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How to Draft Trusts to Own Retirement Benefits

Keith A. Herman

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How to Draft Trusts to Own Retirement Benefits

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PART I – BACKGROUND

INTRODUCTION

In the United States the amount of wealth in retirement accounts continues to increase – from \$11.6 trillion in 2000¹ to \$20.9 trillion as of June 30, 2013.² It is important for estate planning attorneys, accountants, and financial advisors to understand the special rules applicable to these accounts. As retirement accounts pose unique issues that often must be addressed with special provisions in wills and trusts, it is essential to pay close attention to these assets when designing and implementing an estate plan. The best-designed estate plan can be a disaster if the client's primary asset is a retirement account and the estate plan was not tailored appropriately. Tailoring an estate plan to a retirement account involves a careful analysis of who should be the primary and contingent beneficiary.

For a variety of reasons, a trust is often considered as beneficiary of a retirement account. Most recently this has come to attention because of the U.S. Supreme Court's decision that *inherited* IRAs are not protected from bankruptcy.³ The safest way to protect an IRA from the claims of the beneficiary's creditors is to leave the IRA to a spendthrift trust. As you can never be sure whether the beneficiary will eventually have creditor issues, using a trust to ensure creditor protection is almost a no-brainer. To ensure optimal tax results, a trust named as beneficiary of a retirement account should contain special language.

Congress enacted tax rules granting retirement accounts certain income tax advantages to encourage Americans to save for their retirements, but they did not want retirement accounts to be used as income tax exempt vehicles to pass on wealth to the next generation. The compromise is that the assets in a retirement account grow income tax free, but the account owner must generally begin taking money out of the account at age 70½. The amount required to be withdrawn from the retirement account each year is called the required minimum distribution ("RMD"). The penalty for failing to take an RMD is an astounding 50% of the amount not withdrawn.

The focus of this article is the RMD rules found in Section 401(a)(9) of the Internal Revenue Code (the "Code") and how those

¹ 2013 *Investment Company Fact Book*, INVESTMENT COMPANY INST. 114, Fig.7.4 (53d ed. 2013), <http://www.icifactbook.org>.

² *Retirement Assets Total \$23.0 Trillion in Fourth Quarter 2013*, INVESTMENT COMPANY INST. (Mar. 26, 2014), http://www.ici.org/research/stats/retirement/ci.ret_13_q4.print.

³ Lester B. Law & Bryan D. Austin, *Inherited IRAs, Tragedy or Planning Opportunity—Clark v. Rameker*, PROB. & PROP., Sept./Oct. 2014, 20; *Clark v. Rameker*, 134 S.Ct. 2242 (2014).

rules apply to trusts named as beneficiaries of defined contribution plans. The same RMD rules that apply to 401(a) qualified plans (i.e., 401(k)s) also apply to 403(b)s, IRAs, SEP IRAs, SIMPLE IRAs, Keoghs, 457 plans, governmental plans, and church plans.⁴ All of these accounts are referred to herein as “retirement accounts.” The account owner is the original owner/participant of the retirement account, whereas the beneficiary is who inherits the account after the account owner’s death.

Many defined benefit plans and annuities are also qualified plans subject to RMD rules, but these rules are different than those for defined contribution plans such as IRAs and 401(k)s and are not discussed in this article.⁵ As explained in more detail below, Roth IRAs are subject to the RMD rules only after the account owner’s death.⁶ Commercial (nonqualified) annuities are not subject to these 401(a)(9) RMD rules, but are subject to similar rules.⁷

Although the final regulations issued in 2002⁸ clarified many of the rules involving retirement accounts, the rules applicable to trusts remain vague. The trust rules are difficult to understand without an understanding of the basic RMD rules. The first part of this article describes these basic RMD rules. The second part explains how the rules are applied to trusts. The last section gives practical advice on structuring the most common trusts – credit shelter trusts, marital trusts, lifetime trusts for children (or other beneficiaries), and special needs trusts.

WHY RETIREMENT ACCOUNTS ARE UNIQUE – INCOME TAXES

In general, the receipt of inherited property is not subject to income tax.⁹ The major exception to this rule is retirement accounts, as these accounts represent income that has not been previously taxed. After an

⁴ Treas. Reg. § 1.401(a)(9)-1 (qualified plans); *id.* § 1.408-8, Q&A (1)(a), Q&A (2) (IRAs); *id.* § 1.457-6(d) (457 plans); *id.* § 1.403(b)-3(a)(6), -6(e) (403(b) plans); *id.* Tax Management Portfolio, Church and Governmental Plans, No. 372-4th, Section III.F.9 (governmental and church plans).

⁵ Treas. Reg. § 1.401(a)(9)-6.

⁶ *Id.* § 1.408A-6, Q&A (14)(b).

⁷ There are no “see-through” trust rules for annuities, like there are for retirement accounts. For maximum income tax deferral you must name an individual (or a grantor trust) as beneficiary. I.R.C. § 72(s)(4); *See* Brent W. Nelson, *Navigate the Parallel Tax Rules of IRAs and Annuities*, 39 EST. PLAN. MAG. no. 4, Apr. 2012, at 1, available at http://www.swlaw.com/assets/pdf/news/2012/04/01/NavigateTheParallelTaxRulesOfIRAsAndAnnuities_Nelson.pdf; *but see* James G. Blase & Mimi G. Sharamitaro, *Consider the MAT*, 2010 TR. & EST. 38, 38.

⁸ *See generally* Treas. Reg. §§ 1.401(a)(9)-0 to -9; *see also* Treas. Reg. § 54.4974-2. The final regulations apply for determining RMDs for calendar years beginning after January 1, 2003. *See* Treas. Reg. § 1.401(a)(9)-1.

⁹ *See* I.R.C. § 102(a).

account owner's death, income tax will be due on the amount withdrawn from the account owner's retirement account.¹⁰ The faster money is withdrawn from the account the faster it is taxed. As retirement accounts are income tax exempt entities, the goal is to leave assets in the account for as long as possible to take full advantage of tax-deferred growth. *When dealing with retirement accounts, the primary goal is to allow the account owner's beneficiaries the opportunity to defer these income taxes for as long as possible.*

There are a number of instances where income tax deferral is not important, such as when the beneficiary will withdraw the entire account upon the account owner's death for an immediate need or when the size is so small that a withdrawal of the entire account will not cause a substantial amount of additional income tax. If the beneficiary is near the account owner's age and the account owner is over age 70 1/2, then the identity of the beneficiary will not have a significant effect on how quickly the retirement account assets will be subjected to income tax, as the assets must be withdrawn over the same time period whether or not the beneficiary is a "Designated Beneficiary" (as explained later).¹¹ Finally, income tax deferral is not an issue if the account owner names only charitable organizations as beneficiaries, as the income of charitable organizations is not subject to tax.¹²

RMDs DURING ACCOUNT OWNER'S LIFETIME

The RMD rules specify how much an account owner (and after the account owner's death, the beneficiary) is required to annually withdraw from a retirement account.¹³ During life, the account owner must generally begin taking withdrawals by April 1 of the year after the account owner reaches age 70 1/2.¹⁴ However, for qualified plans and 403(b)s, if the account owner retires after 70 1/2, then the RMDs do not have to begin until the calendar year the account owner retires from employment (this rule does not apply to employees who own 5% or more of the business employing them).¹⁵ This date is referred to as the required beginning date ("RBD"). After the RBD, the RMD is calculated based on an IRS table that takes into account the account owner's life expectancy.¹⁶

¹⁰ See *id.* § 402(a).

¹¹ See discussion *infra* Part I *Distributions After Death if a Non-Spouse is Beneficiary*.

¹² See I.R.C. § 501(a), (c)(3).

¹³ See *id.* § 401(a)(9).

¹⁴ See *id.* §§ 401(a)(9)(C), 408(a)(6).

¹⁵ See *id.* § 401(a)(9)(C); Treas. Reg. § 1.403(b)-6(e)(3).

¹⁶ Treas. Reg. § 1.401(a)(9)-5, Q&A (1).

THE THREE IRS LIFE EXPECTANCY TABLES

To calculate RMDs, there are two IRS tables that can apply while the account owner is alive, but only one table that applies after the account owner's death.

During Account Owner's Life – Uniform Lifetime Table/Joint and Last Survivor Table. While the account owner is alive, one always uses the "Uniform Lifetime Table" contained in Treasury Regulation § 1.401(a)(9)-9(A-2) (see Exhibit E), unless the account owner's sole beneficiary is his/her spouse who is *more than* ten years younger. With a ten year younger spouse, one uses the "Joint and Last Survivor Table" in Treasury Regulation § 1.401(a)(9)-9(A-3). The Uniform Lifetime Table is actually the joint life expectancy of the participant and a hypothetical ten years younger spouse. Under this table, the participant will never exhaust the retirement account if only the RMD is taken each year. By contrast, a beneficiary who takes RMDs under the Single Life Table is guaranteed to exhaust the account by the time the beneficiary reaches his/her late 80s.

To calculate the RMDs *during life*, one goes back to the table each year and finds the new divisor ("recalculation method").

After Account Owner's Death – Single Life Table. After the account owner's death, the beneficiary uses the "Single Life Table" found at Treasury Regulation § 1.401(a)(9)-9(A-1) (see Exhibit F), except for the RMD for the year of the account owner's death¹⁷ and except when the 5-year rule applies. One does not use any table with the 5-year rule, one simply must withdraw everything from the account before December 31 of the calendar year that contains the fifth anniversary of the account owner's date of death.

To calculate the RMDs for the account owner's beneficiary, one only uses the table once—to determine the divisor for the beneficiary's age in the calendar year after the year of death (unless the deceased account owner's surviving spouse is the "sole beneficiary"). For each subsequent year, simply subtract one from the previous year's divisor to determine the new divisor (the "reduce by one method"). See Exhibit H for a sample calculation.

If the deceased account owner's surviving spouse is the "sole beneficiary" then the spouse uses the recalculation method with the Single Life Table and goes back to the table each year to determine the new divisor.¹⁸ The spouse is the "sole beneficiary" if the spouse is individu-

¹⁷ The RMD for the year of the account owner's death is the same amount the account owner would have had to take if still alive. See Treas. Reg. §1.401(a)(9)-5, Q&A (5).

¹⁸ Treas. Reg. § 1.401(a)(9)-5, Q&A (5)(c)(2).

ally named as the only beneficiary or is the beneficiary of a conduit trust. Contingent beneficiaries are irrelevant to this determination. If separate accounts are established, then the spouse must only be the sole beneficiary of that particular separate account. Assume Wife names Husband as beneficiary of her IRA. Husband does not rollover the IRA. Wife dies in 2013 at age 72 when Husband is age 75. Husband is required to take his first RMD by December 31, 2014. Husband's RMD in 2014 will be the December 31, 2013 IRA account balance divided by 12.7, the life expectancy of a 76 year old from the Single Life Table. In 2015, Husband divides the December 31, 2014 account balance by 12.1, the life expectancy of a 77 year old, and so on for each subsequent year.

