the surviving spouse, this is a much better result for the children and grandchildren.

4) If you like to use pecuniary A/B, GST formulas, you have to modify your BDF to avoid blowing up the IRA (see discussion in next section).
   Example: John Doe leaves his IRA to his trust, which funds the first $5.12Million (or whatever the applicable exclusion amount is at the time) to a bypass trust for his wife. The IRA goes into the trust, then the bypass trust. Because IRD is being used to satisfy a pecuniary obligation, it triggers the income tax.
   Solution: either amend the trust, or simply change the BDF so that John leaves his IRA to the Bypass trust directly.
   Drafting example: "If my wife survives me, I leave 100% of my IRA to the subtrust under Article X of the John Doe Trust dated ______"

5) If the trust is a "mere probate avoidance tool" that simply pays outright to beneficiaries (or at a certain age that has passed), then ask why is the client even bothering with the trust as a beneficiary in all cases?

   Example: Client's trust pays out to child at age 30. Child will turn 30 on February 16, 2019. Consider modifying the beneficiary designation form so the IRA pays to the subtrust if client dies before that date survived by the child, and to the child directly if client dies after that date. While this is more hassle in the short term, this saves a lot of post-mortem hassle, delay, complexity and room for error in the long-term.

   Drafting Example: On the BDF where you name beneficiary, you write "See attached sheet", and then attach a sheet ("Attachment to John Doe's IRA beneficiary designation for IRA account number XXXXXXXX" at top) "If I die after February 16, 2019 survived by my child ________, I name my child ____ as beneficiary of ____% of my IRA. Otherwise, I name the trustee of the ___________ Trust dated ______ fbo child ____ per stirpes as beneficiary of ____% of my IRA. The trust currently uses my address and social security number, but will use a different address and EIN upon my death. My child's address and SS are: _____."

6) Similarly, it is common to have a trust as contingent beneficiary to anticipate potential disclaimer bypass trust funding.
   Example: IRA owner names his wife as 100% beneficiary. Then his Trust (or bypass trust, as discussed above) as contingent, to allow disclaimer funding. However, children are grown and there is no desire for continued trust protection. This complicates matters if she predeceases because the funds unnecessarily flow through the trust.

Drafting example: “If my wife survives me, I name my wife ______100% beneficiary.  If my wife survives me but makes a qualified disclaimer under federal and Ohio law, I name the Bypass Trust under Article X of the John Doe Trust dated X as beneficiary of any portion of the IRA so disclaimed.  If my wife does not survive me, I name my child ____ as primary beneficiary of 100%.”

7) If you have smaller IRAs/estates that do not merit a trust, yet have minor children as contingent, at least customize the form to name an UTMA custodian to avoid continuing guardian of the estate hassles and at least give protection until age 21.
Example: If I die before _______ (date when child turns 21), and my daughter Jane survives me, I name my brother James Doe as custodian under the Ohio Transfers to Minors Act for my daughter Jane until she reaches the age of 21 of 100%.  If I die on or after _________ (date when child turns 21), and my daughter Jane survives me, I name my daughter Jane as beneficiary of 100%.  If my daughter Jane does not survive me, I leave 100% to James Doe as custodian under similar terms for Jane’s issue.  If my daughter Jane does not survive me, nor leaves issue surviving, I leave 50% to the University of Dayton and 50% to my brother James Doe.

## IV. Why ATRA makes standalone/separate IRA trusts more compelling

For a list and explanation of why many attorneys are choosing to use separate/standalone trusts holding only IRAs, see the attached article entitled Using Separate or Standalone Trusts for Retirement Benefits.

Since that article was published, Ohio has eliminated its estate tax, and the federal income tax scheme surrounding irrevocable non-grantor trusts has changed, so that there are very compelling tax reasons to make sure that trust income can be sprayed to children or charities. For instance, if a beneficiary makes $100,000 outside of the trust, and the irrevocable trust has $100,000 capital gains and $50,000 dividends/interest, the capital gains will incur 23.8% tax over $11,950, whereas if it is taxed to the beneficiary, it will be taxed at only 15%. If it can be distributed to a beneficiary in the lower two tax brackets, the rate is 0%. Similarly, even 43.4% income can be taken to 0% if it can be sprayed to charity.

This trust income tax planning, along with "step up in basis" planning, are the subjects of two separate articles and outlines and beyond the scope of this CLE.[4] Here is why I need to mention them at least in passing. The best planning tools to achieve better "step up" and avoid "step down" in basis is to use flexible testamentary powers of appointment. Two of the best planning tools to avoid ongoing income tax are spray provisions and lifetime limited powers of appointment. **All of these are poison** to "see through trusts" designed to achieve stretch IRA treatment. While conduit trusts are still consistent with the optimal basis planning techniques, even conduit trusts are inconsistent with lifetime limited powers of appointment and spray powers, unless they are very carefully constructed and different from the lifetime limited power of appointment over the rest of the trust.

[4] *Avoiding the Medicare Surtax on Trusts*, Trusts and Estates, Dec. 2012, *The Optimal Basis Increase Trust*, March 2013, Leimberg Information Services, updated at http://ssrn.com/abstract=2436964

## IV. What's at stake with improper planning and administration?

## Tax Traps, Penalties and other Potential Disasters

The potential for additional Income and Excise Tax liability due to mistakes in estate planning for QRP/IRAs now exceeds potential estate tax liability for 99.8% of estates. The federal estate tax exclusion is $5,250,000 in 2013, with portability of spousal exclusion, and the Ohio estate tax is eliminated. Assuming these stand, the two most important *tax* areas where attorneys provide value to their clients are in planning for income tax basis and ongoing trust income tax (see, *The Optimal Basis Increase Trust* at http://ssrn.com/abstract=2436964), and exploiting tax deferral for retirement benefits.

We discussed all the various reasons for using trusts or trusteed IRAs to receive retirement benefits, but unfortunately it entails much greater risk for the attorney. After all, when people don't use trusts as beneficiaries, it's hard to imagine any liability for the attorney, not only because the attorney probably did not advise on or draft the beneficiary designation form, but because none of the beneficiaries would have standing (privity) to sue under *Zipperstein*, and even if the estate had privity, it would rarely be the estate that would suffer damages – it is the beneficiaries who lose out.

Unfortunately, this is not the case when a trust is named as beneficiary. Not only is the attorney intimately involved in the drafting of the trust and beneficiary designation (or should be), but the trust could have significant damages and there is unlikely to be the privity problem to block the family from suing, since the attorney probably represented the initial trustee of the living trust or the surviving spouse, and such cases may well be the kind of case the Ohio Supreme Court mentioned in *Shoemaker v. Gindlesburger* ("question for another day") that it is willing to revisit regarding privity. Additionally, there is greater potential for tax problems and snafus during trust administration that the attorney may be consulted on.

We discussed the value of the stretch in the previous section – and recall, the numbers might be greater if tax rates increase (the spreadsheet/chart used 2012 numbers and I did not update the chart for 2013 income tax changes), or if a beneficiary lives in a state with a separate state income tax, or if the beneficiary is younger. The "damages" to the beneficiary would have to be backed out to present value from the charts above, but would still be significant. If this stretch is blown and taxable income is trapped in trust, the damages are **worse** still – because any ordinary income trapped in an irrevocable non-grantor trust is taxed at the highest federal rate after approximately $11,950.

Let's take a simple example. Assume Dr. Do-Good, age 70, dies with a $2 million IRA rollover as part of his estate and leaves this to a revocable living trust for his third wife and children from prior marriages. Imagine the trust has one of the potential problems noted in the checklists below and does not qualify as a "see through trust", yet all the parties think that it does and only take out 3-4% required minimum distributions each year. Six years later, the trust is audited, or perhaps another attorney or IRA provider newly reviews the trust agreement and it is determined that the IRA should have been withdrawn by the end of the fifth year (this is the rule for non-qualifying trusts when someone dies before their required beginning date). The excise tax under IRC § 4974 is 50% of the amount that should have been distributed. Assuming the IRA is still approximately $2 million at that time, the 50% excise tax would be **$1,000,000**, in addition to the income tax all trapped in the highest bracket, potential underpayment/negligence penalties and interest on the $2 million of ordinary income.

If the mistake was not obvious, a taxpayer might be able to seek relief for "reasonable cause".[5] However, this is somewhat reliant on the good graces of the IRS - not a great position.

Even if the excise taxes are waived, there is still the substantial issue of the loss of the stretch, the additional tax because of taxation in the highest bracket, and there is potentially, depending on the terms of the trust, potential action by beneficiaries if a remainder or current beneficiary is prejudiced at the expense of the other (e.g. a botched conduit trust would hurt remainder beneficiaries greater than current beneficiaries because the inadvertent early distributions would all inure to them).

Do not assume that the statute of limitations on excise tax has run for QP/IRA situations that involve an excise tax or unrelated business income. Generally, for the statute of limitations to run against the IRS the appropriate tax return must be filed[6] and few people would have filed a Form 5329 or Form 5330. Although there is at least an argument that filing Form 1040 and declaring $0 "additional tax on IRAs, qualified plans" should start the statute.

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[5] Treas. Reg. §54.4974-2 A-7

[6] IRC §6501(a), (c)(3)

## V. What if Congress “Snaps” the Stretch? Coping with Legislative Change

It’s bad enough that the rules encompassing trusts and IRAs are extremely complicated, but some in Congress want to change them again. See the noted language in the proposed bill in the Appendix. Do the trust provisions our clients have still make sense if Congress “kills the stretch” for non-spousal rollovers and institutes a blanket 5 year rule, or something similar?

More importantly, what if the client dies BEFORE amending their trust but after Congressional meddling? This can be a DISASTER for conduit trusts, accumulation trusts, and even trusteed IRAs, and is not easily fixed post-mortem via court order or private settlement agreement due to conflicts between parties, interpreting grantor intent and uncertainty whether the IRS will honor any post-mortem interpretations/reformations thereof.

Consider:

a) If a conduit trust or trusteed IRA is established and Congress kills the stretch, would clients want the IRA paid out completely over a mere 5 years? Some may answer “yes”, because they would not want the ordinary income trapped in the trust at the highest tax bracket. Many more would say “no”, because it defeats the asset protection purposes and estate tax shelter (if GST is allocated) of the trust. Regardless, you have an inherent conflict – current beneficiaries will answer, “yes” and remainder beneficiaries “no”.

b) If an accumulation trust is established and Congress kills the trust, would clients really want the entire IRA over $11,950 to be taxed at the highest tax rates, as would likely happen if stretch limited to 5 years? Again, current beneficiaries will answer “of course not”, remainder beneficiaries “of course”. Would all the limits on powers of appointment, charitable bequests etc still be desired?

**c)** There is no easy boilerplate fix – the answers depend on the client’s main purposes for the trust, the proportion of IRA/QP to total trust assets, the beneficiaries’ state and federal tax brackets, their level of expected estate, whether accounts are Roth or traditional and other factors.

Consider some potential fixes to the trust to accommodate changes in law:

**Material Purpose of Retirement Plan Provisions and Adapting to Law Changes**

a) "It shall be considered a material purpose of this trust that my children [grandchildren, beneficiaries etc] (through each subtrust for the beneficiary) qualify as a "designated beneficiary" of the retirement plan, and thus each child's life expectancy [alternately, for an accumulation trust or for when subtrusts are not named directly on the beneficiary designation form, the oldest child's or beneficiary's life expectancy] be used to exploit the tax deferral according to the designated beneficiary's current life expectancy according to single life tables under Treas. Reg. §1.401(a)(9)-9, A-1, or successor table. I understand that Congress or the Treasury, pursuant to the proposed Highway Investment, Job Creation and Economic Growth Act of 2012 or otherwise, may limit this "stretch" to five years or some other drastically shorter deferral period. If such changes (or substantially similar) affect my trust, my trust may be amended accordingly by the trustee, trust protector, under Uniform Trust Code §416 or otherwise, and I hereby inform my trustee of my intentions that:

> [Option 1]: My desire for protective provisions, including vesting conditions, distribution provisions and standards, outweigh my desire for minimum income tax treatment of IRA distributions, and therefore I would not want such standards modified and understand that taxable income may be trapped in trust at higher income tax rates than if distributions were in turn made to the beneficiary or made to the beneficiary directly. However, the additional restrictions designed to comply with the treasury regulations in effect at the time of the execution of this trust in paragraphs ____, ____ and ____ may be deleted (e.g. this may be restrictions on powers of appointment).
>
> [Option 2]: My desire for minimizing overall income tax to my family outweighs the protective provisions of the trust. Therefore the additional restrictions designed to comply with the treasury regulations in effect at the time of the execution of this trust in paragraphs ____, ____ and ____ may be deleted. However, I encourage the

trustee to continue with a quasi "conduit" distribution scheme to the extent this reduces the combined overall income tax to my current beneficiaries and my trust, even if such distributions exceed the distribution standards otherwise applicable. For example, if an IRA distribution is $100,000, and my beneficiary would pay tax on $90,000 of the distribution at lower overall rates than my trust, I encourage the trustee to distribute the $90,000 even if that amount is beyond what is needed for his or her health, education and support pursuant to paragraph ____. To the extent my beneficiary pays the same or higher tax rate than the trust, the distribution provisions for non-retirement assets in paragraph ___ applies.

[Option 3] the overall income tax considerations and secondary desire to benefit charity as well outweigh the protective and flexible provisions of this trust, therefore I instruct [do not "encourage", that may not be enough to secure deduction to estate] the trustee to fund any such retirement benefits to the charitable remainder trust outlined in paragraph ___ below.

As mentioned above, a CRT might be a viable back up option to ensure the stretch. It could be incorporated into the beneficiary designation form for either trusteed IRAs or ordinary IRAs, or in the trust agreement for the trust named as beneficiary of the IRA. For the former solution, the tricky issue is drafting the form in a manner that the trustee/custodian will accept. For example, what if something slightly different from the originally proposed Baucus bill is passed (this is not uncommon in legislation)? Say, 10 years instead of 5? Custodians do not like uncertainty as to who is entitled to the money. Trusts can adapt to this easily through the use of a trust protector or other discretion. Custodians/trustees of IRAs do not want to make such determinations, but may accept a clear direction from someone else. E.g. "If Congress or the Treasury, pursuant to the proposed Highway Investment, Job Creation and Economic Growth Act of 2012 or otherwise, limits the permissible tax deferral to less than ten years, I hereby name KeyBank, NA, trustee, or successor trustee of the John Doe Charitable Remainder Unitrust fbo Jennifer Doe and Greater Cincinnati Foundation, Inc as primary beneficiary of 100% of this IRA. My custodian/trustee may consult with XYZ law firm, LLC and shall be completely indemnified for any reasonable interpretation of this clause.

