When Good IRA Beneficiary Designations Go Bad:

What You Can (and Cannot) Do To Fix Them

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A. This Presentation in 200 Words, More or Less.

There are three reliable ways to fix an IRA beneficiary designation on a post-mortem basis:

- *Distribute* the interest of the disadvantageous beneficiary before the "designation date" of September 30 of the year after the year in which the IRA owner dies.

- *Divide* the IRA into separate accounts not later than the "division date" of December 31 of the year after the year in which the IRA owner dies.

- *Disclaim* the IRA interest pursuant to a qualified disclaimer under Code Section 2518.

The beneficiary designation is not the only thing that can throw a wrench into the works. Sorrow can result if the IRA is community property, if the surviving spouse takes an elective share, if the designated beneficiary dies soon after the owner, or if the IRA contains annuities.

As of 2010, Congress has succeeded in fixing the historic disconnect between post-mortem distributions to IRA beneficiaries (where life expectancy is generally available) and those to qualified plan beneficiaries (where life expectancy had commonly not been available).

B. Distribution.

(1) The Problem.

(a) If there are multiple IRA beneficiaries, and if *any* of the beneficiaries is not an individual, the IRA owner "will be treated as having no designated beneficiary for purposes of Section 401(a)(9), even if there are also individuals designated as beneficiaries." Treas. Regs. §1.401(a)(9)-4, A-3.

(b) If a trust is described in Treas. Regs. §1.401(a)(9)-4, often referred to as a "see through" trust, the individual beneficiaries of the trust will be treated as having been designated directly as the beneficiaries of the IRA. Otherwise, the trust will be considered a non-individual beneficiary.

(c) If, as of the designation date, there are *any* non-individual beneficiaries, the IRA will have to be paid out under the "five year rule" if the owner died before his RBD, or over the owner's remaining life expectancy if he or she died after the RBD. An individual designated beneficiary will be denied the ability to stretch distributions over his or her life expectancy because of the presence of a non-individual co-beneficiary.

(d) The IRS has hinted from time to time that the possibility or certainty that a portion of the IRA will be used to pay estate taxes and expenses of administration makes the estate – a non-individual beneficiary – an IRA beneficiary.

(2) The Solution.

(a) "Be as-tute, dis-tribute, but don't be late, do it by the date."

(b) According to Natalie Choate, the IRS has never disqualified a trust as a see though trust solely because the IRA could be used to pay taxes or expenses of administration.

(i) It must be said that in all of the PLRs she cites, the advisor requesting the ruling affirmatively represented to the IRS that the IRA would not, in fact, be used to pay taxes or expenses of administration.

(ii) If the IRA will in fact be used to pay taxes, it will be necessary to withdraw the amount of taxes to be paid from the IRA prior to the designation date in order to enable the individual designated beneficiary to take distribution from the balance of the IRA over his or her life expectancy.

(iii) PLRs 200432027, 200432038 and 200432029 are examples of the IRS' liberal ruling stance in this area. The ruling request in each case was for a determination that the trust at issue qualified as a see through trust. The taxpayer represented that the trustee had already withdrawn amounts sufficient to pay anticipated

costs of administration and taxes properly charged to the trust assets. However, the taxpayer acknowledged the possibility that, if additional estate taxes were found to be due, those taxes, interest and penalties could be charged against the IRA beneficiary trust if no other assets were available to pay the tax. At the time of the ruling, the estate had filed the estate tax return and paid the estate tax, but had received neither a closing letter nor correspondence from the IRS indicating an intent to audit. The IRS ruled that the trust qualified as a see through trust, and that the mere possibility that the trust could be called upon to pay additional taxes did not mean that the trust had a non-individual beneficiary.

(iv) What if the decedent's estate and see through revocable trust make the Section 645 election, so that the trust is treated as if it were a portion of the probate estate? Does that mean that the estate, a non-natural person, is now the beneficiary? No: "…the IRS and Treasury intend that a revocable trust will not fail to be a trust for purposes of Section 401(a)(9) merely because the trust elects to be treated as an estate under section 645, as long as the trust continues to be a trust under state law." TD 8987, 20012-1 C.B. 852, 857.

C. <u>Division: the "Separate Account" Rules</u>.

(1) <u>The Problem</u>. If there are multiple beneficiaries, all of whom are individuals, the life expectancy of the eldest beneficiary must be used to calculate post-mortem MRDs. Treas. Regs. §1.401(a)(9)-5, A-7.

(2) <u>The Solution</u>.

(a) As the Treasury Regulations put it, if the IRA:

> is divided into separate accounts and the beneficiaries with respect to one separate account differ from the beneficiaries with respect to the other separate accounts of the employee under the plan, for years subsequent to the calendar year containing the date as of which the separate accounts were established, or date of death if later, such separate account under the plan is not aggregated with the other separate accounts under the plan in order to determine whether the distributions from such separate account under the plan satisfy §401(a)(9). Instead, the rules in §401(a)(9) separately apply to such separate account. . . ."

Treas. Regs. §1.401(a)(9)-8, A-2(a).

(3) <u>How to Implement the Solution</u>.

(a) For each of the beneficiaries to use his or her own life expectancy, all of the beneficiaries' interests in the IRA must be fractional or percentage interests. This flows from the definition of "separate accounts" in Treas. Regs. §1.401(a)(9)-8, A-3:

> [S]eparate accounts in an employee's account are separate portions of an employee's benefit reflecting the separate interests of the employee's beneficiaries under the plan as of the date of the employee's death for which separating accounting is maintained. *The separate accounting must allocate all post-death investment gains and losses, contributions, and forfeitures, for the period prior to the establishment of the separate accounts on a pro-rata basis on a reasonable and consistent manner among the separate accounts.*

(emphasis added)

(b) From Treas. Regs. §1.401(a)(9)-8, A-3 it follows that a beneficiary who is to receive a pecuniary amount from an IRA does not have a separate account. This is because, unless state law or *the IRA beneficiary designation itself* provides, the recipient of the pecuniary amount will not share in post-death investment gains and losses, and contributions and forfeitures with respect to the IRA. Thus, unless a pecuniary amount IRA beneficiary is cleared out via distribution prior to the distribution date, separate account treatment will not be available. Under Florida law, a recipient of a pecuniary amount within an IRA does not share in post-death investment gains and losses. *See* F.S. 738.201(2).

Even if Florida law provided that the share of the pecuniary beneficiary shared in IRA income and charges on a pro rata basis (which does not appear to be the case), many IRA arrangements will be governed by the laws of states other than Florida. It is probably preferable just to distribute the share of the pecuniary beneficiary on a timely basis than to do research on a principal and income statute in Florida or anywhere else.

(c) Separate accounts must be established.

(i) Physically separating the beneficiaries' shares into separate inherited IRAs, *each in the name of the deceased IRA owner*, will clearly create separate accounts.

(ii) If the physical separation is done not later than December 31 of the year after the year in which the IRA owner dies, each beneficiary may from the inception of the inherited IRA take post-mortem MRDs from his or her inherited IRA over his or her own life expectancy.

(iii) The creation of the separate accounts can be done at any time after the decedent's death. Treas. Regs. §1.401(a)(9)-8, A-2(a). However, if it is done *after* December 31 of the year after the IRA owner's death, the age of the eldest beneficiary will have to be used for that year and for the year in which the division is accomplished. Separate life expectancies can be used beginning in the year after the division occurs.

(iv) Separate accounts can exist short of physically segregating the IRA if the beneficiaries and the custodian enter into a written agreement containing the necessary under Treas. Regs. §1.401(a)(9)-8, A-2. Not recommended.

D. Disclaimers.

(1) The Basics. A disclaimer is "qualified" under Code Section 2518, and will not be treated as a taxable gift, if it:

(a) is irrevocable;

(b) is an unqualified refusal to accept;

(c) identifies the property being disclaimed;

(d) is in writing;

(e) is signed by the disclaimant;

(f) is received by the transferor or his legal representative;

(g) is timely made (i.e., no later than nine months after the transfer that creates the interest in the person disclaiming, or nine months after the day on which the disclaiming party reaches age 21);

(h) is made prior to the disclaimant's acceptance of the disclaimed interest or any of its benefits; and

(i) is such that the disclaimed interest passes without any direction on the part of the disclaimant.

(2) The Problem Areas.

(a) Acceptance of Benefits.

(1) General Rule: "A qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer." Treas. Regs. §25.2518-

2(d)(1). "Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in the property." Id.

(2) Florida disclaimer law is the same as federal law: the disclaimer is invalid under Florida law if the disclaimant "accepts the interest sought to be disclaimed." F.S. 739.402(2).

(3) Acts that constitute acceptance of benefits (from Treas. Regs. §25-2518-2(d)(1)):

(i) Using the property interest sought to be disclaimed.

(ii) Accepting dividends, interest or rents from the property sought to be disclaimed. Once acceptance has occurred, it cannot be cured by repayment or return of the property sought to be disclaimed. However, see discussion in D(2)(b) below concerning severable interests.

(iii) Directing others with respect to the property.

(iv) The exercise by the donee of a power of appointment is an acceptance of the benefits of the power and precludes a subsequent disclaimer.

(v) Receipt of consideration in exchange for making the disclaimer is an acceptance of the benefits of the interest sought to be disclaimed. The IRS recognizes that the possibility that a disclaimant may benefit in the future as a result of the disclaimer is not receipt of consideration. *See* PLRs 9427030 and 9509003 (disclaimant did not receive consideration for disclaiming even though the likely effect of disclaimer was to increase size of estate that may ultimately pass to disclaimant).