RMDs AFTER ACCOUNT OWNER'S DEATH IF THE SPOUSE IS A BENEFICIARY

A. When a Spousal Rollover is Available

If the account owner's spouse is named *outright* as the primary beneficiary, then the spouse may roll over the retirement account into his/her own IRA. A rollover is also available if the spouse is a beneficiary of a *trust* and has the right to distribute the assets to him/herself without anyone's permission, and actually distributes the retirement account to him/herself. This includes when the spouse has the right to withdraw all of the trust assets or if the trust allows distributions to the spouse based on a standard *and* the spouse is the sole trustee.¹⁹

The surviving spouse can roll over the account if it is payable to the *estate*, as long as estate assets are payable directly to the spouse, the spouse is the sole executor, and the spouse actually distributes the retirement account to him/herself from the estate.²⁰ The rollover is also available if (1) the beneficiary is the estate, (2) the will leaves the residuary estate to a trust for the surviving spouse, (3) the spouse is the sole trustee of the trust, (4) the spouse is the sole executor, and (5) the spouse distributes the retirement account to him/herself under the terms of the trust (after first allocating the retirement account to the trust from the estate as executor).²¹

Benefits of Spousal Rollover

Spouses can usually obtain the most favorable income tax results by utilizing the spousal rollover. A surviving spouse is the only person who can roll over an inherited retirement account into his/her own IRA and

¹⁹ PLR 200935045 (June 1, 2009); PLR 200934046 (May 26, 2009).

²⁰ PLR 200406048 (Nov. 13, 2003).

²¹ See PLR 200136031 (June 12, 2001).

treat it as the spouse's own IRA.²² By rolling over the account, the surviving spouse can defer withdrawals from the account until the spouse turns 70 ½ (any other beneficiary must begin taking withdrawals the year after the account owner's death). In addition, the spouse can name his/her own beneficiaries of the IRA that may use a life expectancy payout. When other beneficiaries die, the RMD continues to be based on the deceased beneficiary's life expectancy. As explained *infra* in the *Non-Spouse Rollovers* Section, non-spouses may roll over certain qualified plan accounts, but the rollover will be treated as an inherited IRA.²³

B. Spouse is Sole Beneficiary but Does Not Rollover

If the surviving spouse is named outright as the primary beneficiary or is the current beneficiary of a conduit trust (as explained below),²⁴ and the spouse does not roll over the account, then the spouse is the "sole beneficiary." The spouse's RMD will be based on the spouse's life expectancy found in the Single Life Table, but not reduced by one each year. Instead, the spouse returns to the Single Life Table each year under the recalculation method and redetermines the spouse's new life expectancy.²⁵ Distributions to the surviving spouse as sole beneficiary must begin by December 31 of the calendar year following the year of the first spouse's death, unless the first spouse died before 70 ½.

If the first spouse dies before age 70 ½, the surviving spouse must begin taking distributions by December 31 of the *later* of (1) the year following the year in which the first spouse died or (2) the year in which the first spouse would have reached age 70 ½.²⁶

There are at least two situations where it may be preferable for the surviving spouse *not* to do a rollover and instead receive the benefits as an *inherited* retirement account. If the younger spouse dies first before 70 ½ and the surviving spouse is over 70 ½, then distributions would have to begin immediately if the survivor rolled over the account. However, if the survivor does not roll over the account, then distributions are not required to begin until the younger spouse would have turned 70 ½. The surviving (older) spouse should consider deferring the rollover until the year before the first spouse would have turned 70 ½ to avoid taking any RMDs as beneficiary. In the year before the deceased spouse would have turned 70 ½, the survivor should then roll over the ac-

²² See I.R.C. § 402(c)(9) (qualified plans); I.R.C. § 408(d)(3)(C)(ii) (IRAs).

²³ See *infra* Part I *Non-Spouse Rollovers*.

²⁴ See *infra* Part II *Conduit Trusts as a Safe Harbor*.

²⁵ See Treas. Reg. § 1.401(a)(9)-5, Q&A (5)(c)(2); see *supra* Part I *The Three IRS Life Expectancy Tables*.

²⁶ I.R.C. § 401(a)(9)(B)(iv)(I); Treas. Reg. § 1.401(a)(9)-3, Q&A (3)(b).

count.²⁷ The spousal rollover can be done at any time—there is no deadline.²⁸

If the surviving spouse is under age 59 ½ and does a rollover, then he/she will incur a 10% penalty for taking distributions from the rolled over account before age 59 ½. If the surviving spouse anticipates needing this money to live on, then he/she should consider taking distributions as an inherited account, as there is no 10% penalty on early distributions from an inherited account.²⁹

DISTRIBUTIONS AFTER DEATH IF A NON-SPOUSE IS BENEFICIARY

If someone other than the spouse is the beneficiary, the beneficiary's RMD depends on whether there is a "Designated Beneficiary" of the account, as that term is specifically defined in the regulations.³⁰ Although individuals are Designated Beneficiaries, estates, states, charities, and business entities are not Designated Beneficiaries.³¹

If there is a Designated Beneficiary and the account owner died *before* the account owner's RBD, then the beneficiary's RMD is the beneficiary's life expectancy as found in the Single Life Table, determined using the beneficiary's age in the calendar year after the calendar year of the account owner's death.³² If there is a Designated Beneficiary and the account owner died *after* the account owner's RBD, then the beneficiary's RMD is based on the longer of the (i) beneficiary's life expectancy from the Single Life Table, based on the beneficiary's age in the calendar year after the calendar year of the account owner's death or (ii) account owner's life expectancy as found in the Single Life Table, using the account owner's age in the calendar year of the account owner's death (not the year after death as with the other rules above).³³

If there is *no* Designated Beneficiary and the account owner died *before* the account owner's RBD, then the beneficiary must withdraw all of the retirement account within 5 years of the account owner's death (by December 31 of the calendar year that contains the fifth anniversary of the account owner's date of death).³⁴ If there is *no* Designated Beneficiary and the account owner died *after* the account owner's RBD, then the beneficiary's RMD is calculated using the account owner's life expectancy in the Single Life Table, using the account owner's age in the

²⁷ See PLR 200936049 (Sept. 4, 2009).

²⁸ See PLR 9311037 (Dec. 22, 1992).

²⁹ I.R.C. § 72(t)(2)(A)(ii).

³⁰ Treas. Reg. §§ 1.401(a)(9)-4, -5.

³¹ *Id.* § 1.401(a)(9)-4, Q&A (3).

³² *Id.* § 1.401(a)(9)-5, Q&A (5)(b).

³³ *Id.* § 1.401(a)(9)-5, Q&A (5)(a).

³⁴ *Id.* § 1.401(a)(9)-3, Q&A (4)(a)(2); *id.* 1.401(a)(9)-5 Q&A (5)(b).

calendar year of the account owner's death (not the year after death) under the reduce by one method.³⁵

The beneficiary may withdraw more than the RMD, but the beneficiary must withdraw at least the RMD each year to avoid a penalty. When a beneficiary takes his/her RMD based on his/her life expectancy it is often referred to as a "stretch."³⁶ Although life expectancy payouts in IRAs are common, not all IRAs offer this option. Most qualified plans do not allow a life expectancy payout option, as they typically require a lump sum distribution upon death or a five-year payout.³⁷ However, a non-spouse rollover can correct this problem.

NON-SPOUSE ROLLOVERS

A non-spouse Designated Beneficiary may rollover a qualified plan account into an IRA by a trustee-to-trustee transfer.³⁸ This rollover is not as favorable as the spousal rollover, as the non-spouse rollover is treated as an inherited IRA, not as the non-spouse's contributory IRA.³⁹ *The only benefit to the non-spouse rollover is the ability to transfer a qualified plan account that does not allow a life expectancy payout to an IRA that does allow a life expectancy payout.* This non-spouse rollover applies to 401(a) qualified plans, 403(b) plans, and governmental 457(b) plans.⁴⁰ Non-governmental 457(b) plans may not be rolled over by a non-spouse.

The IRS issued two clarifications of this law. On January 10, 2007 it issued Notice 2007-7, and on February 13, 2007 it issued a special edition of Employee Plans News to respond to the confusion caused by the Notice. To use a life expectancy payout the rollover must be completed by the end of the calendar year after the year of death, and the first required distribution must also be taken by this same date.⁴¹ If the rollover is not completed by the deadline, the beneficiaries must take distributions according to any plan rules that are more restrictive than a life expectancy payout, such as a 5-year payout.⁴² Second, the amount of the beneficiary's first RMD (and any other undistributed RMDs) cannot

³⁵ Treas. Reg. § 1.401(a)(9)-5, Q&A (5)(a)(2), (c)(3).

³⁶ NATALIE B. CHOATE, LIFE AND DEATH PLANNING FOR RETIREMENT BENEFITS § 1.5.01, at 60 (Ataxplan Publ'n, 7th ed. 2011).

³⁷ *Id.* § 1.5.10, at 82.

³⁸ I.R.C. § 402(c)(11).

³⁹ *Id.* § 402(c)(11)(A).

⁴⁰ *Id.* §§ 402(c)(11)(A), 403(b)(8)(A), 457(e)(16)(A)-(B).

⁴¹ I.R.S. Notice 2007-7, 2007-5 I.R.B. 398; IRS, *Direct Rollovers to Nonspouse Beneficiaries - Clarification of Notice 2007-7*, EMPLOYEE PLANS NEWS, Feb. 13, 2007.

⁴² I.R.S., *Direct Rollovers to Nonspouse Beneficiaries - Clarification of Notice 2007-7*, EMPLOYEE PLANS NEWS, Feb. 13, 2007.

be rolled over.⁴³ Third, the rollover account must be properly titled identifying both the deceased account owner and the beneficiary.⁴⁴ Contrary to this Notice, it is now clear that qualified plans must allow non-spouse rollovers.⁴⁵

ROTH IRAS

Due to the elimination of the \$100,000 income limitation on who can convert a traditional IRA to a Roth IRA in 2010 and future years, there may be more large Roth IRAs coming soon.⁴⁶ The RMDs explained above do not apply to Roth IRAs while the account owner is alive, but RMDs are required after the account owner dies (unlike traditional IRAs, the contributions to a Roth IRA have already been taxed).⁴⁷ The RMD rules apply to the beneficiaries of a Roth IRA as if the account owner had died before his RBD.⁴⁸

Unlike traditional IRAs, qualified distributions from Roth IRAs are not subject to income tax.⁴⁹ However, it is still important to optimize how long beneficiaries of a Roth IRA can defer withdrawals so the assets in the account can continue to grow income tax free. Therefore, the advice herein for qualifying the beneficiary of a traditional IRA as a “Designated Beneficiary” also applies to Roth IRAs. In addition, the benefits of a spousal rollover also apply to Roth IRAs.

There are several differences with Roth IRA beneficiaries. Think carefully before naming a charity as beneficiary of a Roth IRA, as pre-paying income taxes on assets being left to an income tax-exempt charity is not tax-efficient. Compared to a traditional IRA, it is more tax-efficient to name grandchildren as beneficiaries of a Roth IRA, as no generation-skipping transfer (“GST”) tax exemption will be wasted on the payment of income taxes – as would be the case with a traditional IRA.

As Roth IRA distributions are not subject to income taxes, some commentators suggest that a Roth IRA is an excellent growth asset with which to fund a credit shelter trust. However, as discussed later, there are serious drawbacks to using a credit shelter trust as the beneficiary of any retirement account, including a Roth IRA.⁵⁰

⁴³ I.R.S. Notice 2007-7, 2007-5 I.R.B. 395, 398.

⁴⁴ *Id.* at 397.