## VI. Four Basic Choices to Protect the Stretch: Trusteed IRA, Conduit Trust, Accumulation Trust, IRA Annuity with Restricted Payout Options

The easiest solution, if it is available, is to simply put protective trust terms into the IRA beneficiary designation itself and avoid a lot of the complexity and pitfalls noted elsewhere herein – this is known as a **trusteed IRA**.[7]

Many people are unaware there are two legal forms of Individual Retirement Accounts (IRAs): a custodial IRA under IRC § 408(h)(more common) or a trusteed IRA under IRC § 408(a) (rarer). One is in the legal form of a trust, the other a contract. There are no differences between the two forms of IRA as to the income tax benefits to the current owner. Historically most IRAs have been opened as custodial accounts because companies do not want greater legal duties nor want to qualify under state or federal law as a trust company and come under additional regulatory scrutiny. There could be various state laws and issues where differences in legal form (contract/agency v. trust) matter, but for most investors the two forms of IRAs are indistinguishable during their lifetime.[8]

With some banks and trust companies, there is no difference at all because they simply copy the beneficiary designation forms and options available to custodial IRAs. However, there can be tremendous estate planning advantages to the beneficiaries of a trusteed IRA after the owner's death if the IRA trustee is flexible and prepared to administer it as an irrevocable third party created trust. A trusteed IRA can combine many of the estate planning advantages of a trust while ensuring the compliance and income tax benefits of an IRA. In essence, **it creates a conduit trust without the legal, tax and accounting complexities of a separate trust instrument**.

There can be a wide variety of distribution options to the trusteed IRA owner. An experienced estate planning attorney may wish to further customize the form, provided that the strictures of the IRA/RMD rules are complied with. For instance, an owner may mandate that only the RMDs be paid to a beneficiary until they reach age 40, after which point there are no longer any restrictions, or that only the MRDs be paid out unless an emergency dictates that more be distributed, or for the traditional "health, education and support". An owner may also limit the ability of a beneficiary to name another beneficiary, thus keeping funds in the family bloodline.

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[7] See generally, *Life and Death Planning for Retirement Benefits, 7th Ed.*, Choate, ¶6.1.07, *Trusteed IRAs: An Elegant Estate Planning Option*, article in Appendix

[8] E.g. *Waller v. Davis (In re Estate of Davis)*, 225 Ill. App.3d 998 (2000), in which the form of the IRA did matter to the court in fending off an ex-spouse's attempt to attack the IRA as not subject to divorce disinheritance statute; plus there are many cases holding that custodial IRAs cannot get §541 bankruptcy exclusion because they are not trusts

## Naming a separate trust – Conduit v. Accumulation v. Non-Qualifying Trust

For an extensive comparison, email the author for a copy of an article on this topic.[9] For a quick comparison chart, see the spreadsheet in the Appendix. For purposes of this CLE, it is probably more useful to give the simplest explanation possible, point out the Regulation in the Appendix, and then go through portions of the checklists in the subsequent sections.

A ***beneficiary*** is simply anyone inheriting funds, whether named on a beneficiary designation form or not, but there is a term of art necessary to understand IRA/Trust planning – the ***designated beneficiary***. This is the important term for qualification for the "stretch" based on a beneficiaries' life expectancy. To be a designated beneficiary, one must be an individual named on the BDF, or in the document as default (for example, a spouse is often a default for ERISA plans if no form is filed).[10]

A **conduit trust** is basically whenever any retirement plan distributions that pay to the trust are paid "directly to" the beneficiary. Even if some expenses are paid, no retirement plan distributions ever "accumulate" in the trust. **It is NOT a trust that merely pays "all net income annually", without more,** because some retirement accounts are not taxable (Roth) or have basis (non-deductible contributions to IRAs). More importantly, "all net income", without more, is referring to fiduciary accounting income, not taxable income, and IRA distributions are typically divided between principal and income according to the Uniform Principal and Income Act. A trusteed IRA is a simplified variation on a conduit trust.

An **accumulation trust** is any trust wherein distributions might be paid to the trust and potentially "accumulate" for one or more beneficiaries and that otherwise complies with the see-through trust regulations (more on this later).

**Note that a bypass trust, marital trust and/or QTIP trust can be either one, or neither.**

You may wonder why the code and regulations appear to be under the qualified plan section rather than the sections on IRAs. This is because IRC §408(a)(6) makes those applicable to IRAs as well.

We cannot go through the various differences in depth. The biggest differences are in technical clauses in the trust, and when spouses are named as beneficiaries, the tax deferral is markedly different for a conduit/trusteed IRA versus an accumulation trust. See following page.

### IRA Annuity with Restricted Payout Options

Some annuity companies will allow a qualified annuity (IRA Annuity) to have restricted payout options after death. This mimics the trusteed IRA, but without any discretion that a trust company would be allowed to use. For instance, paying ONLY the RMDs. Restricted annuities might be viable in narrow circumstances as the "poor man's trust".[11]

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[9] *Contrasting Conduit Trusts, Accumulation Trusts and Trusteed IRAs*, Morrow, J. Retirement Planning, May-June 2007

[10] Treas. Reg. §1.401(a)(9)-4, A1

[11] See discussion of IRA annuities compared to separate trusts and trusteed IRAs in *Ensuring the Stretch*, Kavesh/Morrow, J. Retirement Planning, July-August 2007

**Minimum payout Tables for 60 yr old leaving an IRA to 60 year old spouse via:**

| Age | Rollover (best for income tax, worst for protection) | Conduit/Trusteed IRA (2nd best for income tax (3rd best for protection) | Accumulation Trust (3rd best for income tax, 2nd best for protection) | Non-Qualifying Trust (worst for income tax, best for protection) |
|---|---|---|---|---|
| **60** | **n/a** | **n/a** | **1/25.2** | **1/5 or none** |
| **61** | **n/a** | **n/a** | **1/24.2** | **1/4 or none** |
| **62** | **n/a** | **n/a** | **1/23.2** | **1/3 or none** |
| **63** | **n/a** | **n/a** | **1/22.2** | **1/2 or none** |
| **64** | **n/a** | **n/a** | **1/21.2** | **1/1 by Dec 31** |
| **65** | **n/a** | **n/a** | **1/20.2** | **(five year rule)** |
| **66** | **n/a** | **n/a** | **1/19.2** | **(need not** |
| **67** | **n/a** | **n/a** | **1/18.2** | **be pro rata -** |
| **68** | **n/a** | **n/a** | **1/17.2** | **could take** |
| **69** | **n/a** | **n/a** | **1/16.2** | **100% in yr 5)** |
| **70** | **1/27.4** | **1/17** | **1/15.2** | **(Roths should** |
| **71** | **1/26.5** | **1/16.3** | **1/14.2** | **wait, but trad.** |
| **72** | **1/25.6** | **1/15.5** | **1/13.2** | **IRAs should** |
| **73** | **1/24.7** | **1/14.8** | **1/12.2** | **usually spread** |
| **74** | **1/23.8** | **1/14.1** | **1/11.2** | **incometo avoid** |
| **75** | **1/22.9** | **1/13.4** | **1/10.2** | **bracket creep)** |
| **76** | **1/22.0** | **1/12.7** | **1/9.2** | **Note – if owner** |
| **77** | **1/21.2** | **1/12.1** | **1/8.2** | **were past** |
| **78** | **1/20.3** | **1/11.4** | **1/7.2** | **RBD, then 5** |
| **79** | **1/19.5** | **1/10.8** | **1/6.2** | **year rule is** |
| **80** | **1/18.7** | **1/10.2** | **1/5.2** | **unavailable -** |
| **81** | **1/17.9** | **1/9.7** | **1/4.2** | **but may use** |
| **82** | **1/17.1** | **1/9.1** | **1/3.2** | **“ghost” life** |
| **83** | **1/16.3** | **1/8.6** | **1/2.2** | **expectancy of** |
| **84** | **1/15.5** | **1/8.1** | **1/1.2** | **owner** |
| **85** | **1/14.8** | **1/7.6** | **gone** | |
| **86** | **1/14.1** | **1/7.1** | **-** | |
| **87** | **1/13.4** | **1/6.7** | **-** | |
| **88** | **1/12.7** | **1/6.3** | **-** | |
| **89** | **1/12.0** | **1/5.9** | **-** | |
| **90** | **1/11.4** | **1/5.5** | **-** | |
| **91** | **1/10.8** | **1/5.2** | **-** | |
| **92** | **1/10.2** | **1/4.9** | | |
| **93** | **1/9.6** | **1/4.6** | | |
| **94** | **1/9.1** | **1/4.3** | | |
| **95** | **1/8.6** | **1/4.1** | | |
| **96** | **1/8.1** | **1/3.8** | | |
| **97** | **1/7.6** | **1/3.6** | | |
| **98** | **1/7.1** | **1/3.4** | | |
| **99** | **1/6.7** | **1/3.1** | | |
| **100** | **1/6.3** | **1/2.9** | | |

The Graph of the next page is from a spreadsheet wherein a young 50 year old widow inherits a $1,000,000 IRA under these four results methods. The second chart is if she dies 20 years later. The ending value includes both tax-deferred IRA and outside taxable accounts. 7% growth assumed.

Note that the above life expectancy table does not take into account another advantage to the IRA rollover and the conduit trust or trusteed IRA for surviving spouse that is noted in the charts below – that the spouse who is "sole beneficiary" (potentially including a conduit trust) can name a new beneficiary to take at their death and get a new "stretch" over the beneficiary's life expectancy. While most practitioners are familiar with this nuance of IRA rollovers, most are not familiar with this quirk of inherited spousal IRAs (even via trust) when the spouse is considered the "sole beneficiary".[12]

It has been said by a few learned commentators that conduit trusts are silly IRS constructs having no practical value because if you leave IRA assets in a conduit trust, they will be gone by the beneficiary's life expectancy and therefore all trusts should be drafted as accumulation trusts. While I might agree with the first part of this critique about the arbitrariness of the IRS regulations and interpretations, the second part ignores two salient points:

1) The "sole spousal beneficiary" feature of the code and the fact that people rarely have 100% of their estate in retirement plans. If spouses are roughly the same age, over 70 ½, there is no income tax benefit to structuring the trust for a surviving spouse as an accumulation trust (although there may be if spouse does not survive or the surviving spouse disclaims). If the IRA owner/participant dies after their required beginning date, the trust will be subject to a similar RMD payout scheme whether it qualifies as a see-through trust or not (recall, the 5 year rule is for owner/participants who die without a designated beneficiary BEFORE their RBD, beneficiaries of those who die after that date can use the "ghost" life expectancy of the decedent, even if not "designated beneficiaries").
2) Conduit trusts are often needed to ensure the use of younger beneficiaries' life expectancy whenever children vary greatly in age, or much more starkly, when different generations, such as children and grandchildren, are beneficiaries. E.g. if I name an accumulation trust for my granddaughter, and the remainder beneficiary is my daughter, then my daughter's life expectancy is used, not the granddaughter's – not so with a conduit trust. That's huge.

[12] Special "sole beneficiary" rules discussed elsewhere herein, also see Treas. Reg. §1.401(a)(9)(5), A5 (c)(2), Treas. Reg. §1.401(a)(9)(4), A4(b): "if the employee's spouse is the sole designated beneficiary as of September 30 of the calendar year following the calendar year of the employee's death, and the surviving spouse dies after the employee and before the date on which distributions have begun to the surviving spouse under section 401(a)(9)(B)(iii) and (iv), the rule in section 401(a)(9)(B)(iv)(II) will apply. Thus, for example, the relevant designated beneficiary for determining the distribution period after the death of the surviving spouse is the designated beneficiary of the surviving spouse."

## VII. Why Charities are Preferred DIRECT beneficiaries of Retirement Accounts

The reason to name charities as beneficiaries of non-Roth retirement accounts is fairly obvious – the charities don't pay tax on inherited IRA distributions, unless there is a very unique circumstance, such as a self-directed IRA with business interests generating an unrelated business income tax (UBIT). Income in Respect of a Decedent (IRD), such as inherited IRA distributions, is taxable to whomever has a right to receive it.[13] Generally, unless it is a Roth IRA, has substantial basis (from non-deductible IRA contributions) or qualifies as net unrealized appreciation from employer securities from a lump sum distribution from a qualified plan, or is eligible for a partial IRC §691(c) deduction, taxpayers pay ordinary income tax on 100% of the distribution (usually state as well as federal).

Charities typically pay no income tax. Plus, there are non-tax advantages to having the charity receive their assets directly from the IRA provider, such as not having to have the charity involved in probate/trust administration and accountings.

Deferred compensation is even more ideal than retirement benefits to leave to charity, because deferred comp would not otherwise even receive a "stretch" over a beneficiaries' life expectancy. Similarly, non-qualified deferred annuity contracts will not if the alternative beneficiary were a trust.[14]

Of course, you could leave bequests in a Will or Trust, the charity won't pay taxes on that either, and, the estate/trust *may* get an offsetting deduction under IRC §642(c). However, even in the very best circumstances, you have additional administration and accounting hassles. However, two bigger problems loom: 1) the potential for disqualifying the trust from the stretch for other beneficiaries if administration is delayed and the charity is not paid its entire share by Sept 30 of the year after death; and 2) the potential that the IRS disallows the charitable income tax deduction, which it has ruled it will do unless the Will/Trust has instructions to use IRD (IRA) assets to satisfy charitable bequests.[15] The executor/trustee may avoid the latter issue by transferring the IRA *in kind*, rather than taking a distribution, but again, this is dependant on the cooperation of an IRA provider. Conclusions here – *name the charity directly on the BDF unless you have compelling reason to do otherwise, and add a boilerplate clause in your will to have charitable bequests paid from IRD*.

[13] IRC §691, Treas. Reg §1.691(a)(4)(B)
[14] Though a small number of annuity companies will permit the stretch and there is an argument that NQ annuities payable to trust should be eligible – however, there is no definitive ruling on this issue.
[15] Rev. Rul. 2003-123

However, even if charities are named directly on the BDF, there can still be complexities – such as planning an exact dollar or percentages when charity is not getting 100% of the IRA.

Planning can get tricky when someone wants to make relatively small percentage gifts in the most tax-effective way for charity. For instance, an executive might want his deferred comp to be first source for a charitable bequest, followed by an old low basis non-qualified annuity, followed by retirement plan assets, and it's not uncommon to want "caps" on charitable bequests. This can get complex (see Section III for some variations on customizing BDFs). If I want $200,000 to go to charity, can I state in my IRA BDF to pay $200,000 minus amounts, if any, left to XYZ charity pursuant to my deferred comp agreement and/or deferred annuity contract? In theory, *yes*, but good luck getting a custodian to honor that. Be aware that you may have to battle with and perhaps even change IRA custodians for any unique beneficiary designation form drafting.