(4) Acts that do not constitute acceptance of benefits (from Treas. Regs. §25-2518-2(d)(1) and (2)):

(i) Taking delivery of an instrument of title, without more, does not constitute acceptance of the property. So, for example, if a joint account is re-titled in the name of the surviving tenant, he or she can disclaim the decedent's interest in the account as long as the disclaimant has not directed others with respect to it (i.e., a sale of the assets).

(ii) In the case of residential property owned jointly, a surviving co-owner will not be precluded from disclaiming a deceased owner's interest simply because he or she continued to reside on the property prior to the disclaimer. Would the result be the same if the residence were solely owned by the decedent and his or her child continued to reside there after the decedent's death? Probably not.

(iii) If the disclaimant is also a fiduciary, actions taken by the disclaimant in a fiduciary capacity do not preclude a disclaimer in a beneficiary capacity.

(b) Separate and Severable Interests.

(1) General Rule: "[T]he disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest." Treas. Regs. §25.2518-3(a)(1)(i).

(2) Easy examples of separate interests:

(i) An interest in trust principal is different from an interest in trust income.

(ii) A current interest in a trust is a separate interest from a remainder interest in the same trust.

(iii) The right to remove and replace a trustee is a separate interest from an income or principal interest.

(iv) A power of appointment over trust assets is a separate interest from the right to receive principal or income.

(3) In general, a disclaimant is treated as making a qualified disclaimer of a separate interest in property if the disclaimer relates to severable property and the disclaimant makes a disclaimer that would be a qualified disclaimer if the severable interest were the only property in which the disclaimant had an interest. Treas. Regs. §25.2518-3(a)(1)(ii). Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. Id.

(4) The "severable property" rule is the theoretical underpinning for:

(i) A disclaimer of, say, 35 of the 50 shares of stock that form a bequest.

(ii) A disclaimer of an undivided interest in property.

(iii) A fractional interest in the residue of an estate.

(iv) A disclaimer of a pecuniary amount. To be a valid disclaimer of a pecuniary amount, the income attributable to the disclaimed amount must be segregated and pass with the disclaimed amount. Treas. Regs. §25.2518-3(c). The

Regulations permit the disclaimant to receive a portion of the inheritance to which he is entitled and, later, to disclaim the balance of the gift (but the income on the partial distribution cannot be disclaimed). Id.

(v) Formula disclaimers. *See* Treas. Regs. §25.2518-3(d), Ex. 20.

(5) The "severable property" rule is also the basis for the IRS' conclusions in Rev. Rul. 2005-36, 2005-26 IRB 1368.

(i) In the Revenue Ruling, the IRS ruled that the surviving spouse who took the decedent's year-of-death MRD (a pecuniary amount) could disclaim the balance of the IRA (or just a portion of the balance of the IRA if he chose) since the MRD was a separate interest severable from the IRA as a whole.

(ii) Consistent with Treas. Regs. 25.2518-3(c), the disclaiming spouse could not disclaim the income attributable to the MRD, but could disclaim the balance of the income (or the income attributable to the portion of the IRA disclaimed, if not the entire balance). There is no logical reason why a spouse who chose to withdraw more than the MRD could not then disclaim all or the rest of the IRA; however, the Revenue Ruling's safe harbor is limited to the MRD amount.

(iii) **WARNING!** If the surviving spouse directs the IRA custodian to re-title the IRA in her name, or rolls over the IRA (except for the MRD, which can't be rolled over), or starts making investment decisions with respect to the IRA, she can no longer disclaim since she will have accepted the benefits of the IRA.

(iv) Many custodians will automatically change the title on the account to "Deceased IRA Owner f/b/o Beneficiary" when they receive the beneficiary's social security number. This, by itself, should not preclude a disclaimer or all or a portion of the IRA. Treas. Regs. §25-2518-2(d) provides that a mere change to the title of an asset is not an acceptance of benefits that precludes a disclaimer.

(v) Rev. Rul. 2005-36 highlights the importance of naming a contingent beneficiary for all IRA accounts. The Revenue Ruling, and disclaimers of IRA benefits in general, may be of limited utility if the owner did not name a contingent beneficiary and, under the IRA documents, the owner's estate becomes the beneficiary when the disclaimant is deemed to have predeceased the IRA owner.

(vi) **ALWAYS KNOW AHEAD OF TIME WHERE THE DISCLAIMED IRA WILL GO AS A RESULT OF THE DISCLAIMER.** Remember, the disclaimer will fail under Code Section 2518 if the disclaimed asset passes via direction on the part of the disclaimant. And, the IRS will only recognize disclaimers that qualify under Code Section 2518 in determining who is the beneficiary for MRD purposes. Treas. Regs. §1.401(a)(9)- 4, A-4.

(3) <u>How to Disclaim IRAs into the Credit Shelter Trust: PLR 200522012</u>.

(a) Here's What the Beneficiary Designation Said:

(1) Primary beneficiary: surviving spouse.

(2) Secondary beneficiary if surviving spouse disclaims: Marital Trust under will.

(3) Secondary beneficiary if surviving spouse disclaims under (1) and (2): Family Trust under will.

(4) Tertiary beneficiary if surviving spouse predeceased: IRA owner's daughters.

(b) Here's What the Marital Trust and the Family Trust Said:

(1) Marital Trust:

(i) Surviving spouse to receive all income from the Marital Trust. "Income" specifically includes the income from the IRA, which is required to be distributed to the surviving spouse at least annually (this, under Rev. Rul. 89-89, 1989-2 C.B. 231 and Rev. Rul. 2000-2, 2000-2 C.B. 208, is required to qualify the Marital Trust for the estate tax marital deduction if IRA benefits are to be paid to the trust).

(ii) The trustee of the Marital Trust was directed to withdraw the MRD amount payable to the trust.

(iii) The surviving spouse had what the IRS describes as "certain non-cumulative rights to withdraw all or a portion of the property of the Marital Trust."

(iv) Principal can be distributed to the surviving spouse for her reasonable health, support and maintenance.

(v) The surviving spouse had a testamentary non-general power to appoint the assets in the Marital Trust among the decedent's descendants.

(vi) In default of exercise of the power, upon the decedent's death the assets in the Marital Trust will pass to the decedent's descendants, per stirpes.

(2) Family Trust:

(i) The Family Trust was modified by court order prior to submitting the ruling request. The ruling does not say how or exactly when.

(ii) As modified, the trustee of the Family Trust had the discretion to pay income to the surviving spouse as needed for her health, support and maintenance, and the further discretion to pay any income not so needed for the health, support, maintenance and education of any one or more of the decedent's descendants.

(iii) The trustee could make distributions of trust principal to any one or more of the surviving spouse and the decedent's issue as needed for their health, support, maintenance and education.

(iv) The surviving spouse had a testamentary non-general power to appoint the assets in the Family Trust among the decedent's descendants.

(v) In default of exercise of the power, upon the decedent's death the assets in the Family Trust will pass to the decedent's descendants, per stirpes.

(c) Here's What the Disclaimer Said:

(1) The surviving spouse, as the primary beneficiary, disclaimed a fraction of the IRA, defined by a formula, plus any post death income earned on that amount.

(2) The surviving spouse disclaimed all of her interest as a beneficiary of the Marital Trust.

(3) The surviving spouse disclaimed her testamentary power to appoint that part of the Family Trust attributable to the IRA passing to the Family Trust as a result of the upstream disclaimers.

(4) The portion described in (3) above will be determined in accordance with Treas. Regs. §25.2518-2(e)(5), Example 5.

(d) Anatomy of the Disclaimer, and What the IRS Ruled:

(1) Formula disclaimers are permitted under the Treasury Regulations. *See* Treas. Regs. §25.2518-3(d), Example 20. Disclaimers of undivided portions of a single asset are likewise permitted under the severable interest rules discussed at D(2)(b) above. The income attributable to the amount disclaimed via the formula must also be disclaimed; otherwise, the disclaimant will have accepted the benefits of the disclaimed amount, and the disclaimer will fail.

(2) The portion of the IRA disclaimed by the surviving spouse will pass to the Marital Trust, from whence it will be added to the Family Trust as a result of the surviving spouse's second disclaimer of the Marital Trust.

(3) According to the Treasury Regulations, "[a] disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant." Treas. Regs. §25.2518-2(e)(1). There is one major exception: A surviving spouse – *and only a surviving spouse* – may disclaim even if the disclaimed interest passes to the surviving spouse, *but only if the surviving spouse's ability to direct the enjoyment of the disclaimed interest is limited by an ascertainable standard*. Treas. Regs. §25.2518-2(e)(2).

Here, the decedent's daughters, and not the surviving spouse, were the trustees of the Family Trust, so the surviving spouse has *no* ability to direct the enjoyment of the disclaimed interest. However, if the surviving spouse had been named as the trustee, the disclaimer in this case still would have worked since the power of the trustee of the Family Trust as to the timing and amounts of distributions of income and principal were limited by an ascertainable standard.

What if the surviving spouse was the trustee and had the power to distribute assets to herself under an ascertainable standard *and* the power to pay income and principal to the decedent's descendants under a "best interests" standard. In that case, to save the disclaimer it would be necessary for the surviving spouse either to (a) resign as trustee (in which case she would have no power to direct the enjoyment of the disclaimed interest); or (b) disclaim her power to make discretionary distributions to the children. A disclaimer by trustees of fiduciary powers is permissible under F.S. 739.104(2). Court approval for the trustee's disclaimer will be required if the power to disclaim is not granted in the trust instrument.