⁴⁵ I.R.C. § 402(c)(11), (f) (effective as of 2010).

⁴⁶ *See id.* § 408A(c)(3)(A)-(B).

⁴⁷ *Id.* § 408A(c)(5); Treas. Reg. § 1.408A-6, Q&A (14)(a).

⁴⁸ Treas. Reg. § 1.408A-6, Q&A (14)(b).

⁴⁹ I.R.C. § 408A(d)(1).

⁵⁰ *See infra* Part III *Credit Shelter Trusts*.

ROTH 401(K)S AND 403(B)S

Account owners also have the option of contributing to a Roth 401(k) or 403(b) if the account owner's employer has such a plan.⁵¹ These are sometimes referred to as designated Roth accounts ("DRACs"). A DRAC is treated like a 401(k)/403(b) except that contributions to the account are not excluded from gross income, and qualified distributions from the account are tax-free. For example, DRACs are subject to the same lifetime and post-death RMDs as 401(k)s. However, rolling over the DRAC into a Roth IRA can stop the lifetime RMDs.⁵² The advice for naming beneficiaries of Roth IRAs, described above, also applies to DRACs.

SEPARATE ACCOUNTS AND MULTIPLE BENEFICIARIES

If there are multiple beneficiaries of a retirement account, it is deemed to have no Designated Beneficiary, unless *all* of the beneficiaries are individuals.⁵³ If all of the beneficiaries are individuals, then the RMD is based on the life expectancy of the oldest beneficiary.⁵⁴

However, if separate accounts are "established" for multiple beneficiaries prior to December 31 of the year after the calendar year of the account owner's death, then the RMD rules will apply separately to each such separate account.⁵⁵ A separate account allows one to calculate the RMD based on the life expectancy of the oldest beneficiary of such separate account (and allows one to ignore a non-individual beneficiary of a different account). To establish separate accounts the beneficiaries' interests must be fractional (i.e. not pecuniary). In addition, some affirmative act must establish the separate accounts, such as a physical division of a single account into completely separate accounts or using separate account language on the beneficiary designation form. Whenever possible, it is best to create the separate accounts with appropriate language directly on the beneficiary designation form.⁵⁶

SEPARATE ACCOUNTS FOR TRUSTS

The IRS takes the position that separate account treatment is not available when a single trust is named as beneficiary.⁵⁷ If a revocable

⁵¹ I.R.C. § 402A.

⁵² Treas. Reg. § 1.401(k)-1(f)(3); *id.* § 1.402A-1, Q&A (5)(a).

⁵³ *Id.* § 1.401(a)(9)-4, Q&A (3).

⁵⁴ *Id.* § 1.401(a)(9)-5, Q&A (7)(a)(1).

⁵⁵ *Id.* §§ 1.401(a)(9)-4, Q&A (5)(c), -8, Q&A (2)(a)(2).

⁵⁶ *See infra* Exhibit A.

⁵⁷ Treas. Reg. § 1.401(a)(9)-4, Q&A (5)(c) ("[T]he separate account rules under Q&A-2 of section 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."); *see also* PLR 200432029 (May 12, 2004).

trust is named as the beneficiary of a retirement account, then the RMDs for all separate trusts created under the revocable trust will be based on the oldest beneficiary of any of the separate trusts, not the beneficiary of the separate trust at issue.⁵⁸ One should name the separate trusts to be created, as opposed to naming the funding trust, directly on the beneficiary designation form.⁵⁹ For example, instead of naming the “John T. Smith Revocable Trust” as the beneficiary, one should consider the language in Exhibit A.

ELIMINATING UNWANTED BENEFICIARIES PRIOR TO SEPTEMBER 30

The deadline for determining the initial beneficiaries of a retirement account is the date of the account owner’s death. However, between the account owner’s death and September 30 of the following year, troublesome or non-individual beneficiaries may be removed by disclaiming the interest (pursuant to a disclaimer that satisfies Code Section 2518), creating separate accounts, or distributing their benefits outright to them.⁶⁰ A beneficiary of a trust who dies before the September 30 deadline should also be ignored.⁶¹

PART II – TRUSTS

REASONS TO NAME A TRUST AS BENEFICIARY

To avoid unneeded complexity, an individual is the best choice as the beneficiary of a retirement account. However, in many situations a trust must be named as beneficiary, such as when (i) the beneficiary is a special needs child that relies on government benefits; (ii) the beneficiary is a second spouse that the client wants to have limited access to the trust principal; (iii) the beneficiary is a minor; (iv) the beneficiary is a spendthrift or has substance abuse problems; and (v) when retirement account assets will be used to fund a credit shelter trust.⁶² In these situations the client may decide the reason for the trust outweighs the lost income tax deferral or may choose to structure the trust as a Designated Beneficiary as explained below.

Even if one of these reasons is not present, a trust may still be the best choice as the beneficiary of a retirement plan. Trusts can provide a

⁵⁸ PLR 200235038 (June 4, 2002).

⁵⁹ See PLR 200537044 (Mar. 29, 2005); see *infra* Exhibit A.

⁶⁰ Treas. Reg. §1.401(a)(9)-4, Q&A (4)(a).

⁶¹ See *infra* Part II *Which Beneficiaries Must Be “Considered”*.

⁶² Funding credit shelter trusts with retirement benefits is less of an issue now that gift/estate tax portability is permanent. See *infra* Part III *Credit Shelter Trusts*.

beneficiary with many benefits, including asset protection,⁶³ divorce protection,⁶⁴ exemption from estate and GST taxes, and income tax benefits. Due to these benefits, many clients are leaving their estates to their family in “lifetime trusts” rather than outright. A “lifetime trust” contains no rights of withdrawal and never terminates. Even if a client would be comfortable with a beneficiary receiving his/her inheritance outright, a lifetime trust is often the better alternative, as the beneficiary can be named as the sole trustee with almost as much control over the trust assets as if they had received them outright. In most cases, there is almost no downside to creating a lifetime trust for a beneficiary – other than the cost of the annual income tax return. With a broad power of appointment at death and appropriate language in the trust instrument, the remainder beneficiaries can be left without any real position to challenge the primary beneficiary’s use of the trust assets.

If assets are left to a beneficiary outright, the client loses the ability to allocate GST exemption and shield the assets from estate taxes for future generations. This is not a concern for clients with sufficient non-retirement assets to fully utilize their GST exemption, but for many clients some portion of their \$5,340,000 GST exemption will be wasted if they leave their retirement assets to their children outright (as they will not have enough other assets to fully utilize their GST exemption). Depending on the size of the child’s estate and his/her remaining GST exemption, if the parent does not allocate GST exemption to the retirement assets, it could result in a GST tax at the child’s death when the assets pass to a skip person.⁶⁵

QUALIFYING A TRUST AS A “DESIGNATED BENEFICIARY”

The regulations explicitly provide that a trust must satisfy four conditions to qualify as a Designated Beneficiary: (i) the trust must be valid

⁶³ Naming a spendthrift trust as the beneficiary of a retirement account is a safer asset protection alternative than leaving the account to a beneficiary outright. Keith A. Herman, *Asset Protection Under the New Missouri Uniform Trust Code*, 62 J. Mo. B. 196, 196-97 (July-Aug. 2006). Although the retirement account may provide asset protection to the account owner, in many states it is unclear whether the asset protection of the account extends to the account owner’s beneficiaries. In addition, inherited IRAs are not protected in bankruptcy. See *supra* note 3.

⁶⁴ See Keith A. Herman, *How to Protect Assets From a Beneficiary’s Divorce*, 63 No. 5 J. Mo. B. 228, 228 (Sept.-Oct. 2007).

⁶⁵ If the child has sufficient GST exemption of his/her own to fully shield the retirement assets and all of the child’s other assets, then this is not an issue. In other words, if the child will never have more than \$5,340,000 of assets, including what the child inherits from his/her parents, then the child will have sufficient GST exemption to avoid GST taxes, assuming the estate/gift/GST tax exemptions are not reduced by Congress in the future.

under state law; (ii) the trust must be irrevocable or become irrevocable at the account owner's death; (iii) the trust beneficiaries must be identifiable; and (iv) certain documentation must be provided to the plan administrator or IRA custodian by October 31 of the year after the account owner's death.⁶⁶

If these four tests are met, then the trust is a Designated Beneficiary. Thankfully, these four conditions are easily satisfied. But remember the multiple beneficiary rules. If there are multiple beneficiaries, none are deemed to be a Designated Beneficiary, unless *all* of the beneficiaries are individuals.⁶⁷ If all of the beneficiaries are individuals, then the RMD is based on the life expectancy of the oldest beneficiary.⁶⁸ Therefore, there is in essence a fifth requirement – drafting the trust so it is possible to determine the identity of the oldest beneficiary, and ensuring only individuals are beneficiaries of the trust.⁶⁹

A trust that qualifies as a Designated Beneficiary is often referred to as a “see-through trust.” If an account owner names a see-through trust as the beneficiary and the trust has only individual beneficiaries, then the trust may make withdrawals from the account based on the life expectancy of the oldest beneficiary of the trust. In essence, the trust is ignored and the beneficiaries of the trust are treated as the beneficiaries of the retirement account.

VAGUE TRUST RULES IN THE REGULATIONS

The regulations provide two vague rules as to which contingent trust beneficiaries can be ignored. The general rule is that, with respect to determining if there is a beneficiary of the trust that is not an individual and determining who the oldest beneficiary is, a “contingent beneficiary” must be taken into account.⁷⁰ The second rule provides:

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*

⁶⁶ See Treas. Reg. § 1.401(a)(9)-4, Q&A (5).

⁶⁷ See *id.* § 1.401(a)(9)-4, Q&A (3).

⁶⁸ See *id.* § 1.401(a)(9)-5, Q&A (7)(a)(1).

⁶⁹ See *id.* § 1.401(a)(9)-4, Q&A (5)(c).

⁷⁰ *Id.* § 1.401(a)(9)-5, Q&A (7)(b).

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.⁷¹

The regulations provide that a "contingent beneficiary" must be taken into account and a "mere potential successor" beneficiary can be ignored, but the regulations do not define these terms. I believe the IRS was trying to say that if a beneficiary is only entitled to a portion of the trust, such as the annual income or a percentage of the value of the trust each year, then one must consider the remainder beneficiaries because they are guaranteed to receive a portion of the retirement account. However, if the current beneficiary is entitled to all of the trust, then you can ignore this "mere potential successor" beneficiary. The problem with this analysis is that trusts are typically drafted to provide the beneficiary with discretionary distributions of income *and* principal under a standard, such as health, education, maintenance, and support. The regulations do not clarify whether you must take into account the remainder beneficiary in this case, and if so, how remote a remainder beneficiary. Fortunately, as explained later, the letter rulings take a common sense approach to this situation.

CONDUIT TRUSTS AS A SAFE HARBOR

The regulations set forth a safe harbor trust, a "conduit trust," that has a beneficiary the IRS will treat as a Designated Beneficiary.⁷² A conduit trust requires the trustee to distribute all of the retirement account withdrawals to the beneficiary.⁷³ The example in Treasury Regulation § 1.401(a)(9)-5 specifically provides that "all amounts distributed from [the retirement account] to the trustee while [the beneficiary] is alive will be paid directly to [the beneficiary] upon receipt by the trustee[.]"⁷⁴ According to letter rulings, the trustee may use conduit trust assets to pay expenses attributable to such assets.⁷⁵ As the trust may not

⁷¹ *Id.* § 1.401(a)(9)-5, Q&A (7)(c)(1) (emphasis added).