Is it a problem if I name 10% to Salvation Army and 30% each to my three children? No - as long as the account is divided and the Salvation Army gets their share before September 30 of the year after my death, because at that point, the Salvation Army is no longer a beneficiary of the IRA. Absent substantial litigation tying up an estate, this should not be a problem. For those hyper-conservative, the IRA could be divided during lifetime (e.g. 4 IRAs, 4 different beneficiaries). While this solves one issue, it may cause other, probably greater problems, such as calculating and taking RMDs, differences in investment performance changing legacies, more difficulty managing and understanding investments, potentially higher fees/loss of break points, more difficulty changing the estate plan and greater chance of administrative errors.

However, when the charity is a remainder or contingent beneficiary *of a trust* receiving substantial retirement benefits, this creates several problems that we will discuss in the next section (e.g. I give my estate to my wife, then child, but if they die then 1/3 to the Ohio State University, 1/3 to Xavier University and 1/3 to the Salvation Army).

## VIII. 5th Choice: Charitable Trust? When this may be preferred

If Congress “snaps” the stretch, or if the trust is otherwise payable to an older beneficiary without a long life expectancy (e.g. surviving spouse or sibling), or if the client has significant deferred income within a non-qualified annuity (which does not get the “stretch”, even if a colorable argument can be made that it does), deferred compensation, royalties or other “non-stretch” income in respect of a decedent (IRD), consider leaving such assets to “stretch” via Charitable Remainder Trust. The charity need only receive 10% minimum share. Ultimately, due to the tax deferral, beneficiaries may be better off, and you have the added benefit of helping a charity of choice. Interest in this option will greatly increase if Congress passes anything close to the Baucus bill.

*CRTs will also become more compelling as interest rates increase and revert to historical norms, and as capital gains tax rates increase*. Lifetime CRTs are also more compelling when women are beneficiaries, because their life expectancy is higher than the blended average life expectancy that IRS/CRT tables must use. A small, but interesting nuance. For a sixty year old couple, the difference between male and female life expectancy is about 3 years, for an 80 year old couple, only about a year and a half difference.

Example of a recent case with compelling reason for IRA payable to CRT:

John, age 65, is unmarried, without children, and wishes to leave his $6million estate (with $2million in IRAs) to his sister, for her health and support, with the remainder to various charities. If he leaves everything to a fully discretionary trust, there is no charitable deduction (because it is not in an approved split-interest trust form), and no “stretch” for the IRA (because it is not a see-through trust). So, he left approximately $3million, including the IRA, into a CRT for his sister, which would generate a $1million charitable deduction at his death, eliminating his estate tax (assuming $5million exclusion, and of course, this could be formula dependent). This would establish the “floor” for his sister to have an assured income stream, and the remaining $3million in non-IRA assets could be fully discretionary to fund any excessive needs beyond the CRT annuity.

## IX. Pre-Mortem Checklist

### a) Checking the client's plan, IRA, BDF or other non-trust issues that could affect the trust

1) **_____ Check the BDF itself.**[16] Are the beneficiary designations all really naming the trust as claimed? *And which trust*? Sometimes forms will name a subtrust (e.g. Credit Shelter, Marital) as beneficiary, sometimes a testamentary trust, more often in Ohio, the master revocable living trust. It may matter a great deal if the bypass/marital trust or other subtrusts are named directly as beneficiary rather than the master trust.[17]

It makes a positive difference when SUBTRUSTS are named as beneficiary if there are multiple beneficiaries of the trust. E.g. I name my trust 100% primary beneficiary (which in turn splits between my child and grandchild) may have quite a different tax result than if I direct 50% to my child's subtrust and 50% to my grandchild's subtrust.[18]
And, be careful of sloppy BDFs that say "as stated in will" or "as stated in trust" and do not name the testamentary trust or trust explicitly as beneficiary. A BDF written as quoted above may NOT qualify as designated beneficiary (see PLR 2008 49020).
Also verify that the trust is the same trust you are dealing with – it is becoming more common to have a separate, standalone trust solely for retirement benefits.

2) **_____ If you have an ERISA retirement plan (401k, defined benefit, some 403bs) and spouse is not named, check to make sure the spouse has waived rights as primary beneficiary.** The Retirement Equity Act of 1984 may grant a surviving spouse rights despite a validly executed beneficiary designation form that purports to name a trust or someone else. The law requires vesting at one year of marriage, but allows plans to vest it sooner (many plans will immediately vest a spouse with rights upon marriage). Note that a prenup is ineffective to waive rights – such waivers must be done after marriage.

3) **_____ If you have an ERISA retirement plan, and a *same sex spouse* is not named (even if a trust for the same sex spouse is named), check to make sure that spouse has waived rights as primary beneficiary, even if those rights are as yet unclear.** We have already seen same sex spouses win court cases (e.g. *Windsor v. U.S.*) declaring the Defense of Marriage Act (DOMA) unconstitutional. This issue can, and probably will, seep into ERISA and qualified plan law at some point as well. Same sex spouses may someday be entitled to joint/survivor annuity rights, spousal rollovers, etc. If DOMA is ruled constitutional, and a non-traditional spouse waives rights granted by the plan, rather than by law, query whether a waiver could be a taxable gift. However, if the plan tracks federal law, then "spousal" rights move in tandem and this issue disappears.

[16] See Section III of outline above
[17] See generally, Morrow, *Using Separate or Standalone Trusts as Beneficiaries of Retirement Benefits*, J. Retirement Planning (2007), included in Appendix
[18] Treas. Reg. §1.401(a)(9)-4, A-5(c)

4) **_____ If you have an ERISA retirement plan and *ex-spouse*** is not named, and no QDRO addressed the ERISA plan, you may still want to check into whether the ex-spouse became vested in client's ERISA benefits prior to divorce. Just because non-participant spouse waived benefits in a property settlement/divorce does not waive them for ERISA purposes unless qualifying as a QDRO.[19]

5) **_____ Check the "Schedule A" and any Assignments/Transfer Schedules executed with a living trust –** pursuant to many state laws, listing assets on this schedule or transferring them with a separate assignment may transfer ownership or change beneficiaries, EVEN IF no form (or a different form) is filed with the IRA custodian/trustee.[20] This state law application is highly unlikely to apply to ERISA accounts.[21] Do not let clients do this, it unnecessarily risks the IRA and muddies the estate, but it could be a savior in post-mortem clean up planning if you are trying to find a valid beneficiary where there is not otherwise one properly named.

6) **_____ Check Ages of Beneficiaries - Does "See-Through Trust" status even matter?** If client is a retired 72 year old naming his trust for his 71 year old brother and 73 year old sister as the beneficiaries of the trust, there is really very little to be gained by achieving "see-through trust" status because the life expectancy payouts would be effectively the same whether the trust is "qualified" or not (unless the brother/sister predecease and/or disclaim so that younger beneficiaries take). If it is a 72 year old spouse, qualifying as an accumulation trust has no benefit, but qualifying as a conduit trust would (see discussion in section above).

7) **_____ Check Pre/PostNuptial Agreements –** are there clauses that address retirement plan benefits? A prenuptial agreement may not be a valid waiver of vested benefits of ERISA spousal rights.[22] A marital agreement could even affect the marital deduction and/or rollover, if it restricts the surviving spouse's rights even after death.

8) **_____ Beware of Reliance on Disclaimer Planning for ERISA, 401k accounts –** ERISA plans are not required to permit disclaimers (federal law trumps state law). So, if you see primary beneficiary as spouse, contingent as bypass trust (the plan being to disclaim optimal amount at death), see the SPD or get written confirmation that the plan permits disclaimers.

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[19] *Kennedy v. Plan Administrator for DuPont Savings and Investment Plan*, 129 S. Ct. 865 (2009)
[20] See *Stephenson v. Stephenson*, 163 Ohio App. 109, where a court held that a custodial IRA owner changed ownership of his IRA to his living trust by listing it on Schedule A attached to his living trust that purported to transfer assets, overriding the beneficiary designation form filed with Merrill Lynch, the custodian.
[21] *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001)
[22] Treas Reg §1.401(a)-20, A28

9) ____ **Beware of annuities within accounts –** Sometimes an annuity will be held by an IRA. The annuity company will have their own BDF for the annuity that may differ from the BDF for the IRA custodian which holds it.

10) ____ **Is there any basis in the IRA or QP?** Most plans and IRAs don't, but many do. Have Form 8606s been filed (this would indicate if a non-deductible IRA were established, which would cause the IRA to have basis)? If there is considerable basis in a plan, consider a complete distribution followed by a rollover of pre-tax funds over basis within 60 days to permit efficient use of basis and less complicated administration.[23] Consider a Roth IRA conversion, especially where there is a high percentage of basis to overall IRAs. Remember the "cream in the coffee rule" that has to take into account all IRAs for this, including rollovers to IRAs later in the same year from other qualified plans.

11) ____ **Keep a copy of the BDF in the file.** Financial firms move, go out of business, get bought out and merged, employees leave or make mistakes, computers crash – keep a signed copy (ideally, with signed acknowledgement by the IRA custodian/trustee).

12) ____ **Consider Power of Attorney language** to address and allow changes in retirement plan elections, beneficiaries, rollovers, Roth conversions/recharacterizations, lump sum distributions. Consider clauses to limit abuse by one family member at the expense of others (e.g. "my agent may change qualified plan/IRA beneficiaries to my existing trust, to my children equally per stirpes, or to subtrusts for my children equally. My agent may also make changes to beneficiary designations that are unequal, provided all my children, or their issue per stirpes, unanimously consent….).

13) ____ **Consider Roth Conversions, even (more especially?), deathbed Roth conversions**. This may work out better for the family overall in some instances. For instance, a client may have net operating losses, large end-of-life medical expenses, short tax years, or other reasons why a partial Roth conversion would not "cost" much in the last year of life. Additional factors might be whether there would be a state estate tax (because IRC 691c does not allow a deduction for that), or if estate taxes are paid, whether the beneficiaries itemize their deduction (necessary for the IRC 691c benefit).

**14)** ____ **Plan for Potential Roth Recharacterizations**. Many people have recently or will this year be doing full or partial Roth Conversions, for large accounts often with a Roth Segregation Conversion Strategy. This is especially compelling this year with the anticipated 2013 tax increases in both income tax rates and the 3.8% health care surtax. Have reminders been set to reevaluate the conversions prior to the end of the year, before April 15 or October 15 deadlines (the latter is available if returns/extensions are filed on time)? Is there a traditional IRA left with a valid BDF to recharacterize back to if the owner dies before the deadline? If not, you may not have a valid designated

[23] See IRC §402(c)(2)

beficiary. And are the rules clear to the executor/trustee as to whether and when to do so? This may not be an issue if the beneficiaries are exactly the same, but one can imagine many scenarios where someone has strong pecuniary incentives or disincentives to recharacterize or not recharacterize an IRA contrary to what the owner originally intended (e.g. plan leaves estate to kids, IRAs to grandkids).

15) **____ Has a financial planner or wealth management team reviewed the investments as "IRA appropriate"?** It would be rare to have an investment advisor or client silly enough to buy tax-free municipal bonds, for example, in an IRA. However, there is a lot of inefficient placement of investments between taxable and tax-deferred accounts that is less obvious. Does the IRA invest in an international fund that kicks off foreign tax credits that go wasted? Does it invest in money market funds or short-term treasuries making 0.01% interest? Are REITs and high yield bonds in the taxable account instead of the IRA? What about Gold ETFs that kick off 28% collectible income? (trick question there – be careful with any collectibles in an IRA, but many PLRs seem to indicate the IRS is OK with IRAs holding Gold ETFs). Are the individual stocks that kick off 15% long-term capital gains and 15% dividend income and can be manipulated for tax-loss harvesting held in the IRA when they may be more efficiently managed in the taxable account? Are high-turnover managed funds kicking off gains (even, gasp! short-term capital gains) held in the taxable account when they may be more efficiently held in the IRA? It rarely makes sense to have the exact same asset allocation in an IRA as in a taxable account for larger sums, yet this is very common practice among unsophisticated investors and advisors.

16) **_____ If the sole primary beneficiary is a spouse (or conduit trust for spouse), and the spouse is more than 10 years younger than the IRA/QP owner, remember that the owner is entitled to more favorable required minimum distributions under a different life expectancy table.** If a conduit trust is named, this will require similar trust documentation delivered to the custodian/trustee as discussed herein for post-mortem see through trust compliance.[24]

**17) ____ Ask clients whether there are significant employer securities in qualified retirement plans that would benefit from net unrealized appreciation (NUA) treatment**. If that is the case, how exactly should the trust that is a potential beneficiary of the plan deal with this issue? Ideally it is addressed and exploited upon retirement, but clients cannot promise not to die early so it can be an issue for the trustee and counsel. Is it such a small benefit that it should be ignored? If it is large enough to matter, then would the client be comfortable with a conduit clause that distributed the entire employer stock distribution in kind to the beneficiary? Would the trust permit it? If the lump sum distribution "accumulates" in trust, will there be sufficient liquidity to pay the income tax (especially important concern when using a "standalone" trust)? Most trusts are completely silent on NUA, but some guidance is merited.

[24] Treas. Reg. § 1.401(a)(9)-4, A6

## b) Checking the Trust Itself

The requirements seem much simpler than they are. Recall Natalie Choate's warning that "**drafting a 'see through trust' to be named as beneficiary of retirement benefits requires complying with very precise and narrow requirements – requirements that most typical estate planning trusts will NOT meet**".[25]

The requirements are that:

1) the trust must be valid under state law (easy);
2) it must be irrevocable (also easy, but beware of joint trusts);
3) beneficiaries must be identifiable (harder to determine than it seems, corollary to this is that all beneficiaries must be individuals);
4) IRA custodian/trustee must receive copy of trust (or alternative summary) by October 31 of year after death (easy, but often overlooked).[26]

However, if it were that simple, we would not need 100 page outlines, treatise chapters or the next 20+ pages below to devise a checklist! The above is **completely worthless** as a practical guide for attorneys.

Items 20-24 below may not apply if a subtrust or separate trust is named directly on the BDF (as opposed to using a "master" living trust that splits into subtrusts post-mortem, which is more common). They do, however, apply whether the trust is designed as a "conduit trust" or an "accumulation trust". Some points in this checklist are not required (such as the first two below), but are a good practice for various reasons. Others are quite simply unresolved, with a PLR or even less for guidance - they warrant care in proactive planning and drafting, but would merit a more aggressive stance in post-mortem reporting/arguments (in fact, this might be the majority of the points below!).