(4) The surviving spouse's disclaimer of the testamentary power of appointment over the portion of the Family Trust attributable to the IRA was critical to the success of the coordinated disclaimers. Unless the power of appointment was disclaimed (or, if not disclaimed, unless the testamentary power of appointment was limited to an ascertainable standard), the surviving spouse would have retained the right to direct the disposition of the disclaimed IRA proceeds, which would have scotched the disclaimer.

Note that the disclaimer of the testamentary power of appointment over the Family Trust was limited to that portion of the Family Trust attributable to the IRA, and that it was not necessary to disclaim the entire testamentary power of appointment. This is significant for three reasons:

(i) The IRS apparently believes that a testamentary power of appointment is "severable property" for purposes of the disclaimer regulations, so that part of the power can be disclaimed and part retained.

(ii) After the disclaimer, the trustees have to be able to determine which part of the Family Trust is attributable to the disclaimed assets. Treas.

Regs. §25.2518-2(e)(5), Example 5 adopts a proportionate approach: if the disclaimed property, *as of the date of the disclaimer*, is 25% of the value of the entire trust assets, the disclaimer of the testamentary power of appointment will relate to 25% of the trust assets as of the surviving spouse's death.

(iii) If the surviving spouse exercises the power of appointment over, say, 75% of the Family Trust, issues relative to the funding of the exercise are bound to arise. For example, can the fiduciary fund the exercise of the power on a non-pro rata basis? Can the surviving spouse pick and choose which assets are to be a part of the 75% exercise? These types of issues can be avoided if a stand-alone IRA beneficiary trust is used.

(5) The Family Trust qualified as a see through trust and the life expectancy of the surviving spouse, as the eldest trust beneficiary, could be used to determine post-mortem MRDs from the IRA. In this regard, it was helpful that the Family Trust terminated at the surviving spouse's death with outright payments to the decedent's issue.

(4) <u>See Section F(3)(g) below for another possible use of disclaimers</u>.

E. <u>Reformation of IRA Beneficiary Designation: A Dead End</u>.

(1) <u>The Problem Stated</u>. The IRA owner dies, and it is discovered that the decedent's IRA will pass to the "wrong" beneficiary due to an error on the part of the IRA custodian. The failure to make the IRA payable to the "right" beneficiary deprives the intended beneficiary the opportunity to stretch the IRA over his or her life expectancy.

Is there is a way to correct the error, and install the "right" beneficiary after the deceased IRA owner's death, so the intended beneficiary can use his or her life expectancy to stretch out payments from the IRA? In 2006, the answer to this question was a qualified "yes." Now, as far as the IRS is concerned, the answer is an unqualified "no."

(2) <u>In General</u>.

(a) If you rely solely on the Treasury Regulations, the answer is a resounding "no." Treas. Regs. §1.401(a)(9)-4, A-4(a) makes it clear a new beneficiary cannot be added after the IRA owner's death: "In order to be a designated beneficiary, an individual must be a beneficiary as of the date of death."

(b) There is nothing in the Code or the Treasury Regulations that mentions the possibility of a post-death reformation of an IRA to change beneficiaries.

(3) <u>A Crack in the Wall Appears: PLRs 200616039, 200616040, 200616041</u>

(a) The three PLRs are based on the same set of facts:

(i) For his IRA at Custodian *A*, Decedent named his spouse as the sole primary beneficiary and his two daughters as equal secondary beneficiaries.

(ii) Decedent moved his IRA to a new Custodian *B*. Decedent's spouse was named as the sole primary beneficiary but no secondary beneficiary was named.

(iii) Decedent dies (as decedents will do), and shortly thereafter his spouse died, too. Because the surviving spouse did not name a beneficiary, the surviving spouse's estate was entitled to the balance of the IRA. *See* discussion at Section G below.

(iv) One of the Decedent's daughters, as personal representative of the Decedent's spouse's estate, with court approval, disclaimed all of the interest of the surviving spouse and the surviving spouse's estate in the IRA.

(v) *Prior to the disclaimers,* a state court had reformed the IRA beneficiary designation for the IRA at Custodian *B* to name Decedent's daughters as equal secondary beneficiaries. The reformation was done on a *nunc pro tunc* ("now for then") basis, pursuant to which the reformation related back to when the IRA account was opened at Custodian *B*. The daughters therefore were, in effect, named as secondary beneficiaries as of the opening of the new IRA account, well before Decedent's death.

(vi) The state court noted that Decedent directed that the daughters be named as secondary co-beneficiaries on the Custodian *B* IRA, just as they had been on the Custodian *A* IRA, but that his instructions were not followed.

(b) If the IRS refused to honor the reformation, pursuant to the disclaimers Decedent's IRA would have been payable to the default beneficiary under the IRA agreement, presumably the surviving spouse's estate (although the disclaimer purported to renounce any interest in the IRA). Even if the IRA had been payable through the estate to Decedent's daughters, they could not have used their life expectancies for post-mortem MRD purposes. Instead, they would have to use the surviving spouse's life expectancy, assuming she had reached her RBD, or the "5 year rule" if the surviving spouse had not reached her RBD.

(c) However, the IRS did honor the reformation for purposes of determining post-mortem MRDs. Although the Service never said anything about the state court reformation of the beneficiary designation, the IRS ruled that the life expectancy of the eldest of Decedent's daughters could be used for purposes of determining MRDs out of the two inherited IRAs created as a result of the disclaimers. (This is what the ruling request asked for. There is no reason why each daughter should not have been able to use her own life expectancy as to her own inherited IRA.)

(d) These are the first (and, s it has turned out, only) PLRs of their kind and, of course, not applicable to anyone except the persons asking for the rulings.

(e) The IRS' apparent willingness, in at least this case, to consider post-mortem changes to the IRA beneficiary designation could have broader application, at least conceptually.

(i) Suppose Decedent has named X as his primary beneficiary of IRA One. Before his death, in failing health and of sound but impressionable mind, Caregiver takes Decedent to Custodian, and Decedent sets up a new IRA Two, naming Caregiver as the primary beneficiary. After Decedent's death, X proves that Caregiver unduly influenced Decedent to change the IRA beneficiary designation, and the court installs X as the rightful beneficiary as of the date that IRA Two was created.

Would the IRS rule that X's life expectancy could be used if he is made the rightful beneficiary, effective prior to Decedent's death? Or, would the IRS rule that Caregiver's life expectancy had to be used since (presumably) Caregiver would still be the beneficiary of record as of the September 30 determination date? What if there have been secondary beneficiaries all along? Would their life expectancies be used?

(ii) The same analysis, and questions, would seem to apply if Decedent revoked the designation of Y as sole beneficiary of the IRA, and named Z as the new sole beneficiary, when Decedent lacked the capacity to do so. This assumes that the consequence of the ineffective change of beneficiary designation is to put Y back in as the beneficiary.

(4) <u>The IRS Plasters Over the Crack: PLR 200742026</u>

In PLR 200742026, the IRS receded from the results of the 2006 private letter rulings, proving once again the wisdom of the familiar refrain: "Private letter rulings should not be relied upon by anyone other than the taxpayer requesting them."

In the PLR, Husband named Wife as the primary beneficiary of his IRA, and his Daughter as the secondary beneficiary. Husband changed IRA custodians, and executed a new beneficiary designation form. Husband again named Wife as his sole primary beneficiary, but neglected, on the new beneficiary designation form, to name a secondary beneficiary.

Wife died, survived by Husband. After Wife's death, the IRA custodian mailed another beneficiary designation form to Husband so that he could name Daughter as the beneficiary of the IRA. However, Husband did not sign the form, thus, as a result of his death, Husband's estate became the beneficiary of the IRA.

Daughter was the sole personal representative and sole beneficiary of Husband's estate. In order to conform to Husband's presumed intent, Daughter went to the appropriate state court, which issued an order amending Husband's IRA beneficiary designation form to provide that Daughter was to be treated as a beneficiary as if Husband had named her prior to his death. Daughter requested the IRS to rule that she would be treated as a "designated beneficiary" of the IRA, so that post-mortem minimum required distributions could be calculated based upon her remaining life expectancy, and not upon Husband's remaining actuary life expectancy.

Notwithstanding its prior rulings, the IRS ruled, in this PLR, that the Daughter could *not* be treated as a designated beneficiary. In the PLR, the IRS seems to finally have remembered the *Bosch* case, reasoning that the IRS was not bound by a state trial court's determination of the federal tax implications of a state law property interest.

(5) <u>Elvis Has Left the Building: PLR 201021038</u>

The IRS shot down another attempted post-mortem reformation in no uncertain terms in PLR 201021038. There, the decedent's IRA was paid at her death to a trust the stated intent of which was to allow the trust beneficiary to use her life expectancy to determine post-mortem MRDs. For various reasons, the drafter botched the attempt, and after the decedent's death it became clear that the terms of the trust would preclude the desired post-mortem "stretch" distributions from the IRA. The daughter filed an action for declaratory judgment in state court, and the court reformed the trust retroactive to the date of the decedent's death to achieve the desired IRA result.