⁷² *Id.* § 1.401(a)(9)-5, Q&A (7)(c)(3), ex. 2.

⁷³ See PLR 200537044 (Mar. 29, 2005); See *infra* Exhibit B for sample language.

⁷⁴ Treas. Reg. § 1.401(a)(9)-5, Q&A (7)(c)(3), ex. 2.

⁷⁵ PLR 200620026 (Feb. 21, 2006).

accumulate any assets withdrawn from the retirement account, the IRS allows the trust beneficiary to be treated as the oldest beneficiary of the retirement account, irrespective of the identity of the remainder beneficiaries.⁷⁶ Care should be taken to draft the beneficiary designation appropriately when using conduit trusts.⁷⁷ Although conduit trusts have the advantage of certainty, as they are specifically described in the treasury regulations, they also have a major disadvantage. A conduit trust cannot withdraw retirement account proceeds and accumulate them inside of the trust. This is often contrary to the intent of the client, who may be using a trust to prevent the retirement account assets from being distributed to the beneficiary.

Conduit trusts are useful if the client wishes to defer a beneficiary's ability to withdraw more than the RMD until the beneficiary is older than 21 (Uniform Transfers to Minors Act custodianships must terminate at 21).⁷⁸ An independent trustee may be named with the authority to withdraw the greater of the RMD each year or an amount needed for the child's health, support and education. The child may be named to take over as sole trustee at some age, or the independent trustee may continue to serve for the child's lifetime.

Conduit trusts do not work in many situations where it is important for the trustee to have the discretion to accumulate the retirement account withdrawals inside of the trust – such as with a special needs beneficiary, when the beneficiary has serious substance abuse problems, or when divorce or creditor protection is important. In these situations, an accumulation trust should be considered.

ACCUMULATION TRUSTS

A. Background

A trust that allows accumulation of retirement account withdrawals – any trust other than a conduit trust (referred to herein as an “Accumulation Trust”) – may also qualify as a Designated Beneficiary.

There is one example in the regulations that describes an Accumulation Trust (this is the only example in the regulations other than the conduit trust example).⁷⁹ In this example, the IRS determined that the only beneficiaries who counted were the spouse (the current beneficiary) and the spouse's children who were the “sole remainder beneficiaries of the trust.” Unfortunately, this provides no help because trusts do not work that way in real life. There are never “sole remainder bene-

⁷⁶ See *infra* Exhibit H for an illustration of the RMDs to a conduit trust.

⁷⁷ See *infra* Exhibit A for sample language.

⁷⁸ Unif. Transfers to Minors Act § 20 (amended 1986).

⁷⁹ Treas. Reg. § 1.401(a)(9)-5, Q&A (7)(c)(3), ex. 1.

ficiaries” of a trust. There are always contingent beneficiaries that take in the event one or more of the first line remainder beneficiaries are not then living (or not then in existence). Even if not explicitly named in the trust agreement, state law will fill in the gaps.

Fortunately, the IRS issued a series of private letter rulings issued after the final regulations became applicable that shed light on the situation. Exhibit D describes several of these rulings in detail.⁸⁰ Below is a summary of the most important points from the rulings.

B. Which Beneficiaries Must Be “Considered”

In all of the rulings described in Exhibit D, the trust qualified as a see-through Accumulation Trust – the RMDs were based on the life expectancy of the oldest trust beneficiary. Most importantly, in each ruling the IRS only considered the current beneficiaries and the first line *then living* remainder beneficiaries, *assuming those remainder beneficiaries would still be living when the current beneficiaries died*. The IRS looked at who will receive the remainder of the trust when the current beneficiary dies – based on individuals who were alive at the account owner’s death. The IRS ignored the fact that those contingent remainder beneficiaries could predecease the current beneficiary of the trust. The IRS never cited to any law on which beneficiaries must be considered and never stated the rule described above. The rulings just summarily state which beneficiaries are to be “considered.”

Interestingly, the letter rulings examine who is alive upon the account owner’s death, as opposed to who is alive on September 30 of the calendar year after the calendar year of death. One ruling determined that the spouse would continue to be the designated beneficiary (with respect to a marital trust and credit shelter trust) even if she died prior to September 30 of the calendar year after the calendar year of death.⁸¹ According to the regulations, “the employee’s designated beneficiary will be determined based on the beneficiaries designated as of the date of death who remain beneficiaries as of September 30 of the calendar year following the calendar year of the employee’s death.”⁸² If a trust beneficiary dies prior to September 30, and the deceased beneficiary’s estate is not entitled to anything from the trust after death (as is the case

⁸⁰ See *infra* Exhibit D. The rulings in Exhibit D are *not* an exhaustive list of all of the rulings analyzing whether an accumulation trust is a valid see-through trust. The final regulations became effective January 1, 2003. Private letter rulings issued before the regulations became final are not relevant.

⁸¹ PLR 200438044 (June 22, 2004).

⁸² Treas. Reg. § 1.401(a)(9)-4, Q&A (4)(a).

with almost every trust), then the deceased beneficiary should be ignored for purposes of the RMD rules.⁸³

If the remainder beneficiary of a trust is another trust, then the IRS will also consider the current and remainder beneficiaries of the second trust (but again assuming that all individuals alive at the account owner's death will also be living when the current beneficiary of the second trust dies).⁸⁴

In PLR 201203033, the IRS found that if the current beneficiary of a trust has the right to withdraw some portion of the trust assets, then all remainder beneficiaries can be ignored with respect to the portion of the trust that can be withdrawn. Unfortunately, this does not present any planning opportunities; if a client were willing to give the beneficiary the right to withdraw all of the assets, then the client would not need the trust in the first place.

The examples below illustrate the analysis in the letter rulings.

Example 1 (credit shelter trust). Father dies married to Mother. At the date of Father's death, Father and Mother had three living children (ages, 25, 30, and 40) and one living grandchild (age 5). Father names the credit shelter trust created under his revocable trust as the primary beneficiary of his IRA. The credit shelter trust allows discretionary distributions of income and principal for the support of Mother and descendants. Upon Mother's death, the remaining assets will be divided among lifetime trusts for Father's then living children (and descendants of a deceased child). The lifetime trusts provide that the beneficiary may receive income and principal for support. At the beneficiary's death, the remaining assets of the lifetime trust pass to lifetime trusts for the beneficiary's descendants, otherwise to the beneficiary's siblings. If none of Father's descendants are living at the date of Wife's death, the remaining credit shelter trust assets pass to Charity.

According to the IRS's letter ruling position, the only beneficiaries that are to be "considered" are Wife, the three children, and the grandchild. The IRS considers the trust beneficiaries who are currently eligible to receive distributions from the trust. The IRS also considers the beneficiaries who would receive the trust assets when the current trust terminates, but only to the extent those beneficiaries are alive at the date of the account owner's death. As Wife is the oldest of the five trust beneficiaries, the RMDs for the credit shelter trust are based on her life expectancy from the Single Life Table using her age in the calendar after the calendar year of Father's death. The IRS ignores the fact that Charity is a remote contingent beneficiary.

⁸³ CHOATE, *supra* note 36, § 1.8.03, at 113.

⁸⁴ PLR 201203033 (Oct. 26, 2011).

Example 2 (marital trust). Mother dies at age 80 married to Father (age 60). Father and Mother had one child (Son) who predeceased Mother. Son never had children. Mother is survived by Brother (age 90). Mother names the QTIP marital trust created under her revocable trust as the primary beneficiary of her IRA. The marital trust requires all net income to be distributed to Father, and allows discretionary distributions of principal for the support of Father. To qualify the trust for the marital deduction,⁸⁵ the marital trust also requires the trustee to withdraw all of the net income of the IRA each year and distribute it to Father. The marital trust is not a conduit trust as it does not require all withdrawals from the IRA to be paid outright to Father. Therefore, Father is not the “sole beneficiary” of the marital trust.⁸⁶ Upon Father’s death, the remaining assets (including any undistributed income for the year) pass to Brother, outright. If Brother is not living at Father’s death, the remaining assets pass to Charity.

If Brother is living at Mother’s death, then the only beneficiaries the IRS will consider are Father and Brother. The RMDs for the marital trust will be based on the life expectancy of the older of Father and Brother, as determined under the Single Life Table. The IRS ignores the fact that Brother will most likely predecease Father and the IRA will pass to Charity.

If Brother is not living at Mother’s death, then Charity will be considered a beneficiary. The marital trust will not be eligible for a life expectancy payout as the trust had a beneficiary who was not an individual. As Mother died after her RBD, the marital trust’s RMDs are based on Mother’s life expectancy as found in the Single Life Table (using her age in the calendar year of her death, not the year after her death).

Example 3 (lifetime trusts for children). Father dies unmarried with three living children (ages 25, 30, and 35) and no grandchildren. Father names his revocable trust as the primary beneficiary of his IRA. The revocable trust provides that no IRA assets can be used for debts, expenses, or taxes after September 30 of the year after Father’s death. Upon Father’s death, after the payment of debts, expenses, and taxes, all of the remaining revocable trust assets will be divided equally into separate lifetime trusts for Father’s three children. Each lifetime trust provides that the child may receive income and principal for support. At the child’s death, the remaining assets of the lifetime trust pass to lifetime trusts for the child’s then living descendants, or if none, to the child’s siblings. If none of Father’s descendants are living at a child’s death, the lifetime trust assets pass to Charity.

⁸⁵ See *infra* Part III *Qualifying for the Marital Deduction*.

⁸⁶ See *supra* Part I *Spouse Is Sole Beneficiary but Does Not Roll Over*.

The RMD for each lifetime trust will be based on the oldest then living beneficiary of the revocable trust. Under this example, the only current beneficiaries of the lifetime trusts are the three children. If a child dies with no living children, then the deceased child's trust passes to trusts for his/her siblings. Therefore, the three children are the only current beneficiaries and are also the only remainder beneficiaries the IRS will consider. As these are not conduit trusts, the result would be the same if Father had died using a beneficiary designation similar to the sample designation in Exhibit A, naming each lifetime trust directly as the beneficiary as to 1/3 of the IRA.

The analyses in the examples above are based on the IRS's current letter ruling position. However, the IRS has a history of suddenly changing their position on certain issues. Therefore, it is best to plan for the IRS becoming more aggressive in this area by using a savings clause (the most conservative approach is to use a conduit trust).

C. Savings Clauses

In PLR 200537044 the IRS approved of a trust that excluded any person who was older than the primary beneficiary. However, the trust did not preclude a non-individual from being a beneficiary of the trust.

The savings clause in PLRs 200235038 to 200235041 (these rulings were issued before the final regulations became applicable)⁸⁷ covered both categories of unwanted trust beneficiaries – older beneficiaries and non-individuals. However, the savings clause in these rulings only excluded these unwanted beneficiaries from the scope of the testamentary power of appointment; the savings language did not apply to the default trust contingent beneficiaries that would take upon a failure to fully exercise the power of appointment.