18) _____ **Define "retirement benefits"**. While not technically required, I strongly suggest defining "retirement benefits", or distinguishing "deferrable retirement benefits" or "stretchable retirement benefits" in the document. People have different definitions of whether a non-qualified annuity, deferred comp, inherited retirement plans, ESOP, group term insurance, qualified annuities, stock options and the like are "retirement benefits". As noted throughout herein, some accounts cannot or should not be "stretched", at least not for the beneficiary's life expectancy, and therefore many trust clauses should **not** apply to them all equally. For example, non-qualified annuities may not get the same treatment as qualified annuities in an IRA or 403(b). Previously inherited accounts already have their stretch determined, and lump sum distributions to

[25] LISI Employee Benefits and Retirement Planning Newsletter #593 (January 31, 2012)
[26] Treas. Reg. §1.401(a)(9)-4, A5

achieve 10-year averaging or net unrealized appreciation advantages are intended to get tax benefits other than a "stretch". Some provisions, such as a marital deduction or QTIP provision, must affect qualified plan/IRAs, annuities etc even if they are not further "stretchable" – but that is to qualify for the marital deduction, not the stretch.

19) _____ **State on PAGE ONE, clearly, that a material purpose of the trust is to qualify as a designated beneficiary of any retirement benefits payable to the trust**, perhaps even name the beneficiaries that are intended to be used as the measuring life or lives. No, this is not required at all, but psychologically, this should predispose any IRS examiner or IRA/QP custodian/trustee in your favor. It would also assist in post-mortem reformations pursuant to UTC or other state statutes that look to whether an amendment would frustrate a "material purpose" of the grantor.

20) _____ **Conversely, if the trust is NOT DESIGNED to qualify as a designated beneficiary, state that the trust is not so designed, perhaps even why**. For example, the oldest beneficiary is close in age to the grantor who is over 70 ½ , charitable or older contingent remaindermen are important to the grantor, QP/IRA is a small portion of the trust, optimal special needs trust design goals outweigh stretch, maximizing asset protection/GST outweighs stretch, etc. That goes a long way in explaining the design to trust beneficiaries who might otherwise be inclined to sue the drafting attorney later for loss of stretch out, or to successor trustees.

21) **_____ Check the "pour-up"/"transportation" clause**. Could IRA funds be used to pay taxes/expenses of the probate estate after September 30 of the year after death? If so, the IRS may argue that the estate is a de facto beneficiary and thus blow the stretch. Look for a clause similar to this:

> "No payment of the grantor's debts, expenses of estate administration or estate taxes shall be made by withdrawal from any qualified retirement plan or IRA/457/403b account or annuity (or the income on or proceeds from any investment of any such withdrawal) on or after September 30 of the calendar year following that of the grantor's death. The above shall not apply to any such account inherited by the grantor as beneficiary prior to the grantor's death that was not rolled over into the grantor's own name as owner."

Note: the last sentence is to exempt inherited plans for which no further stretch is sought. E.g. H dies, with his own IRA and an IRA he inherited from his mother leaving both in trust for kids. Only H's IRA needs to be circumscribed in the above clause (and others herein), the inherited IRA from H's mother will not change payout and therefore the terms of the trust are irrelevant to it (at least, the clauses like this regarding see through trust qualification, the pecuniary funding with IRD issue would still apply).

22) **_____ Check the A/B funding clause**. Is the formula a fractional or pecuniary formula? (e.g. "that amount which", "shall allocate that pecuniary amount which"). If it is a

pecuniary formula, is the pecuniary amount going to the Bypass or the Marital? Funding a pecuniary obligation (e.g. put the first $5Million in the bypass trust) with IRA assets (not to mention NQ annuities, deferred comp, other retirement plans or other IRD) triggers the tax in the IRA and blows up the stretch pursuant to IRS Chief Counsel Memorandum (CCM) 2006-44020. However, see discussion in Section III – this may not be an issue if the BDF pays ***directly*** to a subtrust.

23) **_____ Check the GST Exempt funding clause.** As with the AB trust division, a pecuniary clause (e.g. put the first $5 million in the GST exempt subtrust) dividing between GST/GST Non-Exempt Trusts may equally blow up the IRA, even if the trust otherwise qualifies as a "see through trust".

24) **_____ Check for whether IRA funds may be needed or even required to be paid from for any other significant pecuniary bequests.** For example, "I leave $2 million to my son Joe, and the remainder to my wife Jane." What if the trust is $3 million and $700,000 of this is the home directed to Jane and $1.3 million is in IRAs? At least half of the IRA will have to be used to fund Joe's bequest (or, perhaps the estate/trust could borrow funds, but guess what happens when you try to use the IRA as collateral?). Same issue as above. Not uncommon in second/third marriages - I have seen many trusts pay the home plus $X to 2nd spouse, remainder to children.

25) **_____ Check for any "Roth inappropriate" clauses in the trust that make sense for taxable IRD, but not tax-free distributions** – e.g. a clause mandating that charitable bequests be made from "IRA assets" or that marital or GST non-exempt trust be funded with IRA/QP assets and bypass/GST exempt trust be funded with non-IRA assets.

26) **_____ Check for overbroad savings or other clauses that might inadvertently apply to non-**qualified deferred comp, non-qualified annuities, NUA stock or QP/IRAs inherited by the decedent.

27) **_____ If the client has significant employer securities (especially ESOP), consider waiving the absolute duty to diversify under the Uniform Prudent Investor Act (UPIA) to permit the holding of those securities for evaluation and effectuation of potential exploitation of Net Unrealized Appreciation (NUA).** See discussion below in ¶ 32.

28) **_____ If a trust designed to qualify for the marital deduction is the beneficiary** (or sometimes even a bypass trust that is qualifying for marital deduction for STATE estate tax purposes), then **check to make sure it qualifies for the marital deduction** as well. **Special language is required if qualified plan/IRA benefits are in a marital trust. See Rev. Rul. 2006-26** – "all net income annually" is NOT enough in most states, because only 10% of an IRA distribution is accounting income under the UPAIA.

Note for Ohio reviewers: **do not** count on Ohio's savings clause in § 5815.23(C), which is poorly written and probably ineffective for federal tax purposes (because qualifying for the marital is a *prerequisite* for application).

Sample clause intended to qualify as a QTIP (but NOT sufficient to be a conduit provision in itself):

"The Trustee shall withdraw from such Retirement Plan and distribute to the surviving spouse the greater of (i) the annual income generated by such Retirement Plan, undiminished by expenses, and (ii) the required minimum distributions under Section 401(a)(9) of the Code. The surviving spouse shall further have the absolute right to direct the Trustee or any investment advisor to convert or make productive [of income] within a reasonable time the assets of such Retirement Plan which are or may be distributed to the Trustee as part of such trust."

Note: QTIPs require all "net" accounting income, so you might think about whether you might delete the "undiminished by expenses" above. As discussed below, this is not enough in itself to qualify as a conduit trust, but would be enough if combined with something like #29 below. For an accumulation trust, if it would otherwise qualify, you would not need "(ii) the required minimum distributions…." Additionally, QTIPs do not require the trustee to pay, they merely require the spouse have the ability to withdraw, so my preference would be to reform the above with something like "My spouse shall have the ability to withdrawal from such retirement plans the net income at least as often as annually…."

**28) _____ Check your trust – are non-pro rata transfers permitted in dividing the estate?**
Many wills/trust will have this in boilerplate, and I can see no reason not to add this to all trusts. If an estate or trust makes unauthorized non-pro rata distributions of property to its beneficiaries, the IRS has ruled that the distributions are equivalent to a pro rata distribution of undivided interests in the property, followed by an exchange of interests by the beneficiaries. This deemed exchange may tax both beneficiaries to the extent that values differ from basis.[27] This is deadly when you have no basis at all. Imagine you have a $600,000 estate - $200,000 in qualified plans, $200,000 in cash/home to be sold and $200,000 in mutual funds, with two children who get 50% of the estate each. The executor and children agree that child #1 gets the plans, child #2 gets the mutual funds, and they split the cash and proceeds from home, but the will/trust does not authorize non-pro rata transfers. Let's say the stock and mutual funds increased by $20,000 by the time of transfer. The IRS interpretation of this transaction is that each child got ½ the plans and ½ the mutual fund, and then they each sold/exchanged the other half to each other. So child #2 is selling his share of the mutual funds for $110,000, with no basis to offset, since the exchanged IRA has no basis ($110,000 of taxable gain). Child #1 is selling his share of the IRA for $110,000, with $100,000 of basis in the exchanged funds to offset ($10,000 of gain), which is bad enough and sounds like child #1 is better off, but who knows what this does to child #2's IRA moving forward (would it trigger a prohibited transaction or disqualify the entire IRA? Just half?)
To avoid this result, **expressly authorize non-pro rata distributions in your will/trust**.

[27] Rev. Rul. 69-486

### c) Conduit Trusts

29) _____ **Check for any conduit clause.** If you see a clause similar to below that REQUIRES ALL IRA distributions to be paid to the current beneficiary, NOT just "all net income" and NOT just "all required minimum distributions", then you can skip the checklist items pertaining to accumulation trusts only.

*"[Conduit Provision] The Trustee shall withdraw from each qualified retirement plan and IRA the required minimum distributions (RMDs) under Section 401(a)(9) of the Code, and may withdraw more funds if desirable to comply with the distribution terms of this trust. A material purpose of this trust is that, should my spouse survive me, this trust for my spouse is intended to qualify as a "designated beneficiary" under Example 2 of Treas. Reg. §1.409(a)(9)-5, A7(c)(3) and this trust shall be interpreted and may be amended accordingly. Accordingly, upon receipt of any retirement plan distributions (other than distributions from any retirement plan inherited by me prior to my death and not rolled over as a surviving spouse to my own qualified retirement plan, as discussed above),* ***the trustee(s) shall thereafter distribute directly to or for the benefit of my spouse all such amounts received by the trust*** *(with reasonable reduction for trustee fees, investment management fees or other expenses allocable to management of those assets). The trustee shall not accumulate any retirement plan distributions for the benefit of any mere potential successor beneficiaries, other than a previously inherited retirement plan as excepted herein.*

*This conduit provision shall supersede any forfeiture clause (including no contest provisions), holdback provision or any other clause that might interfere with distribution of the retirement plan proceeds pursuant to this section.*

*For purposes of this section, 'to or for the benefit of' shall not include payments to another trust, even a 2503(c) minor's trust, via decanting or otherwise."*

Note – the above is not sufficient by itself to qualify for QTIP, discussed later. Here is a recent example of a conduit trust provision that may ***not*** work, due to the *italicized* language permitting retirement plan distributions to be accumulated in the trust under certain circumstances for the next remainder beneficiaries in line (note in this trust there was a separate paragraph for non-spouses):

> "The Trustee shall withdraw from such Retirement Plan and distribute to the surviving spouse the required minimum distributions (RMDs) under Section 401(a)(9) of the Code. If the Trustee elects to withdraw from such Retirement Plan amounts in excess of the required minimum distributions, then the Trustee shall also distribute to the surviving spouse such excess amounts so withdrawn *unless the surviving spouse pursuant to the terms of such trust has the absolute right to withdraw the principal of such trust and fails to exercise such right*. Unless the surviving spouse has an absolute right to withdraw the principal of such trust, any election made by the Trustee to withdraw amounts from any Retirement Plan in excess of the required minimum distributions under Section 401(a)(9) of the Code may only be made by a Trustee who is a person other than the surviving spouse."

Although this author disagrees with using the *italicized* language above (it is mistakenly borrowing a permitted QTIP concept – if the spouse has absolute right to all the principal the spouse should probably consider rolling the IRA over into his or her own name), something like the last sentence may be a good idea. It was added to police common situations in which the surviving spouse is the sole trustee of the conduit trust. Without this sentence, the fear would be that the surviving spouse could withdraw 100% of the retirement plan and then, the surviving spouse as trustee would be compelled to take the entire amount pursuant to the conduit clause, regardless of the HEMS or other standards in the trust. The withdrawal would probably be a breach of fiduciary duty in that instance, but I suppose the extra prohibition is a "belt and suspenders" approach. Another way to rectify this would be to specifically limit the trustee's ability to withdraw greater than the RMDs/net income to the ascertainable standards if the trustee is the beneficiary or related/subordinate thereto.

28) _____ **Check that no other provision, such as lifetime powers of appointment, trust protector, amendment, holdback clauses, in terrorem clauses, etc could override the conduit clause**. E.g. John Doe dies leaving his estate to his daughter Violet. Violet has a ***lifetime*** power to appoint assets from the GST exempt trust to her children, their spouses or to charities, and the lifetime power to appoint assets in the GST-non-exempt trust to her children's education/medical providers pursuant to §2642(c)/2503(e) exception. This is a great clause for non-retirement plan assets, but problematic for our beloved IRAs and goal of a "see through trust". While testamentary powers of appointment do not offend the conduit trust regulations, lifetime ones do.

29) _____ **Check that the spendthrift clause is an ordinary "no assignment, transfer, attachment…." clause, and *not one that changes a beneficiary's rights*** via shifting executory interest ("forfeiture clause"). An ordinary spendthrift clause is actually favored by the IRS, see IRC §401(a)(13) - there is a basic spendthrift clause prohibiting assignment in any IRA or QP.[28] However, you won't see a clause in those plans that divests a beneficiary or takes away mandatory distribution rights. A substantial minority of firms/forms use a form of spendthrift clause that goes beyond merely prohibiting a transfer or assignment and actually removes a beneficiary altogether, temporarily changes (shifts) the beneficiary, or converts the trust to a wholly discretionary trust (often including other beneficiaries, such as descendants of the grantor), either one of which could affect the validity of a conduit provision, and could affect the determination of countable beneficiaries and analysis of an accumulation trust. If the IRS questions such clauses jeopardizing a QSST determination, which is very similar in concept, why would they not think likewise for a conduit trust?[29] Perhaps such shifts should be confined to non-retirement accounts.

30) _____ **Check to make sure there is a provision to deduct fees if there is a conduit clause, especially if IRAs are the only asset in the trust**. Otherwise, how does the attorney, trustee or accountant get paid?

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[28] See IRC §401(a)(13) and IRC §408(a)(4), IRC §408(b)(1)

[29] See AICPA article in The Tax Advisor by Raymond Olczak discussing undesirable boilerplate spendthrift or no contest clauses that could disqualify QSSTs that must pay all S Corp income to one beneficiary: http://www.thefreelibrary.com/QSST+documents+should+avoid+dangerous+provisions.-a011757864

31) _____ **Check to make sure the conduit clause is not so broad as to include inherited retirement accounts (other than those inherited from spouse and rolled over).** Such a clause might unnecessarily cause distribution of RMDs when it is not needed for "stretch".