The IRS wasn't buying it, stating in no uncertain terms that the Service is not bound to give effect to a local court order that modifies the dispositive provisions of a governing instrument after beneficiaries have acquired rights to tax revenues under its terms. The IRS reasoned:

> Were the law otherwise there would exist considerable opportunity for "collusive state court actions having the sole purpose for reducing federal tax liabilities. Furthermore, federal tax liabilities would remain unsettled for years after their assessment if state courts and private persons were empowered to retroactively affect the tax consequences of completed transactions and completed tax years. [citations omitted].
>
> Generally, the Service will treat a state court order as controlling with respect to a reformation if the reformation is specifically authorized by the Internal Revenue Code, such as under section 2055(e)(3), which allows the parties to reform a split interest charitable trust in order that the charitable interest will qualify for the charitable deduction under that statute. There is

no applicable federal state which authorizes…retroactive reformation of …Trust. Accordingly, absent specific authority in the Code or Regulations, the modification of [Trust] will not be recognized for federal tax purposes.

F. <u>How to Save a Spousal Rollover if an Estate or Trust is Named as the IRA Beneficiary</u>.

(1) <u>The Problem Stated in Three Alternatives</u>.

(a) The IRA owner named his estate as the beneficiary of the IRA on the advice of his personal counsel (i.e., his bowling buddy). The owner's spouse is the sole PR and beneficiary of the estate.

(b) The decedent's IRA is made payable to a Marital Trust at her death. The surviving spouse is the sole trustee and sole beneficiary of the Marital Trust, and has a right to withdraw the trust assets.

(c) Same as (b), except that the Marital Trust does not give the surviving spouse the right to withdraw the trust assets, or the spouse is not the sole trustee.

(2) <u>What's at Stake</u>? In a word, deferral.

(a) If the estate is the IRA beneficiary, post-mortem distributions will be paid either under the five-year rule or over the decedent's remaining life expectancy, depending upon when the decedent died. The surviving spouse's life expectancy cannot be used.

(b) If the trust is the IRA beneficiary, assuming that the trust is a see through trust, the surviving spouse's life expectancy, determined under the *Single Life Table*, will be used to determine post-mortem MRDs. Had the decedent named his spouse as the direct beneficiary, outside of the trust, the spouse could roll over the IRA and take MRDs based upon her life expectancy as determined under the *Uniform Distribution Table*.

(c) The life expectancy numbers under the two different tables are quite different. An IRA paid to a trust for the surviving spouse is not as good, deferral-wise, as an IRA paid directly to the surviving spouse.

Suppose the decedent's IRA is $500,000 and the surviving spouse is 73 years old when he must take the first distribution from the IRA after the decedent's death.

(i) If the IRA is paid to a see though trust for the spouse's benefit, the divisor under the *Single Life Table* is 14.8. Thus, in the first year, the surviving spouse has to take an MRD of $33,784.

(ii) If the same IRA were paid to spouse and rolled over, the divisor under the *Uniform Distribution Table* would be 24.7. Thus, the spouse as a "direct" IRA beneficiary would be required to withdraw just $20,243. This is $13,500 less than the distribution that would be required to be paid on behalf of the spouse as the "indirect" beneficiary through the Marital Trust.

(d) If the spouse as the beneficiary of the trust dies before having received all of the IRA, no successor beneficiary's life expectancy can be used to further stretch payments.

(3) <u>The Solution (or Solutions?) to the Problem</u>.

(a) The IRS has ruled on many, many occasions (but only in PLRs, never in a Revenue Ruling or anything else that can be generally relied upon) that, where

(i) the surviving spouse is the sole personal representative or trustee, and, therefore, the only person having the power to allocate, or not to allocate, the IRA to the surviving spouse's share; and

(ii) the surviving spouse either is the sole beneficiary of the estate or trust, or if not the sole beneficiary, the surviving spouse has the unilateral right to demand the IRA benefits as a part of his or her share of the estate or trust

the surviving spouse can distribute the IRA benefits through the estate or trust and roll them over, tax-free, if the rollover takes place within 60 days (or longer if the surviving spouse can get a hardship exemption from the 60-day period).

(b) There would seem to be no reason why the surviving spouse could not instead "withdraw" the funds via a custodian-to-custodian transfer into the spouse's own IRA.

(c) This solution may not work if the surviving spouse is not the sole beneficiary and the IRA would not necessarily be a part of the surviving spouse's share. For example, if the residuary estate was to be paid 50 / 50 between the decedent's son and the surviving spouse, and the value of the IRA was less than 50% of the estate assets, the surviving spouse could not "drop and roll" the IRA on a tax-free basis because she cannot demand the IRA be allocated to her share (unless the will provided for that). Even if the PR allocates the IRA to the spouse's share, the IRS may regard the spouse as not having inherited the IRA from the decedent, and the IRS will not then regard the situation as a tax-free roll over.

(d) This solution may not work (but see discussion in subsection (e) immediately following) if the IRA is paid into a trust for the benefit of the surviving spouse and principal can be paid in accordance with, say, an ascertainable standard. The spouse in this case does not have the *unilateral* ability to withdraw the trust assets, and this would take the situation out of the safe harbor created by the several PLRs.

(i) What if the trust beneficiaries joined in a judicial proceeding to permit the spouse to withdraw the IRA?

(ii) What if the trust beneficiaries agreed among themselves to permit the spouse to withdraw the IRA?

(iii) What if the trust agreement specifically provided that the trustee can, but is not required to, disregard the interests of the trust's remainder beneficiaries in making discretionary distributions of trust principal?

The solutions in (i) and (ii) will probably not work now that the IRS has unequivocally stated that it will not respect post-mortem trust modifications (See Section E.3 above). Further, in the author's view, all of three of these hypotheticals involve the act or tacit or affirmative consent of some third party or parties to enable the spouse to receive the IRA and make any attempted rollover a risky proposition. If the spouse were the sole trustee in situation (iii), however, it might be less risky, though still not for the faint of heart.

(e) As noted above, the IRS has heretofore consistently taken the position that the "drop and roll" technique will not work unless the surviving spouse can demand possession of the IRA from the estate or trust *and* the allocation of the IRA to the surviving spouse's share is within the surviving spouse's sole control. However, in PLR 200807025, the IRS blessed a rollover out of a spousal trust where the surviving spouse was not solely in charge of allocating the IRA to her share.

In the PLR, Owner died without having named a beneficiary for his IRA. The IRA was therefore, under the custodian's default rules, paid to Owner's estate. Owner's will devised his estate to a residuary trust that was to further divide into four sub-trusts, one of which was a Marital Trust for the benefit of Spouse. Spouse had the power to withdraw all of the assets of the Marital Trust; however, Spouse and a third party were co-trustees of the undivided residuary trust.

Spouse and Co-Trustee allocated the IRA to the Marital Trust. Spouse then withdrew the assets from the Marital Trust, including the IRA, and rolled the IRA formerly held in the Marital Trust into Spouse's own IRA.

The IRS ruled that arrangement qualified as a post-mortem IRA spousal rollover. In support of its ruling, the IRS quoted from the preamble to the final Section 401(a)(9) Regulations, reasoning that "if the spouse *actually receives a distribution* from the IRA, the spouse is permitted to roll that distribution over within 60 days into an IRA in the spouse's own name to the extent that the distribution is not a required distribution, regardless of whether or not the spouse is the sole beneficiary." (emphasis added)

So, in the wake of the IRS's stated rationale behind PLR 200807025, is all that matters now is that the surviving spouse gets the IRA, even though whether he or she gets it may be someone else's decision? Although the facts of the PLR were that Spouse could unilaterally withdraw IRA from the Marital Trust, does it no longer matter that the spouse has an unlimited power to possess the IRA if the spouse in fact comes to possess it? If this is true, then a "drop and roll" may be available in some of the scenarios described in subsection (d) immediately above. Risk-averse clients and advisors will probably want to obtain their own private letter rulings before proceeding in this direction.

<u>See also</u>, as to the issues discussed in PLR 200807025, this time in a community property context, discussion at Section K(4) below.

(f) Suppose, instead, that the IRA is payable to an estate as to which the decedent's son, and not the decedent's spouse, is the sole beneficiary and the sole personal representative. Can one infer from the PLRs addressed to the spouse situation that the son could somehow get the IRA from the estate into an IRA of his own, and use his life expectancy to compute MRDs?

This will not work for two reasons:

(i) Only a spouse can rollover a decedent's IRA to create a new IRA that will "reset" the MRD.

(ii) The personal representative cannot distribute the IRA out of the estate to the beneficiary in the hope that the beneficiary, as the owner of the distributee IRA, could then use his or her own life expectancy. This is because, to be a designated beneficiary, the beneficiary must be "designated under the plan." Treas. Regs. §1.401(a)(9)-4, A-1. An estate distributee is not a beneficiary "designated under the plan" because neither the decedent nor plan default provisions named the distributee as a beneficiary.

None of this is to say that the IRA cannot be distributed out of the estate to the beneficiary, only that the distributee cannot use his own life expectancy.

(g) Could a fiduciary disclaimer in lieu of a "drop and roll" work?

(i) Not according to the IRS. In PLR 9437042, the IRS ruled that the estate, acting through the personal representative, cannot disclaim IRA benefits paid to the estate because the participant is thought to have already accepted his own retirement benefits.

(ii) F.S. 739.104(2) gives fiduciaries the power to disclaim assets, in whole or in part, without court approval, to the extent that the governing instrument permits (court approval is required absent such authorization).

(iii) F.S. 739.204 provides that if a trustee disclaims assets allocable to a trust, those assets do not become trust assets. The same result would pertain in the case of a disclaimer by a personal representative of assets otherwise to pass to an estate.