The following savings language for a lifetime trust for a child takes into account non-individual beneficiaries, older beneficiaries, and applies to both the power of appointment and default remainder beneficiaries:

Notwithstanding anything herein to the contrary, upon the Primary Beneficiary's death, the Separate Trust's interest in all Retirement Benefits and all assets derived therefrom, may not be payable, whether outright, in trust, or pursuant to the exercise of a power of appointment, to (1) any individual older than the oldest of my descendants living on the date of my death, (2) any person or entity other than a trust or an individual, or (3) any trust that may have as a beneficiary a person or entity other than an individual or an individual who is older

⁸⁷ See *supra* note 8; PLR 200235038 (June 4, 2002); PLR 200235041 (Aug. 30, 2002).

than the oldest of my descendants living on the date of my death. Any individual or entity who is disqualified as a beneficiary pursuant to the preceding sentence shall be treated as if such beneficiary was then deceased, or did not then exist.

One should keep in mind that the term “beneficiary” still has no clear meaning under the Code or regulations. One can administer the savings clause as if the only trust beneficiaries to be considered are the first line remainder beneficiaries – those who are alive at the account owner’s death and would receive the assets if the current beneficiary had predeceased the account owner. This is the position taken in the private letter rulings so far.

D. General Powers of Appointment

Often trusts contain contingent general powers of appointment to avoid GST taxes or obtain a basis step-up. The general power of appointment allows the beneficiary to appoint to his/her estate or creditors which will cause the trust to have a non-individual beneficiary. If a contingent general power of appointment is needed, then a conduit trust must be used.

MODIFYING THE TRUST OR BENEFICIARY DESIGNATION AFTER THE ACCOUNT OWNER’S DEATH

A. Modifying the Trust by Court Order

It would be helpful if one could turn a non see-through trust into a conduit trust or Accumulation Trust after the account owner died. In private letter rulings before 2010, the IRS respected court modifications of a trust after the account owner’s death for income tax purposes with no analysis of this issue.⁸⁸ However, PLR 201021038 now seems to represent the IRS’s current position on this issue.

In PLR 201021038, assets were to be divided into lifetime trusts for the account owner’s children.⁸⁹ Each child had a lifetime power to appoint the assets of the child’s lifetime trust to certain persons and entities, including charities. The lifetime trusts were *modified by court order after the account owner’s death to qualify them as conduit trusts and remove charities as potential appointees*. The IRS stated that the modification did not apply retroactively to the account owner’s date of death, as a judicial reformation of a trust “is not effective to change the tax conse-

⁸⁸ See PLR 200620026 (Feb. 21, 2006) (trust modified by court order to become a conduit trust); PLR 200608032 (Nov. 30, 2005), PLR 200218039 (Feb. 4, 2002) (trust modification by court order to become an Accumulation Trust), PLR 200522012 (June 3, 2005).

⁸⁹ PLR 201021038 (June 4, 2002).

quences of a completed transaction,” unless the reformation is specifically authorized by the Code (such as in the case of charitable remainder trusts). As charities were among the class under the lifetime powers of appointment, the lifetime trusts were not designated beneficiaries and the RMDs for each trust were to be based on the account owner’s remaining life expectancy (the account owner died after age 70 $\frac{1}{2}$).

The analysis in PLR 201021038 is questionable. A good argument can be made that September 30 of the year after the account owner’s death is the date of the taxable event at issue, because this is the date that the beneficiaries of the retirement account are determined (prior to this date beneficiaries can be removed by death, disclaimer, creating separate accounts, or distributing their benefits outright to them).⁹⁰ The IRS generally respects court modifications that occur before the taxable event.⁹¹ If a trust is modified after an account owner’s death but prior to September 30 of the year after the year of the account owner’s death, then the modification should be respected if all it does is remove existing beneficiaries (as opposed to adding beneficiaries).⁹² Nonetheless, PLR 201021038 is the IRS’s position and people must plan accordingly.

B. Modifying the Beneficiary Designation Form

In two rulings prior to 2007, the IRS allowed a beneficiary designation form to be reformed.⁹³ However, PLR 200742026 now seems to express the IRS’s current position on the issue.

In PLR 200742026, the IRS refused to be bound by a court-sanctioned modification of an account owner’s beneficiary designation almost two years after the account owner’s death.⁹⁴ The account owner died with no living beneficiary so the IRA was payable to the owner’s estate. The owner’s only child tried to have the beneficiary designation modified retroactively to the date of death to name the child directly on the form. The IRS pointed out that after the account owner’s death one can only remove existing beneficiaries, not add new ones. Even then, it must be done prior to September 30 of the year after the calendar year of the account owner’s death. The IRS’s analysis in PLR 200742026 seems correct.

⁹⁰ Treas. Reg. § 1.401(a)(9)-4, Q&A (4)(a). See *supra* Part I *Eliminating Unwanted Beneficiaries Prior to September 30th Section*.

⁹¹ Rev. Rul. 73-142, 1973-1 C.B. 405, 406.

⁹² Treas. Reg. § 1.401(a)(9)-4, Q&A (4)(a).

⁹³ CHOATE, *supra* note 36, § 4.5.05-.06.

⁹⁴ PLR 200742026 (July 23, 2007).

C. Trust Protector's Modification of the Trust

In PLR 200537044,⁹⁵ the IRS allowed a “trust protector” to amend the terms of a trust after the account owner’s death, but only after the trust protector represented that the modification was done within nine months of the account owner’s death and that the modification was “treated as a disclaimer” under state law. The IRS also pointed out that under the terms of the trust, the trust protector’s modification of the trust was effective “ab initio” and related back to the date the account owners died. It is hard to understand how a fiduciary’s modification of the trust could be treated as a disclaimer under state law when the beneficiary had no control over the modification. The attorney that represented the account owner in this ruling indicated that after the trust protector modified the trust, the trust protector then renounced the right to make future modifications. The attorney indicated that they represented to the IRS that *the trust protector’s renunciation* of the right to make future modifications was treated in the same way as a “disclaimer” under state law (California). He said that it was never asserted that the trust protector’s *exercise* of his powers was treated as a disclaimer.⁹⁶

This ruling predated PLR 201021038 whereby the IRS announced that it would not respect a change to the trust made after the account owner’s death.⁹⁷ Therefore, there is no reason to believe that modifying a trust by a trust protector would be any more effective than modifying the trust with a court order, which does not work under the IRS’s current position.

D. Summary

The bottom line is that it is best not to rely on being able to change the terms of a trust after the client dies – whether by a trust protector or a modification of the trust/beneficiary designation by court order or agreement of the beneficiaries. One should put the right terms in the trust at the beginning.

DEALING WITH THE IRA CUSTODIAN

The issue of whose life expectancy can be used in an Accumulation Trust is most likely to come up when the account owner dies and you are working with the IRA custodian. If the account is a 401(k) or another type of qualified plan, then the administrator must see that the RMDs

⁹⁵ See *infra* Exhibit D for a description of the ruling in PLR 200537044.

⁹⁶ Philip J. Kavesh, *PLR 200537044: Defective or Just Misunderstood?*, ULTIMATE EST. PLANNER, INC. (2006), http://ultimateestateplanner.com/global_pictures/PLR200537044DefectiveOrMisunderstood.pdf.

⁹⁷ See PLR 201021038 (Mar. 4, 2010).

are paid appropriately or the entire plan could be disqualified.⁹⁸ However, most qualified plans will not allow a life expectancy payout and the beneficiary will likely do a non-spouse rollover to an IRA. IRA providers are not required to calculate the RMDs for the account owner's beneficiaries. During the account owner's life, the IRA provider must report to the IRS, on Form 5498, the end of year balance of each IRA they administer and whether a RMD is required for the year.⁹⁹ The IRA provider must also calculate the RMD for the *IRA owner* or offer to calculate it for them.¹⁰⁰ An IRA custodian has no requirement to report the RMDs for *beneficiaries* of IRAs of deceased owners.¹⁰¹

Due to this confusing area of law in which we are primarily relying on private letter rulings, some IRA custodians may provide resistance to a trust being treated as a see-through trust and using a particular beneficiary as the measuring life for RMD purposes. In this situation, one can offer to provide the client with a legal opinion or move the account to an IRA custodian more willing to work with him/her. The IRA custodian needs to understand that the risk of calculating the RMD wrong falls on the taxpayer (the trust), not the IRA custodian.

IRS REVIEW OF RMDs

A retirement account owner is not required to file any income tax returns calculating the RMD. Retirement accounts are income tax exempt entities,¹⁰² but they are not required to file the same tax returns as charities. Qualified plans are required to file Form 5500 with the IRS each year, but this form does not require any information to be reported concerning a beneficiary's RMD. IRAs are not required to file any ongoing annual returns with the IRS, other than the Form 5498 explained above. Contrast this to private foundations which are required to file Form 990PF each year. The 990PF contains a detailed calculation of the minimum amount of distributions that must be made to charities the following year to avoid an excise tax.¹⁰³

To check whether RMDs are being made, the IRS would have to review the Form 5498 the IRA provider submits and then review the 1041 for the trust to see if an RMD was reported.¹⁰⁴ The 5498 does not

⁹⁸ I.R.C. § 401(a)(9).

⁹⁹ I.R.S. Notice 2002-27, 2002-18 I.R.B. 814, 815

¹⁰⁰ *Id.* at 814.

¹⁰¹ *Id.* at 815.

¹⁰² I.R.C. §501(a) (401(a) qualified plans); *Id.* § 408(e)(1) (IRAs, SEP IRAs, and SIMPLE IRAs); *Id.* § 408A (Roth IRAs); 403(b).

¹⁰³ *Id.* § 4942.

¹⁰⁴ Natalie Choate, *IRS Stepping Up IRA Enforcement*, MORNINGSTARADVISOR (September 10, 2010), <http://www.morningstar.com/advisor/t/42990159/irs-stepping-up-ira-enforcement.htm>.

show the amount of the RMD, but it lets the IRS know that an RMD is required for the year. The IRS would have to review the trust agreement and argue that that the determination of the oldest beneficiary of the Accumulation Trust is wrong.

PENALTIES FOR FAILING TO WITHDRAW THE PROPER RMD

If the IRS does audit the trust 1041 and does not agree on whose life expectancy can be used to calculate the RMDs for an Accumulation Trust, then the Trust may be subject to a penalty tax. There is a tax equal to 50% of the amount of the RMD that is not distributed during the year; the tax is reported on Form 5329.¹⁰⁵ The tax is imposed on the person/trust who was supposed to take the RMD. Form 5329 is attached to the account owner's Form 1040 (1041 for trusts). If the IRS successfully argues that an older remainder beneficiary of a trust must be counted or that there is a non-individual beneficiary of the trust (such as a charity or an estate), then the trustee will not have withdrawn enough from the retirement account to satisfy the RMD.

The penalty can be waived if it is shown to be caused by "reasonable error" and "reasonable steps" are taken to correct the shortfall.¹⁰⁶ According to Natalie Choate there are no published rulings or other IRS guidance on what will qualify as "reasonable error."¹⁰⁷ A trustee could obtain a legal opinion on how to calculate the RMDs to be used as evidence that any error in calculating the RMD was "reasonable."