32) _____ **Check to make sure the conduit clause is not so broad as to inadvertently preclude lump sum distributions to exploit Net Unrealized Appreciation (NUA) loopholes**. Under what conditions should a lump sum distribution of employer securities be permitted or even directed prior to transfer to an inherited IRA? Large NUA amounts could in some circumstances merit using a separate trust or subtrust as beneficiary of different plans. E.g. John has $500,000 in an IRA, $500,000 in a 401(k) and $500,000 in an ESOP. The ESOP is 95% employer stock with a "basis" for NUA purposes of $50,000. The trustee may wish to rollover the 5% of the ESOP that is not employer stock and the 401(k) to an inherited IRA and take the $475,000 worth of employer securities as a lump sum distribution, incurring ordinary income tax on $50,000, but enabling the remaining $425,000 NUA gain to be deferred indefinitely and eligible to be taxed as long-term capital gain when sold. If a conduit trust is preferred to get a longer ADP or allow charitable or older beneficiaries, perhaps only the IRA and 401k should go to the conduit trust, whereas the ESOP could go to an accumulation trust so that all $475,000 of employer stock would not have to be distributed in kind to the beneficiary(ies). For smaller amounts, or other family situations, the conduit clause causing an in kind distribution of NUA stock may be palatable. More likely, however, practitioners would prefer to use an accumulation trust for all three plans.

33) _____ **Check whether a "facility of payment" clause intended for minors allows a payment to a 2503(c) trust**. Typical clauses permit distributions to guardians, conservators, UTMA/UGMA custodians or direct transfers, but §2503(c) trusts are more problematic because of the GPOA and default of §2503(c) trusts to pay to the minor's estate if death occurs before age 21 (age 25 in some states such as Washington or Oregon). Accordingly, consider prohibiting the trustee from distributing retirement benefits to a §2503(c) trust.

**34) _____ Even if there is no explicit conduit clause, does the trust mandate "all net income" be paid annually, and then later define (contrary to the default under most state's laws) "accounting income" to include ALL IRA or qualified plan distributions?** Query whether a "power to adjust" between principal and income, which may be explicitly in the trust or granted under state UPIA statute, might thwart this method of conduit trust compliance, or whether other IRS guidance re defining principal/income may question this, such as Treasury's admonition that: "Trust provisions that depart fundamentally from traditional principles of income and principal will generally not be recognized."[30] In short, this kind of clause may work, but why try it when other solutions do not have as much hair on them?

[30] Treas. Reg. §1.643(b)-1

## d) Accumulation Trusts

**35) _____ Check who would inherit if the first line of beneficiaries died before being entitled to receive all the benefits. Continue until someone inherits immediately and outright.** These beneficiaries' life expectancies need to be counted as well. It would not be uncommon to have a charity as a contingent beneficiary, for instance, which would blow the stretch.

For example, Father John leaves his trust to his children, Tom, Dick and Harry, to take in full at age 35. If one of them dies before that age, their 1/3 share goes to their issue per stirpes, and if no issue survive the child, then to the University of Dayton. If Tom, Dick and Harry are all over age 35 and living at the time of Father John's death, then no problem, but if Harry is under 35 with no children, University of Dayton is counted as a potential beneficiary, even though Harry is over 34 and actuarially 99% likely to live until age 35.[31] Even if Harry has a 6 year old child, since that child will probably not be entitled to receive all the benefits immediately outright either (most trusts contain a delayed vesting for minors at least), you still have to look to the next beneficiary in line. If instead, his brothers Tom and Dick were "next in line" if Harry died without issue, this satisfies the "test" and allows the oldest brother's LE to be used, since they would inherit immediately and outright. Natalie Choate refers to this method as "outright to now living persons (O/R-2-NLP)".[32]

**36)** _____ Check for any other provision, such as trust protector, holdback clauses, forfeiture type spendthrift clauses, etc that could spoil what you think or would argyue to the IRS is an immediate and outright vesting of benefits.
For example, your client just died with an estate leaving $4million estate with $1million IRA to bypass trust for wife, remainder to children at age 35. Kids are over 35 now, so you think you are OK to stop the search for potential identifiable beneficiaries with the kids. But, consider the effect of this clause paraphrased from a recently reviewed trust:

"if the trustee determines that a beneficiary is disabled in any way, whether formally adjudicated or not, the trustee may delay termination of the trust and distribute income and principal for the beneficiary's health, education and support in the trustee's discretion. If during this period of disability, the beneficiary should pass away, any remaining trust corpus shall be paid to the beneficiary's estate"

Many trusts have some kind of variation on this. While there is always a chance that the IRS will let this kind of provision slide, I would not count on it. The effect is to make the beneficiary's estate a potential beneficiary under the accumulation trust regs and rulings, and thus, the trust would have no life expectancy (ie. no stretch).

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[31] See PLRs 2002-28025, 2004-38044, 2005-22012, 2006-10026, BUT, see PLR 2013-20021 – taxpayer friendly!
[32] Choate, Life and Death Planning for Retirement Benefits, 7th ed., Ch. ¶6.3.08

**37) _____ Use, but don't count on a "savings clause" (while everyone loves a savings clause, it may foster unwarranted confidence in the efficacy of the trust).** Here is one variation I have seen:

"Notwithstanding any other provision herein, the trustee may not distribute to or for the benefit of my estate or any other non-individual beneficiary any qualified retirement benefits payable to this trust, it being my express intention that this trust qualify as a designated beneficiary under IRC §401(a)(9) and regulations pertaining thereto."

A great idea in theory, but questionable in practice – everyone loves a savings clause that simplifies compliance, but there are several flaws:

It applies equally to inherited IRAs (meaning the decedent had inherited them prior to the decedent's death), and lump sum distributions taken to exploit NUA capital gains treatment, that do not need or benefit from the "stretch", so you would generally want to limit application to the qualified retirement plans that would benefit.

There is no clause prohibiting older individuals from taking. If granny is 3rd in line to inherit and is 90 years old, you have messed up the stretch just as much as if you had no eligible beneficiary. You might add "older than my children" or, depending on family "older than my siblings", or something similar to above.

What if the IRS follows Deep Throat's directive to Woodward and Bernstein to "follow the money" – are there actually younger beneficiaries in the family eligible to take *and* would they take outright? Fully dynastic trusts may be a problem, or trusts that have various holdback clauses (see example below). E.g. John leaves his IRA in trust for his daughter in a dynasty trust with a clause similar to above. John may not have any younger eligible extended family – maybe any siblings/cousins/etc are all older than his daughter w/o issue. An absence of eligible beneficiaries would create a default of a resulting trust in favor of John's estate (meaning no DB).

In addition, there is no time period, such as "on or after September 30 of the year following my death" that allows the IRA assets to be withdrawn to pay trust and/or estate expenses before that time.

In addition, there is no tracing of IRA distributions and prohibition of benefits both PAID and "payable". To illustrate, say the trustee withdraws $50,000 from an IRA and distributes $10,000 to the beneficiary. $40,000 is "accumulated" – invested in stocks, bonds, etc outside of the qualified plan/IRA (not a conduit trust). The above savings clause says nothing about that $40,000. Even if it did, by modifying to "paid or payable", you still have a tracing and tracking problem unless you have a separate or standalone trust segregating retirement benefits at the outset.

In addition, it is not clear the provision restricts decanting or other further payments in trust for an individual.

**38) _____ Check limited and general powers of appointment.** Do they permit the transfer of IRA accumulations to anyone older than the beneficiary? Note that it is NOT enough to limit the appointment of IRA assets only, because the IRS is concerned with accumulations in the trust that originally came from the IRA – this is a great rationale for a separate trust/subtrust for IRA assets only when an accumulation trust rather than conduit trust provision is contemplated. Could assets be appointed to one's creditors/estate, or to a charity? Does the marital trust have a "stub" income provision giving the spouse/beneficiary a GPOA right to appoint any undistributed trust income at her death? If so, the stretch may be blown.

**39) _____ Check for powers of appointment that enable payment to other trusts.** Even if a LPOA/GPOA is limited to younger individuals than the intended beneficiary, does it still permit a transfer in further trust? It may not have to say so – generally under most states' laws this power is implicit in a power to appoint.[33] Consider limiting such transfers only to trusts that would otherwise be considered designated beneficiaries (e.g. other subtrusts established by the grantor for a sibling/nieces/nephews of a powerholder), or, more simply, prohibit POAs from transferring to trusts at all. The IRS may argue that, since no copy or summary of any trusts created after October 31 of the year after the participant/owner's death will not have been given to the IRA trustee/custodian by that date (recall, that is a prerequisite under §1.401(A)(9)-4), the trust will not qualify as a Designated Beneficiary. Additionally, all the beneficiaries may not be "identifiable". ***This is one of the most overlooked problems with accumulation trusts, and a reason for segregating such assets into a different subtrust altogether***.

**40) _____** Consider whether to limit the trustee's ability to decant or amend the trust for similar reasons. Approximately eighteen states have enacted or proposed enacting decanting statutes, in addition to potential common law powers to do so. Ohio has recently enacted a decanting statute, effective March 22, 2012.[34] Is the following clause overly conservative?

> "This trust expressly overrides and prohibits the trustee from using common law, Ohio R.C. §5808.18 or its successor or other state decanting law to decant qualified retirement benefits (as defined above) and any distributions remaining in trust therefrom to another trust, unless both of the following apply: 1) such decanting is done prior to September 30 of the year after my death and 2) a copy of the new "second" trust (or qualifying alternate description) is given to and received by the appropriate IRA custodian(s) and/or trustee(s) by October 31 of the year after my death pursuant to Treas. Reg. 1.401(A)(9)-4, A6."

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[33] See, 1 Scott on Trusts, §17.2

[34] Ohio R.C. 5808.18. The savings clause in new §5808.18(C)(6) is somewhat overbroad (because it applies to "any interest subject to…MRDs", such as previously inherited IRAs and other retirement accounts for which qualification as "see through" trust is not needed), and perhaps even inadequate vis a vis accumulation trusts (because it permits decanting in the first place, especially after the beneficiary determination date – Sept 30 of the year after death). The IRS has placed decanting on its "no ruling" list with respect to how decanting affects income, gift and GST tax. Rev. Proc. 2011-3 issued March 28, 2011. The IRS later stated it would issue some guidance on the gift/GST effects but is slow forthcoming. IRS 2011-2012 Priority Guidance Plan issued September 2, 2011.

**41) _____ Check for "springing" or formula GPOAs designed to trade a lower estate tax for a higher GST tax or to soak up a deceased beneficiary's estate tax exclusion for basis increase, and make sure they do not apply to retirement benefits.**[35]

**42) _____ Consider** – Is it possible to have a GPOA if there is also a savings clause that no retirement benefits are to ever be distributed to non-individuals or individuals older than the intended designated beneficiary? If I grant my daughter the power to appoint to any creditor who is an individual younger than my daughter, is that still a general power? Probably, but the IRS may see that as a bit too cute. See the attempt to so limit a GPOA through a partial release in PLR 2012-03033, which did not address this GPOA/GST issue, but allowed such a limitation for see through trust purposes.[36]

**43) _____ Consider, in lieu of GPOAs discussed above to avoid GST in GST non-Exempt Trusts**, whether to instead grant the beneficiary the power to withdraw all of the IRA assets - (not limited by any ascertainable standard) – this triggers estate in lieu of GST tax[37], but does not cause the problem of new, non-identifiable or non-qualifying beneficiaries via GPOA. This could be done with the consent of a non-adverse trustee for slightly better asset protection. [38]

**44) _____ Check "Trust Protector/Advisor" clauses.** Do any provisions allow a charity, corporation and/or older people than the beneficiary to be named later? Do provisions allow granting a General Power of Appointment or broad Limited Power of Appointment over retirement plan assets, or accumulations therefrom? If so, the stretch may be lost because those beneficiaries may have to be counted since they could conceivably receive IRA accumulations.

**45) _____ Check for the "older adoptee" issue**. While there is no IRS case on this point yet, query whether all beneficiaries are "identifiable" if the class can later be expanded to include an older beneficiary via adoption. E.g. I name my grandchildren as beneficiaries (either directly on form, or via trust) – my children could theoretically adopt children (in most states, even older adults) that are older than the grandchildren living at the date of my death. Solution: limit/close the class for retirement benefit purposes to those same age or younger than class. For example:

"Issue", "grandchildren" or "descendants" shall not include an individual adopted after my death who is older than the oldest beneficiary who was a beneficiary at my death."

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[35] For discussion of the "Optimal Basis Increase Trust", using flexible powers of appointment to achieve optimal basis step up (and avoiding "step downs") for trust assets, email the author for CLE materials and article. The author's sample clause considers this issue.
[36] PLR 2012-03033
[37] IRC §2041(a)(2), §2041(b)(1)(C), although query whether the lapse of this withdrawal right at death only triggers estate tax on 95% of the property due to the 5/5 lapse protection of IRC §2041(b)(1)(C)(2).
[38] Consider that generally any lifetime GPOA reduces creditor protection. This power may also greatly complicate the administration and tax accounting of the trust (causing partial beneficiary grantor trust status due to IRC §678).

46) **_____ Check for the "older spouse" issue**. Similar to above. Sometimes people name spouse of children/grandchildren as contingent beneficiaries. This class could be expanded by marriage to include someone much older than the intended measuring life.

47) **_____ If a marital accumulation trust is beneficiary**, check whether the client has considered the more beneficial tax treatment of a conduit trust for a spouse as opposed to an accumulation trust for a spouse (two key provisions - delayed required beginning date and recalculation of life expectancy each year). The first is especially relevant for younger spouses, irrelevant if IRA owner is past 70 ½. If spouse is young, consider showing an illustration showing the detrimental tax effect of accumulation v. conduit.

48) **____ If a marital accumulation trust is primary beneficiary and the spouse is more than 10 years younger than the owner, who is over 70 ½** (think Hugh Hefner) consider the effect that this has on the IRA owners current RMDs. Hugh can use a more advantageous tax table than the Uniform Life Table, taking into account his spouse's actual age, but only if his spouse is the sole primary beneficiary (a conduit trust would qualify as a "sole beneficiary" for this purpose).

49) ____ If a marital accumulation trust is beneficiary **and charities are a part of a client's annual giving or estate plan**, evaluate leaving IRA assets to a charitable remainder trust (CRT) in lieu of an accumulation trust – the "stretch" might even be longer.

50) **____ Check for "pet trusts", "cemetery trusts", charitable provisions or other clauses that leave funds to non-individuals.** If present, consider adding a clause to forbid retirement funds for which a stretch is desired from going to these bequests (see example above), or, better yet, have retirement accounts pay directly to subtrusts and/or separate standalone trust so as to bypass these provisions entirely.

51) _____ Is the QP/IRA only a small part of the potential trust corpus and the trust mandates that "all net income" be paid anyway? If so, there is very little to be lost by using the conduit trust safe harbor. It may be easier and safer. E.g. John leaves $5 million in trust for his daughter Jane, $800,000 of which is an IRA. It mandates "all net income" be paid, but is not a conduit. If "all net income" is roughly 3%, that is $150,000, dwarfing whatever meager conduit payment from the IRA there might be (for a 51 year old, only about $24,000!). Even if the trust does not mandate "all net income", is there a trust beneficiary alive that is not going to demand $24,000 from a $5 million trust? And is even that $24,000 so at risk from creditors with a typical UTC/trust facility of payments clause?