(iv) If there are secondary beneficiaries named to take if the trust does not, then, of course, those beneficiaries would take the benefits disclaimed by the trustee. If there are no such beneficiaries, then the plan's default provisions would apply. If those provisions operate to pass the disclaimed interest to one or more individuals, then, perhaps with additional disclaimers, the desired result could be obtained. However, if the plan's default beneficiary is the owner's estate, the trustee disclaimer will probably not have accomplished very much.

(v) **WARNING!!** The author was involved in a substantial matter involving a Florida trust whose situs was judicially transferred to Virginia. The provisions in the Virginia statute relative to disclaimers of assets by trustees are the same as Florida's, except that no court approval is required under Virginia law. A disclaimer by the trustee of an asset directed under the terms of the trust agreement to be added to a particular trust was considered. In an informal teleconference with a representative of the IRS, the representative stated, in effect, "We don't care if state law authorizes the trustee to disclaim a trust asset. We don't think it works and we won't honor it." Thus, one proceeds at one's risk, at least for the time being.

(vi) **ANOTHER NOTE OF CAUTION:** There are obvious fiduciary duty issues associated with a trustee's disclaimer of assets that would otherwise pass to a trust. Trustees are in the business of marshalling trust assets, not rejecting them. It is not difficult to imagine ways in which a trustee with an ax to grind against certain trust beneficiaries could carry out a spiteful agenda by way of a trustee disclaimer, thereby starting in motion all manner of litigation.

A trustee's act in breach of his fiduciary duties is normally voidable by the beneficiaries. See F.S. § 736.0802. Does this mean that a trustee disclaimer where authorized by the governing instrument and done without prior court order is not "irrevocable" until the statute of limitations on an action for breach of fiduciary duty expires? If it does mean that, is such a trustee disclaimer fatally flawed as a tax-qualified disclaimer because it is not unqualified and irrevocable within the nine-month time limit?

The author is not aware of any written guidance from the IRS making this argument. The larger point is that the trustee disclaimer provisions of Chapter 739 and UDPIA are, at least for now, uncharted waters. With flexibility and discretion comes risk. A trustee

relying on a grant of the power to disclaim trust assets under the governing instrument will need wise counsel before proceeding on the trustee's own. Still, even if the trustee elects to obtain court approval before proceeding, prior to Chapter 739 it was not clear that a trustee could disclaim trust assets, and the ability to do so under the new statute ought to prove useful.

G. What if the Primary Beneficiary Dies before the Determination Date?

(1) The Problem Stated. What happens when the primary beneficiary, who was alive on the date of the deceased IRA owner's death, dies before the September 30 determination date without having disclaimed his or her interest in the IRA?

(a) How are post-mortem MRDs determined?

(b) Where does the undistributed balance of the IRA go? To the secondary beneficiaries designated by the IRA owner? To the beneficiaries designated by the surviving spouse prior to his or her death? Somewhere else?

(2) The Answers Stated.

(a) If the primary beneficiary dies before the September 30 determination date, the life expectancy of the primary beneficiary is still used to determine post-mortem MRDs, regardless of the identity of the persons who actually receive the IRA after the primary beneficiary's death. Treas. Regs. §1.401(a)(9)-4, A-4, provides as follows:

> For purposes of this A-4, an individual who is a beneficiary as of the date of the employee's death and dies prior to September 30 of the calendar year following the calendar year of the employee's death without disclaiming continues to be treated as a beneficiary as of the September 30 of the calendar year following the calendar year of the employee's death in determining the employee's designated beneficiary for purposes of determining the distribution period for required minimum distributions after the employee's death, *without regard to the identity of the successor beneficiary who is entitled to distributions as the beneficiary of the deceased beneficiary.*

(emphasis added)

(b) The undistributed balance of the decedent's IRA will be paid to the beneficiaries named by the primary beneficiary, if the plan permits, or to the default beneficiaries under the plan if the primary beneficiary did not name a successor beneficiary, and *not* to the secondary beneficiaries named by the deceased IRA owner.

In PLR 200126038, the IRS ruled that the personal representative of a deceased primary beneficiary cannot complete the task, started by the deceased primary beneficiary, of affirmatively naming alternate beneficiaries. Thus, the primary beneficiary's estate was the successor beneficiary of the IRA.

It is possible that the surviving beneficiary may be married at the time of his or her death. If the surviving participant's benefits under the IRA pass by default or affirmative beneficiary designation to his or her spouse, they should be able to roll over the IRA to "reset" the MRDs.

(3) What Can be Done to Avoid This?

(a) Post-Mortem Planning.

(i) The personal representative of the primary beneficiary's estate might be able to disclaim the IRA if the primary beneficiary died before nine months from the date of the IRA owner's death. See discussion at F(3)(f) above regarding fiduciary disclaimers.

(ii) If the deceased beneficiary is one of several entitled to the IRA, distribute the deceased beneficiary's share of the IRA by the September 30 designation date. This will enable the life expectancies of the other beneficiary or beneficiaries to be used. *See* discussion at Section C above on the separate account rules.

(b) Pre-Mortem Planning.

(i) If the plan will permit, impose in the beneficiary designation a survivorship requirement on the primary beneficiary, i.e., the primary beneficiary will not be deemed to have survived the IRA owner unless the primary beneficiary survives the owner by X months. If the primary beneficiary is the surviving spouse, a survivorship period of longer than six months is not possible without blowing the marital deduction. This will work because the primary beneficiary would not then be treated as having been alive at the IRA owner's death, and the secondary beneficiary's life expectancy could then be used.

Additionally, this will mean that the secondary beneficiaries selected by the owner, and not those selected or defaulted into by the surviving primary beneficiary, will receive the owner's IRA.

(ii) Name a trust as the IRA beneficiary. This will probably not solve the problem of having to use the life expectancy of the eldest beneficiary (unless that beneficiary's entitlement can somehow be timely disclaimed or distributed), but it

will ensure that the IRA benefits will flow to the owner's beneficiaries, and not to the primary beneficiary's.

(4) A Bad Result in a Related Issue: PLR 200644022.

(a) Husband died before reaching his required beginning date (RBD). He named Trust as the 100% beneficiary of his IRA. After his death, Trust was reformed (see Section E. above) to provide that Wife had the right to request distribution of all of the IRA at any time. The remainder beneficiary of Trust was Wife's son. Wife then died before reaching her RBD.

(b) Son asked the IRS to be allowed to use his own life expectancy to determine post-mortem minimum required distributions from the IRA after Wife's death. The IRS denied the request, ruling that, because Wife died without having designated a successor beneficiary, the 5-year rule applied.

(c) The IRS ruled that Son was a mere "successor beneficiary" under Regs. §1.401(a)(9)-5, A-7, and could not be taken into account. Wife was therefore the only beneficiary of the IRA. As such, Wife did not have to take distributions from the IRA until Husband would have reached his RBD. However, if Wife is the only beneficiary of the IRA and dies before reaching her RBD, as she did, distributions from the IRA after her death are determined as if she were the owner. Regs. §1.401(a)(9)-3, A-5. Because Wife was treated as the sole owner of the IRA and did not name a successor beneficiary, Son had to use the 5-year rule under 401(a)(9)(B)(ii).

Wife did not own the IRA, Trust did; however, the IRS treated her as the owner of the IRA. As the deemed owner of the IRA, the IRS reasoned that Wife could have named a successor beneficiary whose life expectancy could have been used to determine post-mortem MRDs after Wife's death. However, unless the Trust instrument gave Wife the right to do so, she could not have done so under state law.

When using a conduit trust for a spouse who has not reached his or her RBD, then, consider giving the spouse the power *under the trust instrument* to name a successor beneficiary.

H. What if the Primary Beneficiary Does Not Timely Take the First Post-Mortem MRD?

(1) The Problem. Father died in 2002 before reaching his required beginning date. Daughter was the designated beneficiary. Daughter did not take the post-mortem MRDs for 2003 and 2004 until 2005. She paid the 50% failure to timely withdraw penalty tax under Section 4974(a) for 2003 and 2004. Is Daughter now stuck with the 5-

year rule, or can she still take distributions from the remaining IRA based on her life expectancy?

(2) Background. If the IRA owner dies before reaching his or MRD, then the beneficiary must withdraw all of the IRA within 5 years after the owner's death. §401(a)(9)(B)(ii). However, the beneficiary may avoid the 5-year rule by electing to take the remaining IRA benefits over the beneficiary's life span. The "election" is made simply by taking the first post-mortem distribution from the IRA based upon the beneficiary's life expectancy no later than 1 year after the IRA owner's death. §401(a)(9)(B)(iii).

(3) The IRS' Ruling. The Service ruled that Daughter's failure to take the MRDs for 2003 and 2004 did not preclude her from withdrawing the balance of Father's IRA, beginning in 2005, based on Daughter's life expectancy. Daughter was not required to withdraw the remaining balance of the IRA within 5 years after Father's death.

In support of its decision, the IRS quoted from the "Explanation of Provisions" from the final Treasury Regulations:

> "…if an employee dies before the employee's required beginning date and the employee has a designated beneficiary, then the life expectancy rule in section 401(a)(9)(B)(iii) is the default distribution rule. Thus, absent a plan provision or election of the 5 year rule, the life expectancy rule applies in all cases in which the employee has a designated beneficiary and the 5-year rule applies if the employee does not have a designated beneficiary."