STATUTE OF LIMITATIONS ON ASSESSING PENALTIES

In general, the IRS has three years after a return is filed to assess a tax.¹⁰⁸ If no return is filed, the IRS can assess a tax at any time.¹⁰⁹ With respect to the 50% penalty on an undistributed RMD, the "return" that starts the three-year statute of limitations is the Form 5329.¹¹⁰ To start the three-year statute, the 5329 must disclose enough information about the RMD "to apprise the Commissioner of the existence and nature of the item."¹¹¹ If the return underreports the tax by more than 25% (this will always be the case if the return does not show tax due because of the belief that the proper RMD was withdrawn), then there is a six year statute of limitations unless "the transaction giving rise to such tax is disclosed in the return, or in a statement attached to the return, in a

¹⁰⁵ I.R.C. § 4974(a); Treas. Reg. § 54.4974-1(a).

¹⁰⁶ Treas. Reg. § 54.4974-2, Q&A (7)(a).

¹⁰⁷ CHOATE, *supra* note 36, § 1.9.03, at 119.

¹⁰⁸ I.R.C. § 6501(a).

¹⁰⁹ *Id.* § 6501(c)(3).

¹¹⁰ Treas. Reg. § 301.6501(e)-1(c)(4); Paschall v. Comm'r, 137 T.C. 8, 15 (2011).

¹¹¹ Treas. Reg. § 301.6501(e)-1(c)(4).

manner adequate to apprise the Secretary of the existence and nature of such item.”¹¹²

One should be sure to advise the trustee of an Accumulation Trust of the benefit of filing Form 5329 each year with Form 1041 with an explanation of the RMD calculation to start the three year statute of limitations running. An alternative is to obtain a private letter ruling at the account owner’s death asking the IRS to rule on who is the oldest beneficiary of the trust.

PART III – PUTTING IT INTO PRACTICE

Consider a typical estate plan for a married couple. At the first spouse’s death, the deceased spouse’s assets fund a credit shelter trust up to the amount of the decedent’s remaining estate tax exemption and the rest passes to a qualified terminable interest property (“QTIP”) marital trust. Upon the death of the surviving spouse, all of the remaining assets pass equally to lifetime trusts for the children. The lifetime trusts are designed to provide asset protection, divorce protection, and estate tax protection (to the extent of GST exemption allocated to the trust) to the child. One child has special needs.

CREDIT SHELTER TRUSTS

A. When to Fund a Credit Shelter Trust with Retirement Assets

Before determining how to structure the credit shelter trust, the preliminary question is whether the spouse should be the primary beneficiary, outright, to take advantage of the income tax advantages of the spousal rollover, or whether the retirement account assets may be needed to fund the credit shelter trust. If the account owner has sufficient non-retirement assets to fully fund the credit shelter trust (or estate taxes are not an issue), then the spouse should be named directly as the primary beneficiary to take advantage of the income tax advantages of the spousal rollover. The spousal rollover will allow more income tax deferral and the surviving spouse can name new beneficiaries that may use a life expectancy payout after the spouse’s death.

If the account owner has a taxable estate but does not have sufficient non-retirement assets to fully utilize his or her remaining estate tax exemption, then he or she must decide between naming the spouse or the credit shelter trust as primary beneficiary of the retirement account.

This used to be a much more difficult decision because one had to choose between saving estate taxes by funding the credit shelter trust with the retirement account and saving income taxes by naming the

¹¹² I.R.C. § 6501(e)(3).

spouse as the primary beneficiary. Now that the estate/gift tax portability law is permanent, this analysis is easier.¹¹³ In most cases a client will name his or her spouse as the primary beneficiary to utilize the spousal rollover. Any estate tax exemption not utilized at the first spouse's death will be available to the surviving spouse due to estate tax portability.

However, funding the credit shelter with the retirement account will provide two advantages over relying on portability. First, the income and appreciation of the assets in the retirement account between the death of the first and second spouse will also pass estate tax free. On the other hand, any distributions from the credit shelter trust to the spouse will waste estate tax exemption. Second, by funding the credit shelter trust one can allocate the GST exemption of the first spouse to die to the credit shelter trust. The GST exemption is not portable, so any GST exemption not utilized at the first spouse's death will be wasted. This is not a tax issue for the husband and wife but an issue for the children and grandchildren. If the children eventually inherit the retirement account outright or in a trust that is not GST exempt, then there will be a GST tax at the child's death if the value of the child's total estate exceeds the child's available GST exemption.¹¹⁴ On the other hand, if the child inherits the retirement account in a GST exempt lifetime trust, then the value of the account will escape estate and GST taxes at the child's death. Unfortunately, one can never know how large the child's estate will be when he/she dies or how large the GST exemption will be at that time.

There are five main reasons to avoid naming a credit shelter trust as beneficiary of a retirement account. If the credit shelter trust is the beneficiary: (i) distributions from the retirement account must begin sooner (the year after the deceased spouse's death) than if the surviving spouse was directly named as the beneficiary if the surviving spouse is under age 70 1/2; (ii) the RMDs are larger *during* the surviving spouse's life and more must be distributed from the retirement account each year;¹¹⁵ (iii) the RMDs are larger *after* the surviving spouse's death, (iv) the trust will usually be in the highest income tax bracket,¹¹⁶ and (v) the use of trust assets to pay income taxes on the RMDs wastes estate and GST tax exemption. Another consideration is the new 3.8% Medicare tax.¹¹⁷ Sin-

¹¹³ Bruce D. Steiner, *Using Portability for Retirement Benefits*, June 2013 TR. & EST. 40, 40; see I.R.C. § 2010(c).

¹¹⁴ Assuming the account passes to a grandchild or other skip person at the child's death.

¹¹⁵ This is due to using the Single Life Table instead of the Uniform Lifetime Table. Steiner, *supra* note 114, at 41.

¹¹⁶ Trusts hit the highest income tax bracket of 39.6% at \$12,150 of income. *Id.* at 42.

¹¹⁷ See I.R.C. § 1411(a).

gle individuals are not subject to this tax unless they have \$200,000 of income (\$250,000 for married couples filing jointly), but trusts are subject to the tax if they have at least \$12,150 of income.¹¹⁸

There is no way to avoid all of these problems. In most cases, it is safest to name the spouse as the primary beneficiary but provide on the beneficiary designation form that if the surviving spouse disclaims any portion of the retirement account, the disclaimed portion passes directly to the credit shelter trust. This gives the surviving spouse a chance to review the decision after the first spouse's death, when more facts are available (such as the estate and GST tax exemption and tax rates).¹¹⁹

B. How to Structure the Credit Shelter Trust

If some portion of a retirement account may pass to the credit shelter trust, then one must consider whether a conduit trust or an Accumulation Trust is the best alternative. If retirement assets pass to a conduit credit shelter trust, then a substantial portion of the retirement account will be paid out directly to the surviving spouse.¹²⁰ This will save very few tax dollars, as most of the retirement account assets will be added to the spouse's estate just as if the spouse had been named directly as the beneficiary, but without the income tax advantages of the spousal rollover. A conduit trust is usually a bad choice for a credit shelter trust.

A better option is to name an Accumulation Trust as the primary beneficiary of the retirement account. An Accumulation Trust allows the spouse to be treated as the Designated Beneficiary of the retirement plan.¹²¹ Although the spousal rollover may not be available, a life expectancy payout option will allow distributions from the retirement account - and the associated income tax liability - to be gradually withdrawn over the spouse's life expectancy.

MARITAL TRUST

A. When to Fund a Marital Trust with Retirement Assets

Again, a spousal rollover creates the best income tax result, but if the account owner does not want his/her spouse to have outright control over all of the retirement account and there are sufficient other assets to

¹¹⁸ See *id.* § 1411(b).

¹¹⁹ See PLR 200522012 (June 3, 2005).

¹²⁰ A conduit trust for a spouse qualifies the spouse as the "sole beneficiary" and as such, the recalculation method is available. See Treas. Reg. § 1.401(a)(9)-5, Q&A (5)(c)(2), Q&A (7)(c)(3) ex. 2; This means that the account will never be fully exhausted. See *infra* Exhibit E for the percentages required to be distributed at each age; See *supra* Part I *The Three IRS Life Expectancy Tables*.

¹²¹ See PLR 200522012 (June 3, 2005).

fund the credit shelter trust (or he or she is relying on estate tax portability), then a QTIP Marital Trust may be needed. This is common in second marriage situations when a spouse wants his/her children from the first marriage to inherit the remainder of the retirement account at the surviving spouse's death.¹²² If the retirement account may pass to the Marital Trust, then the Marital Trust should be named directly as the beneficiary or use a *fractional* credit shelter/marital formula to avoid triggering gain by satisfying a pecuniary amount with IRD.¹²³ Let's look at the two options.

B. How to Structure the Marital Trust

If a conduit marital trust is used, then all of the RMDs must be distributed outright to the spouse; this may leave little left in the retirement account at the surviving spouse's death.¹²⁴ As the only reason to create the marital trust is to pass a portion of it on to the remainder beneficiaries, a conduit marital trust is usually a poor choice.

The better option is an Accumulation Trust. An Accumulation Trust allows the RMDs to be accumulated in the trust, except to the extent needed to qualify the Marital Trust for the marital deduction. As explained below, the spouse must receive all of the "income" of the retirement account. Therefore, the trustee of an Accumulation Marital Trust must withdraw the greater of the RMD and the income of the retirement account each year. The trustee must then distribute the income to the spouse at least annually. The portion of the RMD that exceeds the retirement account income may be retained in the Marital Trust.

Exhibit G illustrates the amount that may be passed on to the remainder beneficiaries from a conduit marital trust compared to an accumulation marital trust.

C. Qualifying for the Marital Deduction

If a retirement account is payable to a spouse outright, or to a general power of appointment marital trust where the surviving spouse has

¹²² A better option is to give the children a specific dollar amount of the retirement account.

¹²³ See I.R.C. § 691(a)(2); I.R.S. Chief Couns. Mem. 200644020 (Nov. 3, 2006); CHOATE, *supra* note 36, § 6.5.08, at 475-76.

¹²⁴ A conduit trust for a spouse qualifies the spouse as the "sole beneficiary" so the recalculation method is used with the Single Life Table. See Treas. Reg. § 1.401(a)(9)-5, Q&A (5)(c)(2), Q&A (7)(c)(3), ex. 2. This means that the account will never be fully exhausted unless the surviving spouse lives to 111. See the percentages required to be distributed at each age on Exhibit F. See *supra* Part I *The Three IRS Life Expectancy Tables*.

the right to withdraw all of the assets at any time, then the trust will automatically qualify for the marital deduction.¹²⁵ However, if the trust is designed to qualify for the marital deduction as a QTIP trust under Code Section 2056(b)(7) (hereinafter “Marital Trust”), then care must be taken in drafting the trust and filing the estate tax return.¹²⁶

One must take into account two requirements when retirement account assets may pass to a Marital Trust. First, the executor must make two QTIP elections on the federal estate tax return – one for the Marital Trust and another for the retirement account.¹²⁷ The IRS views the retirement account as a QTIP asset itself, as opposed to just another asset of a Marital Trust. The QTIP election is made for the retirement account by listing the retirement account and its value on Schedule M of Form 706.¹²⁸

Second, the Marital Trust must require that the spouse receive all of the income of the retirement account, in addition to receiving all of the income of the Marital Trust. It is advisable to put a retirement account marital deduction savings clause in all revocable trusts. A client could accidentally name the revocable trust or the estate as the primary beneficiary and the account could pass to a Marital Trust under the credit shelter/marital trust formula language. Consider the following:

¹²⁵ Treas. Reg. § 20.2056(b)-5(f)(6).