52) _____ **Check for an old-fashioned "stub income" provision** buried in the marital or even the bypass trust. If found, delete it. You could try to amend it to exclude retirement benefits that have been paid to the trust, but this is more problematic because it brings up tracing issues, so it's safer to simply delete it – few clients will care

about deleting the stub income provision. For some time, it was thought that to get a marital deduction for a trust, you had to mandate that the surviving spouse's estate receive any income received but not distributed in the year of death (this is no longer required, at least if it is a QTIP, but beware GPOA maritals)[39]. This was called "stub income". Such a provision could destroy the see-through status of an accumulation trust, because, arguably, the surviving spouse's estate would be a potential beneficiary of the accumulated retirement plan distributions, ergo, no D.B., no stretch.

> **Example of clause TO AVOID in an Accumulation Trust:**
> "Final Distribution. When Grantor's spouse is no longer living, the Trustee shall pay to Grantor's spouse's estate any undistributed income and also any federal estate taxes and state death taxes attributable to this trust;"
> **Or similarly, what about something like this:**
> "Upon the death of my spouse (beneficiary), the trustee may in its discretion pay the funeral bill and final medical expenses of the beneficiary."

The first paragraph above has a tax payment provision as well as a stub income provision. Would the IRS argue that the tax payment provision also makes the estate or government a beneficiary? It is distinguishable, and less likely to cause a problem than the stub income, because if there are taxes attributable to the trust, via QTIP election or otherwise, federal or state statutes apportion taxes anyway.[40] However, I would leave out the tax clause as well– it adds nothing useful, forces payment from the trust to the estate (potentially jeopardizing asset protection), potentially conflicts with tax apportionment addressed elsewhere, and unnecessarily tempts the IRS.
The second paragraph above seems laudable – why not pay the final expenses, funeral bill, monument, etc.? However, it is akin the same as paying to an estate, since it is the estate's burden and the estate that benefits. Of course, an estate is an entity that does not qualify as a "designated beneficiary", even if individuals are the only beneficiaries of an estate. Moreover, if you are not clear that such expenses cannot be used from retirement funds (and that any accumulations can be traced), the default rule in many states if the trust is silent is probably that such final expenses CAN be paid.[41] Would the IRS squelch a retirement benefit because of such an otherwise laudable goal?

**53)** _____ Have you or should you consider separate accounting provisions, if you are not going to have a separate or standalone trust for retirement benefits? As noted above, you probably don't want payments for estate expenses, appointments, decanting, amendments to the retirement distributions of the trust after the beneficiary determination date. How do you track this when it would typically be commingled with

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[39] Treas. Reg. §20.2056(b)-7(d)(4), §25.2523(f)-1(c)(1)(ii) for QTIPs, Treas. Reg. §20.2056(b)-5(f)(8) for GPOA marital trust
[40] See Treas. Reg. §20.2044-1(d)(2), IRC §2207, IRC §2207A, Ohio R.C. §2113.86
[41] A recent Ohio appellate court held that where trust was silent on issue, the trustee could pay the funeral expenses of the initial primary beneficiary. *In re Cletus P. McCauley & Mary A. McCauley Irrevocable Trust*, 2014-Ohio-3692

other interests, dividends and other investments once out of the plan? Would something like this realistically be followed by a non-professional trustee?

"If any trust hereunder shall have the right to receive qualified stretchable retirement accounts (as defined in paragraph XXX), the trustee shall track and account for, preferably in a separate account altogether, but not necessarily as a separate share for Subchapter J accounting purposes, any distributions from the qualified retirement plan accounts ("Accumulated Retirement Distributions Account"). With respect to any such separate accounts created hereunder, the trustee is encouraged, but not required, to take any distributions from this Accumulated Retirement Distributions Account first. The following rules shall apply to this Account, as well as any qualified stretchable retirement accounts, notwithstanding any other provision of this instrument to the contrary:

1. No power of appointment may be exercised in favor of any entity (entity for this purpose shall include a trust), nor in favor of any individual older than the powerholder. If, after division of this trust, retirement benefits and any accumulated retirement distributions account is held by a GST non-exempt trust having an exclusion ratio greater than zero, any such power of appointment may also be exercised in favor of individual persons who happen to be creditors who are younger than the powerholder.
2. No funds from stretchable retirement accounts, nor any accumulated retirement distributions account, may be used to pay last expenses, funeral costs or any other estate expenses of a deceased beneficiary."

**IX. Post-Mortem Checklist - considerations in reviewing and administering an estate where Trust is beneficiary (perhaps contingent beneficiary) of IRA/QP assets**

1) _____ **Tell executor/trustee(s) (especially spouses) NOT TO SIGN ANYTHING** with financial advisors or employee benefits personnel without reviewing with you first. Financial firms are often overeager to help grieving families. Not only do these well-meaning advisors ignore issues such as disclaimers, AB trust funding, post-mortem Roth conversion opportunities for inherited qualified plans and spousal rollover traps (pre 59 ½ surviving spouses may not want to rollover immediately), but even financial firms can and have gotten IRA titling wrong – the IRS has historically been EXTREMELY strict with the wording and form of the titling of accounts.

2. _____ **Get DOD/AVD values**. If the IRA provider will not give the trustee/executor any valuations regarding the account balance on date of death (or Alternate Valuation Date) because the estate/trustee is not the beneficiary, consider sending them a letter informing them that the IRS will require them to prepare and file an estate tax return regarding the asset under IRC § 6018(b) unless the appropriate information is provided to complete the return. Natalie Choate's "bible" has a sample form.[42] Note - a trustee or anyone else in possession of inherited property may nonetheless be responsible for filing tax returns as deemed executor in the event there is no personal representative (executor, administrator) appointed.[43]

3. _____ **If no BDF is filed and there is no default beneficiary** (and the dollar amount merits), check to see if any document can function as a "substantial compliance" substitute beneficiary designation form (this will likely require a court order to effect). The IRS has allowed a beneficiary designation form to be construed post-mortem when the intent of the decedent was clear but the proper form not filled out with the new IRA provider. PLR 2006-16039, PLR 2006-16040, PLR 2006-16041. Might this also be the case with "Schedule As" attached to trusts, from letters to counsel/financial advisor or from other account designations?[44]

4. _____ **If stepchildren or children of same sex partner were probably intended beneficiaries, but were not named**, consider an argument that they were "equitably adopted", thus taking under BDF (if "children" are named or default) and/or through estate if the estate is default. Laws prohibiting same sex partner adoptions may be unconstitutional. For ERISA plan accounts, this may take additional steps and work arounds, since ERISA plans may disregard state law.[45]

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[42] The single best treatise in this area, Natalie Choate, *Life and Death Planning for Retirement Benefits*, 7th ed. 2011, www.ataxplan.com

[43] IRC §2202, §2203, Ohio R.C. 5731.37(B)

[44] In addition to the strange case of *Stephenson*, discussed in footnote 18, see the successful attempt in getting a "substantially compliant" BDF approved even where the formal BDF requirements of the IRA custodian/trustee were not met *In re Estate of Golas*, 751 A.2d 229 (Pa. Sup. 2000) – neither case addressed the see through income tax issue, however.

[45] See *Herring v. Campbell*, 2012 U.S. App. LEXIS 16397 (5th Cir. 2012)

5. _____ **Take year of death RMD**. If an IRA/retirement plan owner dies on or after his/her required beginning date (RBD), the required distribution that had not been paid prior to the date of his/her death must be paid to the beneficiary of the IRA/retirement plan owner. This MRD is based on the decedent's LE and Uniform Life Table (unless decedent had a spouse greater than 10 years younger) rather than the beneficiaries' LE and Single Life Table. Note that it is possible to have passed the RBD for IRAs and not for retirement plans (e.g. if employee was still working). Remember that you can make this Required Minimum Distribution WITHOUT affecting the subsequent right to later disclaim any or all of the account.[46] A COMMON MYTH is that the estate or living trust takes any year of death RMD not taken by the decedent – this is false. The named beneficiary(ies), unless they disclaim, should take the RMD. And, this should be taken before any attempted rollovers (such as moving an inherited 401k or 403b to an inherited IRA).

6. _____ **Counsel beneficiaries to consider disclaimer issues**.[47] For instance, it is common to name spouse and then bypass trust for spouse as contingent beneficiary. Should spouse disclaim and force some retirement plan assets into the bypass trust? This depends on what other assets are there to fund the bypass trust, the total assets of the surviving spouse, the applicable exclusion amount and, of course, whether the trust qualifies as a see-through trust. Similarly, perhaps a child may wish to disclaim a percentage in favor of a trust for grandchild – who may get 20-40 additional years of tax deferral. Counsel the client regarding consequences of "acceptance of benefits", such as active investment management, that might preclude a qualified disclaimer. Mere retitling should not preclude a disclaimer (e.g. John Doe, deceased, IRA fbo Daughter Doe). Watch out for surprises as to who the alternate beneficiaries are on the BDF, as discussed in the Part IV of this outline. An IRA beneficiary may be able to disclaim a pecuniary amount of an IRA, but it's probably safest and easier to disclaim a percentage.[48]

7. _____ If there are factors which make it questionable whether the trust can qualify as a see-through trust (Designated Beneficiary), and the dollar amount merits, **hire an outside CPA/tax attorney** familiar with the state of the law in this area.

**8)** _____ If the trust does not qualify, consider whether **early terminating distributions** to a beneficiary may remove a beneficiary from consideration (e.g. paying off a charity).

**9)** _____ If the trust does not qualify, **consider qualified disclaimers of certain powers** (such as powers of appointment, overbroad trust protector powers) to remove the impediments to qualifying as a see-through trust.

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[46] See Rev. Rul. 2005-36

[47] IRC §2518 for gift/estate issues, IRS CGM 39858 for income tax effect of qualified disclaimer

[48] See PLR 9630034, in which a disclaimer of an interest in an IRA, construed to be a pecuniary disclaimer, did not accelerate IRD.

10) _____ If the trust does not qualify, and nine months has passed or a qualified disclaimer is for any reason otherwise unavailable, **consider a "non-qualified" disclaimer or a common law release** of such powers under applicable state law.[49] Do NOT execute a *non-qualified* disclaimer over IRA benefits, unless you can get a private letter ruling, since the deemed gift might trigger income taxation on the IRA.

11) _____ **Check to make sure the IRA provider receives a copy of the trust instrument (or appropriate substitute) by October 31 of the year following death**. This is a prerequisite for getting see-through trust treatment as well.[50] While not required, I recommend sending Certified Mail, Return Receipt Requested.

12) _____ **If the trust does not qualify, examine whether a trust protector or amendment clause could allow a change of the terms. Also consider post-mortem reformations** under the UTC or other state law (new Ohio Trust Code's provisions ORC §5804.11, §5804.12, §5804.15 and especially §5804.16 allow retroactive modification for tax reasons, whether the IRS will honor the changes is more unclear and could be the subject of another paper).[51] If a memo is needed, research various cases and rulings on post-mortem reformations effective for QSSTs and other similar safe harbor trusts (there are cases both ways regarding reformations to establish QSST qualification, for example).

13) _____ **If there is a broad trust protector or other power to amend going beyond state law defaults, make sure it cannot be used on or after September 30 of the year after death** (the Beneficiary Designation Date) to affect the beneficiaries' rights to retirement benefits, and that no other clauses can be so construed as well. If they can affect the beneficiary's rights – amend the trust to prevent amendments after that date which would negatively impact see through trust status.

14) _____ **Make sure any post-mortem amendment of the trust, via Private Settlement Agreement (PSA), Trust Protector or otherwise, goes to the IRA custodian/trustee by the October 31** of year after death cutoff, or a new summary compliant with the regulation is sent. Would the IRS catch this or care? Unsure, but be on the safe side.

15) _____ If a qualified retirement plan (especially an ESOP) is payable to the trust, BEFORE TAKING A DISTRIBUTION OR CONSIDERING A TRANSFER TO AN INHERITED IRA, **investigate whether and to what extent employer stocks/bonds are part of the plan assets**. Employer stock can be rolled out post-mortem, taking only the basis of the stock into income under Net Unrealized Appreciation (NUA) rules.[52] This

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[49] See PLR 2012-03033 for a good example of how this planning can save the day
[50] Treas. Reg § 1.401(a)(9)-4, A6
[51] See PLRs 2002-18039, 2005-22012, 2005-37044, 2006-08032, 2006-20026, 2007-03047 and 2007-04033 (allowing reformation to affect tax result for IRA/see through trust), and PLR 2007-42026, 2010-21038 (contra)
[52] IRC § 402(e)(4).

allows the stocks/bonds to be sold later with the amount above basis qualifying as long-term capital gains rather than ordinary income. Beware that the timing and manner of such "lump-sum distributions" is critical to qualify as NUA and avoid other pitfalls. *The tax deferral from NUA is infinite in duration – there are no required minimum distributions!*

**16)** _____ If the trust can otherwise qualify as a see-through trust (Designated Beneficiary), and is beneficiary of any non-IRA qualified retirement plan accounts, **investigate whether a conversion to a Roth IRA may be advantageous** to the trust beneficiaries (e.g. perhaps there is basis in the plan, or perhaps there are losses that might soak up additional income upon conversion). Contact retirement plan administrators to rollover any accounts into an inherited IRA pursuant to the Pension Protection Act.[53] *Who/what trusts would be good candidates for post-mortem conversions?* Typically, if the estate is large enough to pay estate tax and therefore has a §691(c) IRD deduction, this deduction may offset the tax liability of conversion by 35-55%. Beneficiaries of large estates would be more likely to have enough to pay the tax as well. This is somewhat analogous to those with basis in their non-deductible traditional IRAs converting to Roth IRAs because they won't pay tax on most of the conversion.

**17)** _____ If there is a federal estate tax attributable to IRAs and other deferred income assets, **make sure the tax preparer considers and makes it clear to trustee and beneficiaries the implication and mechanics of the 691(c) IRD deduction** – otherwise it can easily go to waste.

**18)** _____ If there is a federal estate tax attributable to IRAs, **make sure the executor considers new guidance for the alternate valuation date (generally six month or sooner if sold)**.[54]

**19)** _____ If the trust is a "mere probate avoidance tool" that simply pays outright to beneficiaries (or at a certain age that has passed), **consider an in-kind and trustee-to-trustee transfer** from John Doe, Deceased IRA fbo John Doe Trust to John Doe, Deceased IRA fbo his son James and John Doe Deceased IRA fbo his daughter Mary. See the fine article by Michael Jones in 145 Trusts and Estates No. 4 (April 2006) entitled *Transferring IRAs*. If an IRA provider is difficult to deal with in making in-kind transfers (and many are), GET ANOTHER IRA PROVIDER – you can always make a trustee-to-trustee transfer with the account titled the same way at another institution, and then change the beneficial owner.