Read on the surface, the passage quoted above, and the result in PLR 200811028, seem to suggest that the 5-year rule is the "elect in" rule, and the life expectancy rule is the "elect out" rule. The ruling appears to be a significant pro-taxpayer result.

Dig deeper, however, and reality begins to set in. The terms of Father's IRA custodial agreement provided that post-mortem MRDs to a designated beneficiary where the owner died before the required beginning date would be made in accordance with the life expectancy rule unless the designated beneficiary chose otherwise. Daughter represented to the IRS that she had not "chosen otherwise," i.e., elected the 5-year rule. Thus, the result in the PLR is consistent with the post-mortem payment options in Father's IRA agreement. But what if the custodial agreement had been silent, or required MRDs to be paid under the 5-year rule unless the beneficiary elects otherwise? The result may have been different.

I. Non-Spouse Rollovers of Qualified Plan Benefits: Code Section 402(c)(11) and IRS Notice 2007-7

(1) The Problem. A non-spouse beneficiary of an IRA can generally use his or her life expectancy to compute minimum required post-mortem distributions after the owner's death (See C. above). However, a non-spouse beneficiary of a qualified retirement account has traditionally not had that option. The terms of the qualified plan frequently require that the benefit must be distributed in one lump sum, or, perhaps, over five years. It is for this reason that many planners advise unmarried clients to roll over their qualified plan accounts to IRAs during life (another reason is that the range of investment options, and the owner's control over investment decisions, is usually greater in the context of an IRA).

(2) What Congress Giveth: Section 402(c)(11).

(a) In General. As of January 1, 2007, a designated beneficiary (other than the surviving spouse) may transfer an inherited qualified plan benefit by means of a custodian-to-custodian transfer only to a newly-established inherited IRA. This is intended to allow the designated beneficiary to take post-mortem minimum required distributions based on the life expectancy of the designated beneficiary.

(b) In Detail.

(i) Section 402(c)(11) applies to distributions made after December 31, 2006, regardless of the date of the participant's death.

(ii) The distribution from the qualified plan cannot be rolled into a pre-existing IRA; instead, the distribution has to be rolled into a new IRA created specifically for that purpose. The new IRA has to be an inherited IRA titled as such; e.g., "Barry Bonds as beneficiary of Bobby Bonds, deceased."

(iii) A beneficiary who is *not* a "designated beneficiary" cannot take advantage of the statute. The IRS is directed in the statute to promulgate rules designed to give guidance as to when a trust created for one or more individuals is a "designated beneficiary" for the statute. The IRS did so in Notice 2007-7, and not surprisingly adopted the regular see-through trust rules of Regs. §1.401(a)(9)-4, A-5. Thus, a trust named as a beneficiary of a qualified plan account that qualifies as a see-through trust can roll over under Section 402(c)(11), but a trust that does not so qualify (e.g., a non-conduit trust having charitable remainder beneficiaries) cannot roll over.

(iv) The participant's minimum required distribution for the year of death cannot be rolled over. Depending on the situation, other amounts are also not eligible for rollover.

(v) The transfer from the qualified plan to the inherited IRA *must* be made via a custodian-to-custodian transfer (what the IRS refers to as a "direct rollover"). It cannot be made as a traditional "rollover" distribution, wherein payment is made to the beneficiary who then contributes it to the inherited IRA within 60 days of receipt in order to avoid taxation on the distribution. If the plan makes the check payable to the beneficiary, the distribution will not qualify under 402(c)(11) even if the beneficiary puts it in the inherited IRA within 60 days.

What if the plan makes the check payable to the IRA but delivers it to the beneficiary? Neither the statute nor Notice 2007-7 (discussed below) addresses this. However, the portion of the Notice that deals with direct payments of amounts from IRAs to charity provides that a check from the IRA made payable to the charity and delivered to the owner is a qualifying distribution. (A-41). That being said, however, why take a chance?

(vi) Note that the spouse as the individual designated beneficiary is specifically excluded from coverage under the statute. A spouse can roll over the qualified plan benefit under authority of other Code provisions (402(c)(9)) and does not need the new statute.

(3) <u>The IRS Attmpteth to Take Away (and Congress Puteth Back): Notice 2007-7, 2007-5 IRB 1, and Section 401(a)(31)</u>.

(a) Most of Notice 2007-7 provides helpful clarity and guidance regarding the statute. Two aspects of the Notice have proved to be controversial:

1. whether Section 402(c)(11), as interpreted by the IRS, really will allow a beneficiary who is otherwise stuck with the "five year rule" under the plan to avoid that rule and use his or her actual life expectancy; and

2. whether qualified plans are required to offer the Section 402(c)(11) rollover option to beneficiaries.

A "no" answer to either of these questions significantly limits the benefits of the new statute. After some fits and starts, we now know that the answer to both questions is "yes."

(b) <u>Can the Designated Beneficiary Shed the 5-Year Rule</u>?

(i) Who is *not* stuck with the 5-Year rule? A beneficiary of a participant who died on or after his required beginning date.

A-19 of the Notice provides that "if the employee dies on or after his required beginning date, the required minimum distribution under the IRA for any year after the year of death *must* be determined using the same *applicable distribution period* as would have been used under the plan if the direct rollover had not occurred." (emphasis added).

Regs. §1.401(a)(9)-5, Q-5 provides that the "applicable distribution period" for post-mortem distributions is the longer of the designated beneficiary's life expectancy or the remaining actuarial life expectancy of the deceased participant. Thus, even though the plan may default to a 5-year rule for *all* designated beneficiaries, the designated beneficiary of a participant who dies after his or her RBD is never stuck with the 5-year rule.

(ii) Only designated beneficiaries of participants who die before the required beginning date can be stuck with the 5-year rule.

How can the plan stick the beneficiary with the 5-year rule for post-mortem plan distributions? There are two ways:

(A) According to Regs. §1.401(a)(9)-3, A-4 (b) "A plan may adopt provision specifying that the 5-year rule in Section 401(a)(9)(B)(ii) will apply to certain distributions after the death of the employee even if the employee has a designated beneficiary, or that distribution in every case will be made in accordance with the 5-year rule…."

(B) According to Regs. §1.401(a)(9)-3, A-4 (c) "A plan may adopt a provision that permits employees (or beneficiaries) to elect on an individual basis whether the 5-year rule in Section 401(a)(9)(B)(ii) or the life expectancy rule in Section 401(a)(9)(B)(iii) and (iv) applies to distributions after the death of an employee who has a designated beneficiary" and may adopt a provision that defaults to the 5-year rule in the event an election is not timely made (and, if there is no default in the plan for disposition in the absence of a timely election, post-mortem distributions must, under the Regulation, be made under the 5-year rule).

(iii) What does the Notice say about designated beneficiaries who are stuck with the 5-year rule under the plan?

The relevant portion of A-19 states as follows: "The *rules for determining the required minimum distributions under the plan* with respect to the non-spouse beneficiary *also apply under the [transferee inherited] IRA*." (emphasis added). Continuing, "[t]hus, if the employee dies before his or her required beginning date and the 5-year rule in §401(a)(9)(B)(ii) applied to the non-spouse designated beneficiary . . . the 5-year rule applies for purposes of determining minimum required distributions under the IRA."

Congress' intent in enacting Section 402(c)(11) was to ensure that "distributions from inherited [rollover] IRAs are subject to the distribution rules applicable to [IRA] beneficiaries [i.e., not the distribution rules of the plan]." Joint Committee on Taxation, "Explanation of Provisions." However, in the Notice, the IRS appears to be saying that, regardless of the date of death, if the 5-year rule applied under the plan it will apply to the rollover inherited IRA. This appears to contravene Congress' intent.

(iv) Bail-out rule for designated beneficiaries subject to the 5-year rule.

Perhaps recognizing the harshness of A-19 of the Notice, A-17 of the Notice sets forth a special rule pursuant to which any beneficiary who is subject to the 5-year rule under the plan "may determine the required minimum distribution under the plan using the life expectancy rule in the case of a *distribution* made *prior to the end of the year following the year of death.*" (emphasis added). Thus, if the beneficiary makes a timely custodian-to-custodian transfer of amounts that can be rolled over, the beneficiary can shed the 5-year rule as to those amounts.

Various muckety-mucks were concerned about uncertainties in the special rule. For example, A-19 and A-17 appear to contradict each other, since A-19 was not prefaced with words to the effect of "Except as provided in A-17…." Which controls?

Perhaps more significantly, what, it was asked, is meant by the italicized term "distribution" in the passage quoted above from A-19? If "distribution" means any distribution, does the special rule mean that the beneficiary, under the 5-year rule, can take distributions in the first four years after the decedent's death based upon his or her life expectancy, roll over the balance in year five, and continue on with such life expectancy distributions thereafter? Or does "distribution" refer to the rollover distribution only, so that the participant is stuck with the 5-year rule unless he or she makes the rollover by the end of the year after the participant's death?

On February 13, 2007, in a special edition of *Employee Plan News* (!!...hardly the place for this sort of thing to appear first), the IRS laid the matter to rest: In order to shed the 5-year rule, the direct rollover distribution has to occur by the end of the year after the year of the participant's death. The IRS further clarified that, for the year after the year of the participant's death, the IRA beneficiary must take a minimum required distribution from the transferee IRA based upon the beneficiary's own life expectancy. These cannot be rolled over.

Under the IRS' February, 2007 guidance, beneficiaries of decedents dying before 2006 are unable to avail themselves of the relief sought to be provided by Section 402(c)(11). This is because the beneficiary of a decedent who died in 2005 had to have made the

rollover by the end of 2006 to qualify. This is apparently the IRS' view notwithstanding that the statute says that it applies to all distributions made after December 31, 2006.