¹²⁶ See I.R.C. § 2056(b)(7) (“The term ‘qualified terminable interest property’ means property which passes from the decedent, in which the surviving spouse has a qualifying income interest for life, and to which an election under this paragraph applies.”). A marital trust may also be structured as a 2056(b)(5) power of appointment trust in which the surviving spouse has a *testamentary* power to appoint the trust assets to the surviving spouse’s estate (but not the right to withdraw the assets during life). In most cases you should avoid naming a 2056(b)(5) testamentary power of appointment trust as the beneficiary of a retirement account. The power to name the spouse’s estate as beneficiary may disqualify the trust from being treated as a “Designated Beneficiary” and therefore a life expectancy payout may not be available. In addition, if the account owner were willing to allow the spouse to have control over the remainder of the marital trust, then the spouse should be named, outright, as the primary beneficiary. See I.R.C. § 2056(b)(5).

¹²⁷ See Rev. Rul. 2006-26, 2006-1 C.B. 939, 941; Rev. Rul. 2000-2, 2000-1 C.B. 305, 306; PLR 9442032 (July 27, 1994); Rev. Rul. 1989-89, 1989-2 C.B. 231, 232.

¹²⁸ According to the instructions to Form 706, “You make the QTIP election simply by listing the qualified terminable interest property on Schedule M and inserting its value. You are presumed to have made the QTIP election if you list the property and insert its value on Schedule M. If you make this election, the surviving spouse’s gross estate will include the value of the qualified terminable interest property.” This is the only guidance on how to report QTIP property on the Form 706. See DEP’T OF THE TREASURY, INSTRUCTIONS FOR FORM 706, SCHEDULE M – BEQUESTS ETC. TO SURVIVING SPOUSE (MARITAL DEDUCTION), 1, 36 (2013), available at <http://www.irs.gov/instructions/i706/ch02.html#d0e5620>.

If any portion of a “qualified retirement plan”¹²⁹ (as defined in Section 4974(c) of the Internal Revenue Code of 1986, as amended (“Code”) is a defined contribution plan and becomes an asset of the Marital Trust (the Marital Trust’s interest in the retirement plan is referred to as the “Retirement Account”), then the trustee of the Marital Trust must annually withdraw the greater of (i) the net income from the Retirement Account and (ii) the required minimum distribution from the Retirement Account. The trustee must distribute at least the net income from the Retirement Account to my spouse at least annually. The income of the Retirement Account shall be determined by the trustee by reference to applicable state law as if the Retirement Account was a trust. If the income of the Retirement Account cannot be determined, then the income of the Retirement Account shall be deemed to be 4% of the Retirement Account’s value, according to the most recent statement of value preceding the beginning of the accounting period. If the trustee cannot determine the income of the Retirement Account or the value of the Retirement Account, then the income of the Retirement Account shall be deemed to equal the product of the interest rate and the present value of the expected future payments, as determined under Section 7520 of the Code, for the month preceding the accounting period for which the computation is made.

The trustee of the Marital Trust shall take whatever steps are necessary to ensure that the Retirement Account, to the extent not previously distributed, is (and will at all times remain) immediately distributable on demand to the Marital Trust. Accordingly, the trustee of the Marital Trust shall not make an installment distribution election unless the trustee retains the unrestricted power to accelerate the installment distributions.

Notwithstanding anything herein to the contrary, the Retirement Account must be held, invested, administered, distributed, and the income of such account must be determined, in a manner that guarantees my spouse has a “qualifying income interest for life” in the Retirement Account, as defined in Code Section 2056(b)(7)(B)(ii). My spouse may compel the

¹²⁹ This marital deduction issue applies to any qualified retirement plan described in Code section 4974(c) that is a defined contribution plan. *See* I.R.C. § 4974(c); Rev. Rul. 2006-26, 2006-1 C.B. 939, 942.

trustee of the Marital Trust to invest the Retirement Account in assets productive of a reasonable income.

The income of the Marital Trust shall be determined without regard to the Retirement Account.

The personal representative of my estate shall make a QTIP election for the Marital Trust and shall make a separate QTIP election for the Retirement Account.

Notwithstanding anything herein to the contrary, the debts, taxes and expenses described in Article ___ [the standard payment of debts, taxes and expenses clause] may not be paid from the Retirement Account or from any assets of the Marital Trust that are attributable to or derived from the Retirement Account, after September 30 of the year after the calendar year of my death.

Optional: Additionally, notwithstanding anything herein to the contrary, upon my spouse's death, the Marital Trust's interest in any Retirement Account and all assets derived therefrom, may not be payable, whether outright, in trust, or pursuant to the exercise of a power of appointment, to (1) any individual older than the oldest beneficiary among the following individuals who is alive on the date of my death: my spouse and my descendants, (2) any person or entity other than a trust or an individual, or (3) any trust that may have as a beneficiary a person or entity other than an individual or an individual who is older than the oldest beneficiary among the following individuals who is alive on the date of my death: my spouse and my descendants. Any individual or entity who is disqualified as a beneficiary pursuant to the preceding sentence shall be treated as if such beneficiary was then deceased, or did not then exist.

The above language covers several important items. First, it requires the trustee to distribute the income of the retirement account to the beneficiary and defines the income of the account in a way that will qualify for the marital deduction irrespective of default state law.¹³⁰ The language referring to 4% of the value of the account and valuing the account using Code Section 7520 is taken from Section 409 of the Uniform Principal and Income Act ("UPIA"), as amended in 2008 (explained in more detail below). Even if state law defines the income of

¹³⁰ See Rev. Rul. 2006-26, 2006-1 C.B. 939, 942.

the account in a different way, the definition above will be respected for tax purposes (as the definition does not depart fundamentally from traditional principles of income and principal) and will qualify for the marital deduction.¹³¹

Second, the trustee is required to maintain sufficient rights over the retirement account to be able to access the underlying assets of the account in case the spouse may need more than the RMD in a particular year.

Third, it makes clear that the income of the Marital Trust is determined separately from the income of the retirement account to avoid the retirement account from being counted twice.

Fourth, the spouse is given the power to compel the trustee of the Marital Trust to invest the Retirement Account in assets productive of a reasonable income satisfying Treasury Regulation Section 20.2056(b)-5(f)(4).

Lastly, the trustee is prohibited from paying any debts, expenses, or taxes from the retirement account after September 30 of the year after the calendar year of death. This ensures that the IRS cannot take the position that the account was payable to the decedent's "estate" thereby disqualifying the trust for a life expectancy payout option.

The optional language will ensure that the spouse (or a child older than the spouse in a second marriage situation) is treated as the oldest beneficiary of the Marital Trust and is therefore the measuring life for purposes of calculating the RMDs. In other words, this is the savings clause for a Marital Trust Accumulation Trust. Without this language, the IRS could take the position that a remote beneficiary of the trust or a charitable beneficiary causes the Marital Trust to not be a Designated Beneficiary. Also, if one wants the Marital Trust to qualify as a Designated Beneficiary, then he/she cannot pay the stub income to the surviving spouse's estate (an estate is not a Designated Beneficiary). One should avoid paying the stub income to the estate as this is no longer required to qualify a QTIP trust for the marital deduction.¹³²

The trust may still qualify for the marital deduction even if the trustee of the marital trust is not *required* to withdraw all of the retirement account income and distribute it to the surviving spouse, provided the spouse has the ability to compel the trustee to make such withdrawal and distribution.¹³³ However, if the spouse does not compel the trustee

¹³¹ See Treas. Reg. § 1.643(b)-1; Rev. Rul. 2006-26, 2006-1 C.B. 939.

¹³² Treas. Reg. § 20.2056(b)-7(d)(4).

¹³³ Rev. Rul. 2000-2, 2000-1 C.B. 305, 306.

to distribute the retirement account income to the spouse, then there may be adverse tax consequences.¹³⁴

If a Marital Trust does not require all of the internal income of a retirement account to be distributed to the spouse *or* allow the spouse to compel the trustee to distribute it to him/her, the account may still qualify for the marital deduction if default state law requires this. Section 409 of the UPIA was amended in 2008 to make the determination of the “income” of a retirement account consistent with the marital deduction requirements described above.¹³⁵ Section 409 now gives the surviving spouse the right to request the trustee to withdraw all of the internal income of the retirement account.¹³⁶ The trustee must then distribute such income to the spouse. The “income” of the retirement account is determined as if the retirement account was a trust (i.e., the other applicable income and principal rules in the UPIA apply). Some states, such as Missouri, defined income in a way that satisfied the marital deduction requirements prior to the amendment to the UPIA.¹³⁷

LIFETIME TRUSTS

A. Conduit vs. Accumulation Trust

Consider Husband and Wife who have one child, Daughter. Daughter is 18 and is about to get married. Husband and Wife are updating their estate plan and are concerned whether Daughter’s marriage will last. An estate planning attorney suggested leaving their inheritance to their daughter in a lifetime trust for divorce protection.¹³⁸ Husband and

¹³⁴ The lapse of the spouse’s right to withdraw the income could cause him/her to be a transferor to the marital trust, which could cause a completed gift, estate tax inclusion under I.R.C. § 2036(a)(1), GST transferor issues, and grantor trust status to the surviving spouse for a portion of the trust. *Estates, Gifts and Trusts Portfolios, Estate Planning/Business Planning, Portfolio 843-3rd: Estate Tax Marital Deduction*, BLOOMBERG BNA (2014); Steven B. Gorin & Michael J. Jones, *Rescue Plans for IRAs Left to Marital Trusts*, Nov. 2008 TR. & EST. 42, 48-49.

¹³⁵ Unif. Principle & Income Act § 409 (amended 2008). Prior to the 2008 amendment, the UPIA provided that 10% of any distribution to the trust from the retirement account was income and the other 90% was principal. Gorin & Jones, *supra* note 135, at 44. The UPIA contained a savings clause that provided that more would be allocated to income if necessary to qualify for the marital deduction. Unif. Principle & Income Act § 409(d). Revenue Ruling 2006-26 held that the 10% rule did not satisfy the “all income” requirement and found the savings clause to be invalid. Rev. Rul. 2006-26, 2006-1 C.B. 939, 941. It is important that the surviving spouse be entitled to all of the internal income of the retirement account, as opposed to simply defining the income of the account in some arbitrary way (as the UPIA previously did).

¹³⁶ Unif. Principle & Income Act § 409(f).

¹³⁷ MO. REV. STAT. § 469.437 (2007).

¹³⁸ See Herman, *supra* note 64, at 232.

Wife must choose between an Accumulation Trust and a conduit trust for Daughter.

The advantage to an Accumulation Trust is that all of the RMDs can be retained in the trust, whereas a conduit trust forces the RMD into beneficiary's hands each year. However, the conduit trust is the more conservative approach because we know it works. Until the beneficiary reaches age 71, the RMDs are less than 6% each year, so the majority of the retirement account will stay protected in a conduit trust until the beneficiary is well into his/her retirement years. Exhibit H illustrates the required distributions from a conduit trust created for a 10-year old.