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[53] IRC § 402(c)(11)

[54] IRC 2032(a), see *IRAs and the Alternate Valuation Method*, Natalie Choate, Trusts and Estates, January 2009, and her follow up, *Estate Tax Alternate Valuation Method*, December 2011

**20)** _____ Whenever in-kind transfers are made, instruct the transferring IRA provider to **contact you prior to doing so if they plan to report the transfer as a distribution despite IRS guidance on pages R-3, 4 of the 1099-R instructions**. This gives you the opportunity to find a more agreeable IRA provider.

**21)** _____ If **the trustee or other beneficiary fails to properly take the Required Minimum Distribution, see Treas. Reg. §54.4974-2 A-7 for waiver of the 50% excise tax** for reasonable cause. See also IRS Form 5329 and instructions.

**22)** _____ **Divide/segregate the account if there are multiple beneficiaries by December 31 of the year after death**, otherwise the oldest beneficiary's LE will have to be used. Plus, it's just a mess tax wise if you don't. Usually beneficiaries are chomping at the bit to get at funds so this is done as a matter of course, but it's not uncommon (especially when people try to resolve an estate without an estate attorney) for inertia to prevent this. In some rare cases you might even want to divide an IRA for one beneficiary (e.g. if partial QTIP, GST or state partial QTIP applies). Inform the trustee/subtrustees/beneficiaries of what measuring life to use for the minimum required distributions and make sure IRA provider agrees.

**23)** _____ If the **spouse is the sole beneficiary** of the trust (e.g. conduit QTIP or bypass trust only benefiting spouse), confirm that the trustee and the IRA provider recognize 1) that if the decedent was under 70 ½, the trust is eligible to use the **special delayed required beginning date** of the year when the decedent would have reached 70 ½ and 2) when using the spouse's LE under the single life table, the trust has the ability to **recalculate the divisor every year** rather than simply reduce by 1 as is done when the spouse is not the sole beneficiary. These advantages can easily be overlooked.

**24)** _____ If the **spouse is the sole beneficiary of the trust** (e.g. conduit or trusteed IRA), **name a new beneficiary of the inherited IRA**. A conduit trust for a surviving spouse may have a potential negative **if** the spouse dies prior to the end of the year in which the owner would have been age 70 ½, if the surviving spouse (or in this case the trustee for the conduit trust for the surviving spouse) does not in turn *name their own new designated beneficiary* – without a newly named beneficiary the trust may be stuck with no beneficiary if surviving spouse dies.[55] The lesson is paradoxically this – the trustee as the beneficiary (ideally with the spouse if they are not one in the same) should file a new designation of beneficiary form naming the subtrust that would next take under the trust, typically the subtrust for a grantor/decedent's children. Better yet, grant the spouse a limited testamentary power to appoint IRA assets at death, and have both the trustee and the spouse (if they are not one in the

[55] PLR 2006-44022. See also Steve Leimberg's Employee Benefits and Retirement Planning Newsletters by Natalie Choate (#395) and Barry Picker (#405) on this PLR. This author agrees with Ms. Choate that the IRS clearly got this ruling wrong, but it doesn't cost anything to file a new Beneficiary BDF to be certain, bizarre as it sounds.

same) sign the new BDF. This should get around the IRS' misguided thinking in PLR 2006-44022.

25) _____ **Review QRP/IRA investments for compliance with the Uniform Prudent Investor Act.** It may NOT be sufficient to simply keep the same assets intact – even if it will be distributed in kind nine months later. ESPECIALLY when there is significant employer stock in a Qualified Retirement Plan, such as an ESOP, or other concentrations of assets.

26) _____ **Know how the applicable state's version of the Uniform Principal and Income Act applies to divide retirement plan payments to the trust between principal and income**.[56] Distributions of RMDs may differ radically from distributions of amounts greater than RMDs, and this might factor in greatly if the five year rule is applicable. For example, John died leaving his Roth IRA in a non-qualifying trust. The trustee must withdraw the IRA by December 31 after the 5th anniversary of John's death. If the trustee takes it all out in year 4, this may be 100% "principal" for trust accounting because the distribution was not yet required, yet if the trustee takes it all out the last year, when it is arguably "required", the distribution is probably 90% principal and 10% income (UPIA default).

27) _____ If the trust is an **accumulation trust** that does not mandate the payment of all IRA distributions from the trust annually, **consider trust distributions at least annually before March**. The trustee may have time to make additional distributions to beneficiaries so that ordinary income is not trapped in the trust in higher income tax brackets. The trustee can then elect under IRC § 663(b) to make distributions made within 65 days of the end of the taxable year treated as distributions made in the prior year.

28) _____ **Check to make sure the executor/tax preparer elected QTIP for both the marital trust and the IRA payable thereto (or the trusteed IRA functioning as such).**

29) _____ **Check if surviving spouse could demand the entire IRA outright**, if so, bring up for discussion w. spouse and/or attorney for estate. A spousal rollover may still be allowed even if an estate or trust is beneficiary if the spouse can demand the IRA – this is a complicated issue with literally dozens of PLRs.

30) _____ **Check to see if you can cash out any undesirable beneficiaries (e.g. older individuals, charitable entities) via distribution prior to September 30** (the beneficiary designation date).

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[56] Uniform Principal and Income Act, http://www.law.upenn.edu/bll/archives/ulc/upaia/2000final.htm (2000), §409 and (2008 version) http://www.law.upenn.edu/bll/archives/ulc/upaia/2008_final.htm

31) _____ **Double Check the IRA Agreement and/or Form 5305 when transferring an inherited retirement plan to a newly created inherited IRA** (e.g., not when simply keeping the same agreement/firm). Is the trustee of the trust that is the beneficiary (or the individual) inadvertently signing the new agreement as the "grantor" ("depositor" for custodial accounts)? Should the agreement be modified to clarify that the beneficiary is not establishing the new IRA as grantor/depositor, but as beneficiary? Read through the agreement and makes sure it makes sense when the person signing the new document is a beneficiary rather than an initial grantor/depositor of the IRA.

32) _____ **For the year after the year of death, make sure to take both the RMD for traditional IRAs and the RMD for Roth IRAs SEPARATELY.** After taking any RMD for the decedent for the year of death (if death after the required beginning date), take the required minimum distributions for the year after death. Don't wait until the last week of December. Repeat every year.
Just as you have to take your RMDs from qualified plans separately from RMDs for IRAs during your lifetime, a similar rule will apply post-mortem for Roth and non-Roth variants. If you have $15,000 RMD resulting from an inherited traditional IRA and $10,000 RMD resulting from an inherited Roth IRA (even if from the same decedent), you cannot take all $25,000 from either one and none from the other to satisfy the required distribution, you have to take those minimums from each computed separately.[57] You can take aggregate all of one type (traditional or Roth) inherited from the same decedent, but this doesn't help much, since for administrative and investment convenience you would probably combine those anyway.[58] This is also a good reason for combining, say, an inherited non-Roth 403(b) or 401(k) from a decedent into an inherited non-Roth IRA, so you don't have to fuss with several RMD requirements (recall, those distributions have to be taken separately).
I have seen CLE presentations/outlines that get this flat out wrong.

33) ____ **Counsel beneficiaries (or have them consult their own counsel) about exercising their powers of appointment and integrating with their own financial and estate plan.** A majority of trusts nowadays have limited or general powers of appointment. Most require a *specific* reference in a will, trust or other document (for various reasons, consider whether you want to require a will to effect an appointment, and whether you want to absolve a trustee who relies on an absence of notification of an appointment to distribute funds to default beneficiaries after a certain period of time). As noted elsewhere, this would also be a good time to consider whether, if it is an accumulation trust, the power should be disclaimed/released/limited and/or a copy of any appointive trust be given to the custodian/trustee. It is also a good time to examine whether investments in the

[57] Treas. Reg. §1.408A-6, A15
[58] Treas. Reg. §1.401(a)(9)-8, A-1, or Treas. Reg. 1.403(b)-3, A-4 for 403(b)s

beneficiary's IRA/trust are appropriate and, for accumulation trusts, whether to encourage or avoid distributions trapped inside the trust for optimal income tax/trust income tax/Medicare surtax planning.

34) ____ **Don't make a 643(e)(3) election to trigger gains on transfers to beneficiaries in the same year you might distribute an IRA/QP in kind to beneficiary**. While this is not used very often, you don't want to trigger gains to the trust/estate when there are IRA/QP assets distributed.

35) ____ **Take the RMD for the year after death.** Continue annually.

# Appendix

## Select Code/Regulations regarding Trusts as Designated Beneficiaries

I have included IRC §401(a)(9) itself and the most important sections from Treas Reg § 1.401(a)(9)-4 and §1.401(a)(9)-5 regarding qualifying trusts as designated beneficiaries below. Bold and italic emphasis added. I have also added [brackets] to indicate which part of the regulation discusses conduit trusts and which example discusses accumulation trusts, and to note any comments.

IRC § 401(a)(9)

(9) Required distributions. -

(A) In general. - A trust shall not constitute a qualified trust under this subsection unless the plan provides that the entire interest of each employee -

(i) will be distributed to such employee not later than the required beginning date, or

(ii) **will be distributed, beginning not later than the required beginning date, in accordance with regulations, over the life of such employee or over the lives of such employee and a designated beneficiary (or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary)**.

(B) Required distribution where employee dies before entire interest is distributed. -

(i) Where distributions have begun under subparagraph (A)(ii). - A trust shall not constitute a qualified trust under this section unless the plan provides that if -

(I) the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), and

(II) the employee dies before his entire interest has been distributed to him,

the remaining portion of such interest will be distributed at least as rapidly as under the method of distributions being used under subparagraph (A)(ii) as of the date of his death.

(ii) 5-year rule for other cases. - A trust shall not constitute a qualified trust under this section unless the plan provides that, if an employee dies before the distribution of the employee's interest has begun in accordance with subparagraph (A)(ii), the entire interest of the employee will be distributed within 5 years after the death of such employee.

(iii) Exception to 5-year rule for certain amounts payable over life of beneficiary. - If -

(I) any portion of the employee's interest is **payable to (or for the benefit of) a designated beneficiary**,

(II) such portion will be distributed (in accordance with regulations) over the life of such designated beneficiary (or over a period not extending beyond the life expectancy of such beneficiary), and

(III) such distributions begin not later than 1 year after the date of the employee's death or such later date as the Secretary may by regulations prescribe,

for purposes of clause (ii), the portion referred to in subclause (I) shall be treated as distributed on the date on which such distributions begin.

(iv) **Special rule for surviving spouse** of employee. - If the designated beneficiary referred to in clause (iii)(I) is the surviving spouse of the employee -

(I) **the date on which the distributions are required to begin under clause (iii)(III) shall not be earlier than the date on which the employee would have attained age 70 1/2**, and

(II) **if the surviving spouse dies before the distributions to such spouse begin, this subparagraph shall be applied as if the surviving spouse were the employee**.

(C) Required beginning date. - For purposes of this paragraph -

(i) In general. - **The term "required beginning date" means April 1 of the calendar year following the later of -**

**(I) the calendar year in which the employee attains age 70 1/2, or**

**(II) the calendar year in which the employee retires.**

(ii) Exception. - Subclause (II) of clause (i) shall not apply -

(I) except as provided in section 409(d), in the case of an employee who is a 5-percent owner (as defined in section 416) with respect to the plan year ending in the calendar year in which the employee attains age 70 1/2 , or

(II) for purposes of section 408(a)(6) or (b)(3).

(iii) Actuarial adjustment. - In the case of an employee to whom clause (i)(II) applies who retires in a calendar year after the calendar year in which the employee attains age 70 1/2 , the employee's accrued benefit shall be actuarially increased to take into account the period after age 70 1/2 in which the employee was not receiving any benefits under the plan.

(iv) Exception for governmental and church plans. - Clauses (ii) and (iii) shall not apply in the case of a governmental plan or church plan. For purposes of this clause, the term "church plan" means a plan maintained by a church for church employees, and the term "church" means any church (as defined in section 3121(w)(3)(A)) or qualified church-controlled organization (as defined in section 3121(w)(3)(B)).

(D) Life expectancy. - For purposes of this paragraph, the life expectancy of an employee and the employee's spouse (other than in the case of a life annuity) may be redetermined but not more frequently than annually.

(E) Designated beneficiary. - For purposes of this paragraph, the term "designated beneficiary" means any individual **designated as a beneficiary by the employee**.

(F) Treatment of payments to children. - Under regulations prescribed by the Secretary, for purposes of this paragraph, any amount paid to a child shall be treated as if it had been paid to the surviving spouse if such amount will become payable to the surviving spouse upon such child reaching majority (or other designated event permitted under regulations).

(G) Treatment of incidental death benefit distributions. - For purposes of this title, any distribution required under the incidental death benefit requirements of this subsection shall be treated as a distribution required under this paragraph.

Reg § 1.401(a)(9)-4

Q-5. If a trust is named as a beneficiary of an employee, will the beneficiaries of the trust with respect to the trust's interest in the employee's benefit be treated as having been designated as beneficiaries of the employee under the plan for purposes of determining the distribution period under section 401(a)(9)?

A-5.

(a) If the requirements of paragraph (b) of this A-5 are met with respect to a trust that is named as the beneficiary of an employee under the plan, **the beneficiaries of the trust (and not the trust itself) will be treated as having been designated as beneficiaries** of the employee under the plan for purposes of determining the distribution period under section 401(a)(9).

(b) The requirements of this paragraph (b) are met if, during any period during which required minimum distributions are being determined by treating the beneficiaries of the trust as designated beneficiaries of the employee, the following requirements are met--

(1) The trust is a **valid trust under state law**, or would be but for the fact that there is no corpus.

(2) The trust is **irrevocable or will, by its terms, become irrevocable** upon the death of the employee.

(3) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are **<u>identifiable</u>** within the meaning of A-1 of this section from the trust instrument.

(4) The **documentation** described in A-6 of this section has been provided **to the plan administrator**.

(c) In the case of payments to a trust having more than one beneficiary, see A-7 of § 1.401(a)(9)-5 for the rules for determining the designated beneficiary whose life expectancy will be used to determine the distribution period and A-3 of this section for the rules that apply if a person other than an individual is designated as a beneficiary of an employee's benefit. However, the **separate account rules under A-2 of § 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit**.

(d) If the beneficiary of the trust named as beneficiary of the employee's interest is another trust, the beneficiaries of the other trust will be treated as being designated as beneficiaries of the first trust, and thus, having been designated by the employee under the plan for purposes of determining the distribution period under section 401(a)(9)(A)(ii), provided that the requirements of paragraph (b) of this A-5 are satisfied with respect to such other trust in addition to the trust named as beneficiary.

Q-6. If a trust is named as a beneficiary of an employee, what documentation must be provided to the plan administrator?

A-6.