Note that a plan beneficiary laboring under the 5-year rule *can* roll over the entire balance of the IRA at any time up to five years from the participant's death. There are no minimum required distributions until the last day of the 5-year period beginning with the decedent's death. So, for example, the beneficiary can roll over the plan into an inherited IRA some time in, say, the third year after the decedent's death. Though effective under Section 402(c)(11), the beneficiary is still stuck with the 5-year rule since the rollover did not occur before the end of the year after the decedent's death. This is so even though the beneficiary took MRDs in years one and two based on his or her life expectancy.

(v) As mentioned above, the minimum required distribution required to be taken from the IRA by the beneficiary cannot be rolled over. The plan administrator will probably want to supply one check, in the full amount of the rollover, made payable to the IRA. This amount will include the minimum required distribution required, as a pre-requisite to the rollover, to be taken from the IRA by the beneficiary for the year preceding the rollover and cannot be rolled over.

It will be preferable, if possible, to make the direct rollover in the year of the participant's death, when no MRD is required to be taken, and the fact of one check is of no consequence.

A possible solution for a direct rollover in the year following the year of the participant's death is to arrange for the custodian-to-custodian transfer of the entire amount, including the MRD for the year after the participant's death. Thereafter, the designated beneficiary can timely remove the MRD (plus any income attributable to that amount) from the inherited IRA, and no excess contribution penalty under Section 408(d)(4) and 4973(b) ought to apply.

(c) Are Plans Required to Offer the Direct Roll-Over Option?

Until 2010, the answer to this question was anything but clear, and the IRS went back and forth. Now, we have clarity: Section 401(a)(31) *requires* the plan to offer the direct rollover option.

J. Elective Share.

(1) In General.

(a) The surviving spouse may make the elective share election at any time before the *earlier* of (i) six months from the date of service of a copy of the notice of administration on the surviving spouse; and (ii) 2 years from the decedent's death. F.S. 732.2135.

(b) The elective share is 30% of the "elective estate." F.S. 732.2065.

(c) IRAs are included in the calculation of the elective estate (F.S. 732.2035(7)) and can be used to satisfy the elective share under the ordering rules of F.S. 732.2075. An IRA is pretty far down the list, after, for example, the decedent's estate and revocable trust.

(d) We are talking about the decedent's IRAs paid to persons *other than* the surviving spouse as of the decedent's death

(2) From the Electing Spouse's Perspective: PLR 200438045.

In PLR 200438045, the IRA owner died before reaching his required beginning date, survived by his spouse. Prior to his death, the IRA owner had named his two children as equal beneficiaries of the IRA. After the owner's death, pursuant to the beneficiary designation, one of the owner's children transferred, by means of the trustee-to-trustee transfer, one-half of the IRA to another IRA for the child's benefit, but opened in the decedent's name. It was represented that the decedent's other child intended to do the same, but had not yet done so.

The surviving spouse made a timely election to take her elective share. Under the facts of the ruling, the election enabled the surviving spouse to a one-third share of the deceased spouse's net estate. The surviving spouse represented that her election entitled her to a pro-rata share of the deceased spouse's IRA, including a share of the child's transferee IRA, and the still-to-be established IRA for the other child.

The surviving spouse stated her intention to receive her elective share from each of the transferee IRAs, and, within 60 days after receipt of the assets from the transferee IRAs, to receive the distributions and roll them over to an IRA established and maintained in her own name.

The IRS ruled that a surviving spouse who actually receives a distribution from an IRA is permitted to roll that distribution over into her own IRA, even if that spouse is not the sole beneficiary of the deceased spouse's IRA, as long as the rollover is accomplished in the requisite 60 day period.

The IRS stated that, as a general rule, if a deceased spouse's IRA does not pass to the surviving spouse by means of a beneficiary designation, the surviving spouse will not be treated as having acquired the IRA from the deceased spouse and, therefore, will not be eligible to transfer or rollover the IRA proceeds into an IRA. However, the IRS ruled that the general rule did not apply in the case of an elective share, and that the electing spouse could roll over the portions of the decedent's IRA acquired in satisfaction of the elective share.

(3) From the Named Beneficiary's Perspective.

(a) What happens if the named beneficiary withdraws all of the IRA before the surviving spouse makes the election?

(i) These amounts can be reached to satisfy the surviving spouse's elective share rights, and if the beneficiary expends the withdrawn funds for value, he or she is still on the hook for what was sold. F.S. 732.2085(2).

(ii) If the surviving spouse ultimately receives the funds withdrawn by the named beneficiary in satisfaction of the elective share, who pays the income taxes on the withdrawal? Presumably, if the funds have been withdrawn for more than 60 days they cannot be rolled over by the surviving spouse when he or she later receives them, and income taxes will be due.

(iii) If the named beneficiary pays the tax, it would seem fair (if you are the named beneficiary) to take this into account in determining the amount to be recovered by the spouse in satisfaction of the elective share; after all, the named beneficiary has in effect paid the surviving spouse's income taxes. On the other hand, it would seem fair (if you are the surviving spouse) to receive an amount equal to what the elective share law provides, regardless of someone else's income tax problems. The IRS will get its tax, but if the named beneficiary or the surviving spouse is in a significantly higher tax bracket than the other, may take an interest in who is the proper taxpayer.

(b) Assume that the elective share is not taken until *after* the September 30 "determination date." This could happen if the administration of the decedent's estate was not commenced near in time to his or her death. Assume, further, that the surviving spouse is much older than the named beneficiary. Will the named beneficiary be stuck with the surviving spouse's much shorter life expectancy in determining the named beneficiary's MRDs?

Good news for the named beneficiary: probably not. Treas. Regs. §1.401(a)(9)-4, A-1 defines a "designated beneficiary" as one who is designated as a beneficiary "under the terms of the plan" – either by affirmative act of the account owner or by default provisions of the plan – and one who "is identifiable under the plan." The Regulation goes on to provide that "[t]he fact that an employee's interest under the plan passes to a certain individual under a will *or otherwise under applicable state law* does not make that individual a designated beneficiary unless the individual is so designated as a beneficiary under the plan." Id. (emphasis added). This seems to suggest that the surviving spouse who takes an interest in an IRA as a result of an elective share will not be considered as a "designated beneficiary."

(4) Unanswered Question now Answered.

Section 222.21(2)(a) of the Florida Statutes generally exempts IRAs from the claims of the owner's creditors. When the surviving spouse makes an election to take the elective share, does the surviving spouse become a "creditor" within the meaning of Section 222.21, so that the IRA cannot be reached in satisfaction of the elective share?

Until recently, the answer was unclear. A recent Virginia case suggested that, in the absence of a specific statutory provision, the answer was "yes." As Florida, Virginia has an "augmented estate" elective share statute which pulls revocable transfers into the elective estate. The decedent had named his sister and niece as beneficiaries of his state employee retirement plan, but retained the right to revoke the designation. The court concluded that the electing spouse could not reach the retirement account in satisfaction of the elective share because, under Virginia law, the account was exempt from legal process. *Sexton v. Convett*, 623 S.E. 2d 898 (Va. 2006).

No more problem in Florida: F.S. §222.21(2)(d) provides that an IRA or qualified retirement account is subject to the "claims of a surviving spouse pursuant to an order determining the amount of elective share and contribution as provided in part II of chapter 732."

K. Community Property Issues

(1) In General.

(a) IRAs can be community property. The provisions of ERISA, which supersede state community property laws, do not apply to IRAs. *See Ablamis v. Roper*, 937 F. 2d 1450 (9th Cir. 1991); *Allard v. French*, 754 S.W. 2d 111 (Tex. 1988), *cert. denied*, 488 U.S. 1006 (1989). Thus, if an IRA is community property, even if it is titled in the name of Wife, one-half of the IRA is Husband's property. Community property can only exist in a valid marriage.

In *Boggs v. Boggs*, 520 U.S. 833 (1996), the Supreme Court held that the anti-alienation provisions of ERISA preclude state community property laws, and prevent the non-working spouse from disposing of his or her interest in ERISA-qualified plans.

(b) The community property states are: Washington, Idaho, Nevada, Texas, California, Louisiana, Wisconsin (has "marital property," which is the functional equivalent), Arizona and New Mexico. Alaska now has an elective community property regime, but it is unclear whether the IRS will respect Alaska elective community property for federal tax purposes. *See Comm'r v. Harmon*, 323 U.S. 44 (1944) (denying recognition for federal income tax purposes to an elective Oklahoma community property statute); *but see* Blattmachr, Zaritsky & Ascher, "Tax Planning With Consensual

Community Property: Alaska's New Community Property Law," 33 *Real Prop., Prob. & Tr. J.* 615 (1999) for a contrary view.

(c) Each community property state has its own rules for determining when community property exists and the rights of each spouse to the ownership and management of their community property. Very generally speaking, an asset acquired by one spouse during the marriage through that spouse's efforts (i.e., not acquired by gift or inheritance) is community property belonging to both spouses equally, regardless of in which spouse's name the asset is titled. Also very generally speaking, there is a strong presumption in virtually all of the community property states that property acquired during a marriage is community property unless there is proof to the contrary. What is and is not community property must be determined under the law of the state where the couple lived when the property was acquired.

(2) Florida Recognizes Community Property Brought into this State.