(a) Required minimum distributions **before death**. If an employee designates a trust as the beneficiary of his or her entire benefit **and the employee's spouse is the sole beneficiary of the trust**, in order to satisfy the documentation requirements of this A-6 so that the spouse can be treated as the sole designated beneficiary of the employee's benefits (if the other requirements of paragraph (b) of A-5 of this section are satisfied), the employee must either--

(1) Provide to the plan administrator a **copy of the trust instrument and agree that if the trust instrument is amended at any time in the future, the employee will, within a reasonable time, provide to the plan administrator a copy of each such amendment**; or

(2) Provide to the plan administrator **a list of all of the beneficiaries of the trust (including contingent and remaindermen beneficiaries with a description of the conditions on their entitlement sufficient to establish that the spouse is the sole beneficiary**) for purposes of section 401(a)(9); certify that, to the best of the employee's knowledge, this list is correct and complete and that the requirements of paragraph (b)(1), (2), and (3) of A-5 of this section are satisfied; agree that, if the trust instrument is amended at any time in the future, the employee will, within a reasonable time, provide to the plan administrator corrected certifications to the extent that the amendment changes any information previously certified; **and agree to provide a copy of the trust instrument to the plan administrator upon demand**.

(b) Required minimum distributions after death. In order to satisfy the documentation requirement of this A-6 for required minimum distributions after the death of the employee (or spouse in a case to which A-5 of § 1.401(a)(9)-3 applies), by **October 31 of the calendar year immediately following the calendar year in which the employee died**, the trustee of the trust must either--

(1) Provide the plan administrator with **a final list of all beneficiaries of the trust (including contingent and remaindermen beneficiaries with a description of the conditions on their**

**entitlement) as of September 30 of the calendar year following the calendar year of the employee's death**; certify that, to the best of the trustee's knowledge, this list is correct and complete and that the requirements of paragraph (b)(1), (2), and (3) of A-5 of this section are satisfied; and agree to provide a copy of the trust instrument to the plan administrator upon demand; **or**

(2) Provide the plan administrator with **a copy of the actual trust document** for the trust that is named as a beneficiary of the employee under the plan as of the employee's date of death.

(c) Relief for discrepancy between trust instrument and employee certifications or earlier trust instruments.

(1) If required minimum distributions are determined based on the information provided to the plan administrator in certifications or trust instruments described in paragraph (a) or (b) of this A-6, a plan will not fail to satisfy section 401(a)(9) merely because the actual terms of the trust instrument are inconsistent with the information in those certifications or trust instruments previously provided to the plan administrator, but **only if the plan administrator reasonably relied on the information provided** and the required minimum distributions for calendar years after the calendar year in which the discrepancy is discovered are determined based on the actual terms of the trust instrument.

(2) For purposes of determining the amount of the **excise tax under section 4974, the required minimum distribution is determined for any year based on the actual terms of the trust in effect during the year**.

Final Regulation § 1.401**(a)(9)-5**

**Q-7. If an employee has more than one designated beneficiary, which designated beneficiary's life expectancy will be used to determine the applicable distribution period?**

A-7.

## (a) General rule.

**(1)** Except as otherwise provided in paragraph (c) of this A-7, if more than one individual is designated as a beneficiary with respect to an employee as of the applicable date for determining the designated beneficiary under A-4 of §1.401(a)(9)-4, the designated beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the applicable distribution period.

**(2)** See A-3 of §1.401(a)(9)-4 for rules that apply if a person other than an individual is designated as a beneficiary and see A-2 and A-3 of §1.401(a)(9)-8 for special rules that apply if an employee's benefit under a plan is divided into separate accounts and the beneficiaries with respect to a separate account differ from the beneficiaries of another separate account.

## (b) Contingent beneficiary.

*Except as provided in paragraph (c)(1)* of this A-7, if a beneficiary's entitlement to an employee's benefit after the employee's death is a contingent right, **such contingent beneficiary is nevertheless considered to be a beneficiary for purposes of determining whether a person other than an individual is designated as a beneficiary (resulting in the employee being treated as having no designated beneficiary under the rules of A-3 of §1.401(a)(9)-4) and which designated beneficiary has the shortest life expectancy under paragraph (a) of this A-7**.

## (c) Successor beneficiary.

**(1) A person will not be considered a beneficiary for purposes of determining who is the beneficiary with the shortest life expectancy under paragraph (a) of this A-7, or whether a person who is not an individual is a beneficiary, merely because the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death.** ***However, the preceding sentence does not apply to a person who has any right (including a contingent right) to an employee's benefit beyond being a mere potential successor to the interest of one of the employee's beneficiaries upon that beneficiary's death.*** Thus, for example, if the first beneficiary has a right to all income with respect to an employee's individual account during that beneficiary's life and a second beneficiary has a right to the principal but only after the death of the first income beneficiary (any portion of the principal distributed during the life of the first income beneficiary to be held in trust until that first beneficiary's death), both beneficiaries must be taken into account in determining the beneficiary with the shortest life expectancy and whether only individuals are beneficiaries.

**(2)** If the individual beneficiary whose life expectancy is being used to calculate the distribution period dies **after** September 30 of the calendar year following the calendar year of the employee's death, such beneficiary's remaining life expectancy will be used to determine the distribution period without regard to the life expectancy of the subsequent beneficiary.

**(3)** This paragraph (c) is illustrated by the following examples:

Example 1. [Accumulation Trust]

**(i)** Employer M maintains a defined contribution plan, Plan X. Employee A, an employee of M, died in 2005 at the age of 55, survived by spouse, B, who was 50 years old. Prior to A's death, M had established an account balance for A in Plan X. A's account balance is invested only in productive assets. A named a testamentary trust (Trust P) established under A's will as the beneficiary of all amounts payable from A's account in Plan X after A's death. A copy of the Trust P and a list of the trust beneficiaries were provided to the plan administrator of Plan X **by October 31 of the calendar year following the calendar year of A's death**. As of the date of A's death, the Trust P was irrevocable and was a valid trust under the laws of the state of A's domicile. A's account balance in Plan X was includible in A's gross estate under §2039.

**(ii)** Under the terms of Trust P, all trust income is payable annually to B, and **no one has the power to appoint Trust P principal to any person other than B**. **A's children, who are all younger than B, are the sole remainder beneficiaries of the Trust P. No other person has a beneficial interest in Trust P.** Under the terms of the Trust P, **B has the power, exercisable annually, to compel the trustee to withdraw from A's account balance in Plan X an amount equal to the income** earned on the assets held in A's account in Plan X during the calendar year and to distribute that amount through Trust P to B. Plan X contains no prohibition on withdrawal from A's account of amounts in excess of the annual required minimum distributions under section 401(a)(9). In accordance with the terms of Plan X, the trustee of Trust P elects, in order to satisfy section 401(a)(9), to receive annual required minimum distributions using the life expectancy rule in section 401(a)(9)(B)(iii) for distributions over a distribution period equal to B's life expectancy. **If B exercises the withdrawal power, the trustee must withdraw from A's account under Plan X the greater of the amount of income earned in the account during the calendar year or the required minimum distribution. However, under the terms of Trust P, and applicable state law, only the portion of the Plan X distribution received by the trustee equal to the income earned by A's account in Plan X is required to be distributed to B (along with any other trust income.)**

**(iii)** Because **some amounts distributed from A's account in Plan X to Trust P may be accumulated in Trust P during B's lifetime for the benefit of A's children**, as remaindermen beneficiaries of Trust P, even though access to those amounts are delayed until after B's death, **A's children are beneficiaries of A's account in Plan X in addition to B and B is not the sole designated beneficiary of A's account.** Thus the designated beneficiary used to determine the distribution period from A's account in Plan X is the beneficiary with the shortest life expectancy. B's life expectancy is the shortest of all the potential beneficiaries of the testamentary trust's interest in A's account in Plan X (including remainder beneficiaries). **Thus, the distribution period for purposes of section 401(a)(9)(B)(iii) is B's life expectancy. Because B is not the sole designated beneficiary of the testamentary trust's interest in A's account in Plan X, the special rule in 401(a)(9)(B)(iv) is not available and the annual required minimum distributions from the account to Trust M must begin no later than the end of the calendar year immediately following the calendar year of A's death**. [this last bolded sentence emphasizes the difference between a spousal conduit trust and the spousal accumulation trust].

Example 2. [Conduit Trust]

(i) The facts are the same as Example 1 except that the testamentary trust instrument provides that all amounts distributed from A's account in Plan X to the trustee while B is alive will be paid directly to B upon receipt by the trustee of Trust P.

(ii) In this case, B is the sole designated beneficiary of A's account in Plan X for purposes of determining the designated beneficiary under section 401(a)(9)(B)(iii) and (iv). **No amounts distributed from A's account in Plan X to Trust P are accumulated in Trust P during B's lifetime for the benefit of any other beneficiary.** Therefore, the residuary beneficiaries of Trust P are **mere potential successors** to B's interest in Plan X. Because B is the sole beneficiary of the testamentary trust's interest in A's account in Plan X, the annual required minimum distributions from A's account to Trust P must begin no later than the end of the calendar year in which A would have attained age 70½ , rather than the calendar year immediately following the calendar year of A's death.

Exhibit B

Single Life Table[59]

| Age | Factor | Age | Factor | Age | Factor | Age | Factor |
|---|---|---|---|---|---|---|---|
| 0 | 82.4 | 28 | 55.3 | 56 | 28.7 | 84 | 8.1 |
| 1 | 81.6 | 29 | 54.3 | 57 | 27.9 | 85 | 7.6 |
| 2 | 80.6 | 30 | 53.3 | 58 | 27.0 | 86 | 7.1 |
| 3 | 79.7 | 31 | 52.4 | 59 | 26.1 | 87 | 6.7 |
| 4 | 78.7 | 32 | 51.4 | 60 | 25.2 | 88 | 6.3 |
| 5 | 77.7 | 33 | 50.4 | 61 | 24.4 | 89 | 5.9 |
| 6 | 76.7 | 34 | 49.4 | 62 | 23.5 | 90 | 5.5 |
| 7 | 75.8 | 35 | 48.5 | 63 | 22.7 | 91 | 5.2 |
| 8 | 74.8 | 36 | 47.5 | 64 | 21.8 | 92 | 4.9 |
| 9 | 73.8 | 37 | 46.5 | 65 | 21.0 | 93 | 4.6 |
| 10 | 72.8 | 38 | 45.6 | 66 | 20.2 | 94 | 4.3 |
| 11 | 71.8 | 39 | 44.6 | 67 | 19.4 | 95 | 4.1 |
| 12 | 70.8 | 40 | 43.6 | 68 | 18.6 | 96 | 3.8 |
| 13 | 69.9 | 41 | 42.7 | 69 | 17.8 | 97 | 3.6 |
| 14 | 68.9 | 42 | 41.7 | 70 | 17.0 | 98 | 3.4 |
| 15 | 67.9 | 43 | 40.7 | 71 | 16.3 | 99 | 3.1 |
| 16 | 66.9 | 44 | 39.8 | 72 | 15.5 | 100 | 2.9 |
| 17 | 66.0 | 45 | 38.8 | 73 | 14.8 | 101 | 2.7 |
| 18 | 65.0 | 46 | 37.9 | 74 | 14.1 | 102 | 2.5 |
| 19 | 64.0 | 47 | 37.0 | 75 | 13.4 | 103 | 2.3 |
| 20 | 63.0 | 48 | 36.0 | 76 | 12.7 | 104 | 2.1 |
| 21 | 62.1 | 49 | 35.1 | 77 | 12.1 | 105 | 1.9 |
| 22 | 61.1 | 50 | 34.2 | 78 | 11.4 | 106 | 1.7 |
| 23 | 60.1 | 51 | 33.3 | 79 | 10.8 | 107 | 1.5 |
| 24 | 59.1 | 52 | 32.3 | 80 | 10.2 | 108 | 1.4 |
| 25 | 58.2 | 53 | 31.4 | 81 | 9.7 | 109 | 1.2 |
| 26 | 57.2 | 54 | 30.5 | 82 | 9.1 | 110 | 1.1 |
| 27 | 56.2 | 55 | 29.6 | 83 | 8.6 | 111+ | 1.0 |

[59] From Treas. Reg. §1.401(a)(9)-9, A-1.


# Edwin P. Morrow III

**Senior Wealth Specialist**
**Key Private Bank**
**Wealth Advisory Services**
**937-285-5343**
edwin_p_morrow@keybank.com
edwin.morrow3@gmail.com


As one of Key's national estate planning wealth specialists, Ed works with local Key Private Bank teams nationwide, advising high net worth clients on how to preserve and transfer their wealth. He is also national manager of wealth strategies communications for the private bank. Through a better and more thorough review of a client's estate, trust and tax planning, teams are able to provide more objective, comprehensive and valuable advice. Ed has been with Key since 2005. He was previously in private law practice in Cincinnati and Springboro, Ohio concentrating in taxation, probate, estate and business planning. Other experience includes drafting court opinions for the U.S. District Court of Portland, Oregon as a law clerk. Ed is recent outgoing Chair of the Dayton Bar Association's Estate Planning, Trust and Probate Committee. He is married and resides in Springboro, Ohio with his wife and two daughters.

**Education:**

- Bachelor of Arts (B.A.), History, Stetson University
- Juris Doctorate (J.D.), Northwestern School of Law at Lewis & Clark College
- Masters of Law (LL.M.) in Tax Law, Capital University Law School
- Masters of Business Administration (MBA), Xavier University

**Professional Accreditations:**

- Licensed to practice in all Ohio courts, U.S. District Court of Southern Ohio and U.S. Tax Court
- Certified Specialist through Ohio State Bar Assn in Estate Planning, Trust and Probate Law
- Certified Financial Planner (CFP®), Registered Financial Consultant (RFC®)
- Non-Public Arbitrator for the Financial Industry Regulatory Authority (FINRA)

**Recent Speaking Engagements and Published Articles:**

- Author, *Ferri v. Powell-Ferri: Asset Protection Pitfalls and Opportunities with Decanting,* LISI Asset Protection Newsletter, March 2014
- Author, Leimberg Information Services, March 2013, *The Optimal Basis Increase Trust, updates available at http://ssrn.com/abstract=2436964*
- Author, Trusts and Estates, Dec. 2012, *Optimizing Trusts to Avoid the New Medicare Surtax*
- Speaker, 2010 Ohio Wealth Counsel Quarterly CLE and NBI CLE: *Advanced Asset Protection Planning*
- Speaker, 2009 Annual Meeting of Cincinnati Financial Planning Association, *Roth IRA Conversion Analysis: What Advisors are Missing and Software Won't Tell You*
- Speaker, 2009 Dayton Bar Association CLE, *Protecting Trust Assets from Tax Liens*
- Co-Author with Phil Kavesh, *Ensuring the Stretch*, July/August 2007 issue of Journal of Retirement Planning