(a) Florida is not a community property state, but it recognizes and enforces the rights of married persons importing community property. *Quintana v. Ordono*, 195 So. 2d. 577 (Fla. 3rd DCA 1967); *Colclazier v. Colclazier*, 89 So. 2d. 261 (Fla. 1956).

(b) Florida will look to the law where the community property originated to determine the rights of the spouses in that property. *Camara v. Camara*, 330 So. 2d. 818 (Fla. 3rd DCA 1976).

(c) The Florida Uniform Disposition of Community Property Rights at Death Act, F.S. 732.216 – 732.228 provides a procedure for the enforcement of the rights of the surviving spouse and the deceased spouse's estate in community property brought into Florida. However, the statute only applies to assets title to which is in the individual name of one of the spouses.

(3) What About a Florida IRA That is Community Property?

(a) Always ask about the possible existence of a community property agreement. It is the author's experience that many couples moving to Florida from a community property have previously entered into community property agreements, and many times these agreements are so old that they have been forgotten about. Florida will respect a couples' community property agreement. *In re Estate of Santos*, 648 So. 2d 277 (Fla. 4th DCA 1995).

(b) There are three basic types of community property agreements:

(i) The "two-prong" agreement: everything we have now is community property, and everything either of us ever receives in the future from whatever source is community property. This is the most common type of agreement.

(ii) The "three-prong" agreement: everything we have now is community property, everything either of us ever receives in the future from whatever source is community property, and at the death of the first of us to die, the survivor gets all of the community property.

(iii) Though not a separate agreement, community property agreements frequently contain a provision pursuant to which each spouse agrees to waive in advance all community property rights in life insurance and IRAs owned by the other. If the community property agreement contains such a provision, the community property IRA will be treated as a common law state IRA, wholly owned by the spouse in whose name the IRA is titled, and the non-titled spouse has no rights in it.

(c) For reasons discussed in section (d) below, it will be advisable to avoid the community property aspects of IRAs upon the death of one of the owners, especially the death of the non-title owner.

(i) Often a provision in an existing community property agreement will solve the problem.

(ii) The IRA plan may permit the non-title spouse to designate a beneficiary of his or her community property interest in the IRA, presumably in favor the of the title spouse. While theoretically possible, the author has never seen this.

(iii) If there is no such provision, the spouses can enter into a Florida post-nuptial agreement pursuant to which they waive their community rights in the IRA.

(iv) Each spouse's will can contain a provision devising his or her community property interest in the IRA to the surviving spouse. Code Section 2056(b)(7)(C) automatically qualifies the gift of the non-title spouse for the estate tax marital deduction unless the non-title spouse's personal representative elects otherwise.

(d) What Happens When the Non-Title Spouse Dies First?

(i) If the IRA is community property, the non-title, predeceasing spouse owns one-half of the IRA. Put differently, one-half of the IRA is subject to the non-title, first-to-die spouse's estate planning documents.

(ii) If the deceased spouse's documents are silent on the disposition of the spouse's interest in the IRA, one-half of the IRA will be treated as any other asset. Thus, for example, one-half of the IRA would be available to fund the "credit shelter" trust to be created under the deceased spouse's documents.

(iii) Who pays the income tax when half of the IRA is withdrawn to flow under the first deceased spouse's estate planning documents?

(1) Section 408(g) provides that the whole of Section 408 is to be applied without regard to community property laws. Taken literally, this would suggest that the title spouse would be taxed on the distribution of one-half of the IRA to fund the non-title spouse's testamentary gifts, since the distribution would be treated as one to the participant. However, in PLR 8040101, the IRS reached a different result: the distribution is taxed to the distributees, and not to the surviving title spouse.

(2) However, in *Bunney v. Comm'r*, 114 TC 259 (2000), the Tax Court returned to a more literal view of Section 408 and 408(g), and concluded that the title spouse recognized income upon a lifetime withdrawal by the non-title spouse in a way not described in Section 408(d), which requires direct transfers between the spouse's IRAs. The title spouse was also liable for the 10% penalty under Section 72. *See also Morris v. Comm'r*, 83 T.C.M. 1104 (2002) (IRS could not proceed against non-title spouse to pay income tax deficiency resulting from the spouse's IRA withdrawal). The Tax Court's reasoning in *Bunney* would apply with equal force to a post-mortem IRA withdrawal on account of the death of the non-title spouse. The Tax Court's holdings therefore cast in doubt the continued viability of the technique of using the non-title spouse's one-half community property interest to fund the credit shelter trust.

(4) <u>PLR 201125047</u>

Husband and Wife lived in a community property state. Husband died, survived by Wife. Husband had not named a beneficiary of his interest in the community property IRA, which was therefore paid to his estate. The IRA eventually found its way to "Husband's Trust" under the couple's "community property revocable trust."[1] The Husband's Trust divided into a credit shelter trust and a marital trust in the normal fashion.

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[1] A typical community property trust provides as follows: At the death of the first spouse to die, all of his or her interest in the couple's community property, together with his or her separate property, will be set aside as one "bucket." From this bucket, debts, taxes and expenses of administration on account of the first spouse's death are paid. The other "bucket" is the surviving spouses interest in the community property, together with the surviving spouse's separate property. This "Surviving Spouse's Trust" continues as a revocable trust as to the surviving spouse; no part of the surviving spouse's trust can be used to give effect the testamentary plan of the first deceased spouse.

The trustees of Husband's Trust after his death were Wife and a corporate trustee. Wife's interest in the community property IRA was allocated to the "Wife's Trust," which was a revocable trust as to the surviving spouse.[2] Thereafter, Wife and the trustees exchanged community property interests in the IRA, so that the Wife's Trust received Husband's one-half interest in the IRA in exchange for Wife's interest in other community property having an equivalent value. Thus, 100% of the IRA was part of Wife's Trust, which was a revocable trust as to Wife.

The IRS ruled that Wife could roll over the IRA out of Wife's Trust to create an IRA in her name. That is not a surprising result, once the IRA reached the Wife's Trust. The significance of the ruling is that (a) getting the IRA to the Wife's trust was not an event that was in Wife's unilateral control (see Section F above); and (b) the IRS recognized the validity of a state property law exchange of community property interests involving an IRA. The IRS went out of its way to state that it did not have a dog in the fight when it comes to state-law governed post-mortem allocations of community property rights in IRAs.

L. Effect of Divorce on IRA Beneficiary Designation

(1) The Problem Stated. Suppose Husband has an IRA and names Wife as his beneficiary. Sometime later, they divorce. Husband dies, survived by Wife, without having removed Wife as the beneficiary. Who gets the IRA?

(2) No Present Solution.

(a) F.S. 732.507 automatically revokes the interest of a divorced spouse in a will, and F.S. 737.106 does the same thing for revocable (but not irrevocable) trusts.

(b) No Florida statute revokes the interest of a divorced spouse in an IRA where the parties' divorce decree or settlement is silent. Florida cases addressing the issue have uniformly held that the divorced spouse is entitled to take the IRA in accordance with the beneficiary designation. *See, e.g., Smith v. Smith*, 919 So. 2d 525 (Fla. 5th DCA 2006) (IRA and life insurance beneficiary); *Luscz v. Lavoie*, 787 So. 2d 245 (Fla. 2nd DCA 2001) (IRA beneficiary); *Cooper v. Muccitelli*, 661 So. 2d 52 (Fla. 2nd DCA 1995) *aff'd*, 682 So. 2d 77 (1999) (life insurance beneficiary).

(3) Help is on the Way.

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[2] In a community property trust the trustees and the surviving spouse together have the power to manage both halves of the community property. The trustees of the first deceased spouse's community property can make non-pro rata distributions of all items of community property, including the surviving spouse's interest in it; all that matters is that the surviving spouse and the deceased spouse's beneficiaries come out, in terms of dollars received, the same as with a pro rata distribution. Of course, this is an oversimplification.

(a) In Judge Blue's dissenting opinion in *Luscz*, the Judge remarks that "the legislature may wish to consider enacting a law similar to sections 732.507 and 737.106 to cover assets passing outside an estate or trust." *Luscz*, 787 So. 2d 245, 250, fn 4.

(b) The RPPTL Section has proposed legislation, which is currently working its way through both chambers of the Florida legislature, that would automatically revoke the interest of a divorced spouse in IRAs, life insurance, and annuities. If enacted, the new law would be codified as Section 732.703, Florida Statutes. The new statute would protect payors without knowledge of the account owner's divorce by allowing payors to conclusively rely without liability on (i) a statement of the decedent's marital status appearing on a death certificate; and (ii) where the death certificate is silent on the decedent's marital status, on affidavits furnished by persons appearing to be entitled to the account proceeds based upon an application of the statutes.

L. What if the IRA Owns Annuities?

Be sure that you designate beneficiaries for the IRA **AND** for each of the annuities in the IRA, and either (1) the beneficiary of the annuity is the IRA (this is the easiest if the annuity provider will permit); or (2) the beneficiary of the annuity is the same as the beneficiary of the IRA. Also, be aware that settlement options for annuities may be contractually restricted to permit post-mortem payouts that are *less* generous than what the law may otherwise allow.

CIRCULAR 230 DISCLOSURE:

Any tax advice contained in these materials was not intended or written by the author to be used, and such advice cannot be used, by anyone to avoid tax-related penalties under the Internal Revenue Code, or to promote, market or recommend to another any tax-related matter addressed herein. Before relying on any tax advice contained herein, a taxpayer should seek advice based upon his or her particular circumstances from an independent tax advisor.

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