In some situations it is important to avoid putting *any* assets directly into the beneficiary's hands, such as when the beneficiary has creditors looming or the beneficiary has serious substance abuse problems.¹³⁹ In these situations, the Accumulation Trust allows the trustee to make distributions indirectly for the benefit of the beneficiary, without exposing any trust assets to the beneficiary's direct ownership. When there are strong reasons why the beneficiary of the trust cannot receive the RMDs outright, then the conduit trust does not work.

With a conduit trust one can be certain that the beneficiary's life expectancy will be used to calculate the RMDs if separate accounts are created on the beneficiary designation form as provided in Exhibit A. In most cases an Accumulation Trust will use the life expectancy of the *oldest* of the children.¹⁴⁰ This could be an issue if there is a wide gap in the children's ages. If after the death of the beneficiary the remaining assets will pass to a charity, then one must use a conduit trust if the trust is to qualify for a life expectancy payout (as the first line remainder beneficiaries must be considered with an Accumulation Trust).

B. UTMA Accounts

Although a Uniform Transfers to Minors Act ("UTMA") account is not technically a trust, it is an alternative to consider when the beneficiary is a minor. An UTMA account functions as a trust that allows distributions to the beneficiary "as the custodian considers advisable for the use and benefit of the minor," but that terminates and distributes outright to the beneficiary when he/she turns 21.¹⁴¹

¹³⁹ See discussion *supra* Part II *Reasons to Name a Trust as Beneficiary*.

¹⁴⁰ With a conduit trust one ignores all remainder beneficiaries, but with an Accumulation Trust one must take into account the first line remainder beneficiaries. At least this is the current position of the private letter rulings. See *supra* Part II *Which Beneficiaries Must be "Considered."*

¹⁴¹ Unif. Transfers to Minors Act §§ 14, 20 (amended 1986).

UTMA accounts have limited use because the assets must be distributed outright to the beneficiary at age 21. If the purpose is to keep the assets out of the beneficiary's hands for as long as possible, then an UTMA account does a poor job. If the retirement account is sufficiently small so that the account owner is comfortable with the minor owning the retirement account outright at age 21, then one should consider an UTMA account. The advantage of an UTMA account is simplicity. The language creating the UTMA account can be placed on an attachment to the beneficiary designation form, as illustrated below:

The total account assets shall be divided to provide one equal share of the account, as of my date of death, for each of my children who is either living on my date of death or is deceased on my date of death but who has one or more descendants living on my date of death. Any share created for a deceased child of mine shall be divided into separate shares for such deceased child's descendants, per stirpes. Each such share created for a descendant of mine who has not attained the age of twenty-one (21) shall be held by [name of custodian], as a custodian for the descendant under the [state of residency] Transfers to Minors Act or similar minor's custodian law of any state where the minor then resides. Each such share created for a descendant of mine who has attained the age of twenty-one (21) shall be distributed outright to such descendant.

Each of my beneficiaries designated above, shall have the right (with respect to the death benefits as to which that beneficiary is then the Designated Beneficiary) to elect any method of payment available.

The assets shall be segregated, effective as of my death, into separate subaccounts, one for the share representing each beneficiary, so that all post-death investment net earnings, gains, and losses are determined separately for each subaccount. Each beneficiary shall have the right to direct changes to investments held in such beneficiary's separate subaccount.

Although not explicitly stated in the Code or regulations, an UTMA account should be treated as being owned directly by the beneficiary so that a life expectancy payout is available.¹⁴²

¹⁴² *Id.* § 11(b).

SPECIAL NEEDS TRUSTS¹⁴³

The purpose of a Special Needs Trust (“SNT”) is to supplement a beneficiary’s lifestyle with the trust assets but prevent those assets from being considered for purposes of certain public benefits, including Medicaid and SSI. There are two types of SNTs – third party trusts and self-settled trusts. With a self-settled SNT the beneficiary contributes his/her own assets to the trust. A self-settled SNT must provide that the government will be repaid at the beneficiary’s death in accordance with federal law.¹⁴⁴ Third Party SNTs are funded with assets from third parties (anyone other than the beneficiary) and are not required to repay the government at the beneficiary’s death.¹⁴⁵

When dealing with retirement accounts at the planning stage practitioners are usually concerned with third party trusts, as the account owner is leaving retirement benefits to the beneficiary in trust – these are not the beneficiary’s own assets.

An important aspect of administering a SNT is to avoid distributing assets directly to the beneficiary, as this could disqualify him/her from Medicaid or SSI. Obviously, a conduit trust will not work as a SNT. However, a SNT can be drafted as an Accumulation Trust.

If a special needs beneficiary is named directly as the beneficiary of a retirement account, then a self-settled SNT is an option. As illustrated by a 2006 private letter ruling, a guardian for the special needs beneficiary may see that a self-settled SNT is created for the beneficiary.¹⁴⁶ If the guardian then transfers the special needs beneficiary’s interest in the retirement account to the SNT, the trust will be a grantor trust for income tax purposes.¹⁴⁷ As grantor trusts are ignored for income tax purposes, the transfer to the SNT is ignored and the special needs beneficiary will continue to be treated as the beneficiary.¹⁴⁸ The 2006

¹⁴³ For a thorough discussion of this topic, see Edward V. Wilcenski & Tara Anne Pleat, *Dealing With Special Needs Trusts and Retirement Benefits*, 36 EST. PLAN. 15 (Feb. 2009).

¹⁴⁴ 42 U.S.C. § 1396p(d)(4) (2006).

¹⁴⁵ Third party special needs trusts are completely discretionary (i.e. there is no support standard) and provide that distributions are to be used to supplement, but not supplant, government benefits. SOCIAL SECURITY ADMINISTRATION, SI 01120.200 PROGRAM OPERATIONS MANUAL SYSTEM (POMS), §13 SUPPLEMENTAL NEEDS TRUSTS, available at <https://secure.ssa.gov/apps10/poms.nsf/lnx/0501120200#a>; THOMAS D. BEGLEY, JR. & ANGELA E. CANELLOS, *SPECIAL NEEDS TRUSTS HANDBOOK* (Wolters Kluwer Law & Business 2011).

¹⁴⁶ PLR 200620025 (Feb. 21, 2006).

¹⁴⁷ I.R.C. § 677(a). For an excellent discussion of why the trust may qualify as a grantor trust under section 677(a), see Jonathan P. McSherry, *Retirement Accounts and Special Needs Planning*, 82 N.Y. ST. B. ASS’N. J., May 2010, at 10, 15.

¹⁴⁸ See Rev. Rul. 85-13, 1985-1 C.B. 184, 186.

ruling, and more recently a 2011 letter ruling, confirm that because the transfer to the SNT is ignored for income tax purposes, the transfer will not trigger gain under IRC section 691.¹⁴⁹

Naming an existing self-settled SNT as the beneficiary is also an option in the planning stage. The SNT will be a grantor trust and the RMDs for the trust will be based on the age of the special needs beneficiary. However, the downside to this planning is that the trust assets will be used to repay the government benefits at the death of the special needs beneficiary. In other words, there may be income tax advantages while the special needs beneficiary is alive, but the remainder beneficiaries of the SNT will suffer. Due to this, a third party Accumulation SNT is a wiser choice.

CONCLUSION

One of the most important areas of estate planning is dealing with tax-deferred retirement accounts. Unfortunately, this is an extremely complicated area of law. The primary question estate planners will face is whether the retirement account beneficiary should be an individual, an UTMA account, or a trust.

If a trust will be named, then the next question is whether to use a conduit trust or an Accumulation Trust. An Accumulation Trust allows the RMDs to be retained in the trust but has drawbacks. The Accumulation Trust may be more difficult to administer if the retirement custodian does not interpret the law consistent with the existing letter ruling analysis. With an Accumulation Trust one must take into account the first line remainder beneficiaries when determining the oldest trust beneficiary, but with a conduit trust one can ignore all remainder beneficiaries. There is also the possibility of a 50% tax on the undistributed amount of the RMD if the IRS audits the trust Form 1041 and successfully argues that the RMD calculation is based on the wrong life expectancy – or worse that the trust does not qualify for the life expectancy payout at all (because there is a non-individual beneficiary of the trust). To safeguard against this, the trustee can file Form 5329 each year to start the 3-year statute of limitations running, but this is an additional administrative complexity the client should be aware of before opting for an Accumulation Trust. Adding a savings clause to an Accumulation Trust may provide enough assurance to avoid filing the Form 5329 each year.

The advantage of the conduit trust is that we know it works. The disadvantage is that all distributions from the retirement account must be immediately distributed outright to the trust beneficiary. However,

¹⁴⁹ PLR 200620025 (Feb. 21, 2006); PLR 201116005 (Apr. 22, 2011).

the RMDs may initially be so small that some leakage from the trust to the beneficiary outright is not a significant concern, depending on the particular facts and purpose of the trust.

EXHIBIT A
SAMPLE BENEFICIARY DESIGNATION
FOR CONDUIT OR ACCUMULATION TRUSTS

Attachment To Beneficiary Designation

For Account No: _____

Primary beneficiary: Any amount on deposit at my death shall be divided into fractional shares so as to provide an undivided equal share for each of my children who is either living on my date of death or is deceased on my date of death, but who has one or more descendants living on my date of death. Any share created for a deceased child of mine shall be divided into separate shares for such deceased child's descendants, per stirpes.

Each share created above shall be owned by the Trustees of the "Separate Trust" to be administered for such individual pursuant to Article 10 of the CLIENT NAME REVOCABLE TRUST dated _____.

Each of the Trustees of the Separate Trusts designated above, shall have the right (with respect to the death benefits as to which that Separate Trust receives) to elect any method of payment available.

The assets of my account shall be segregated, effective as of my death, into separate subaccounts, one for the share representing each Separate Trust, so that all post-death investment net earnings, gains, and losses are determined separately for each subaccount. The Trustees of each Separate Trust shall have the right to direct changes to investments held in such Separate Trust's separate subaccount.

Dated: _____

CLIENT NAME

EXHIBIT B
SAMPLE CONDUIT TRUST

ARTICLE 10. SEPARATE CONDUIT TRUSTS FOR RETIREMENT BENEFITS

Creation of Separate Trusts for My Descendants

The Trustees shall administer, in accordance with this Article 10, any retirement benefits that are directed (by beneficiary designation) to be owned by a separate trust created below in this Article (“Retirement Benefits”). The plan, trust, account, or arrangement under which any Retirement Benefit is payable is referred to as a “Retirement Plan.”

The Trustees shall create one share for each of my children, either who is living on my date of death or who is deceased on my date of death but has one or more descendants living on my date of death. The Trustees shall divide any share created for a deceased child of mine into separate shares for such deceased child’s descendants, per stirpes. As thus divided, the Trustees shall administer each share created above under this Article 10 as a separate trust (a “Separate Trust”) for the benefit of the person for whom the share was created and shall administer the Separate Trust as provided in this Article. For purposes of this Article, the person for whom a particular Separate Trust was created is referred to as the “Primary Beneficiary.”

The Trustees shall take the necessary steps to ensure that each Separate Trust is treated as a “separate account,” as that term is used in Treasury Regulation Section 1.401(a)(9)-8, A-2(a)(2) & A-3.

Debts, Taxes and Expenses

Notwithstanding anything herein to the contrary, the debts, taxes and expenses described in Article ___ [the standard payment of debts, taxes and expenses clause] may not be paid from any assets that are subject to the provisions of this Article 10, after September 30 of the calendar year following the calendar year of my death.

Purpose, Interpretation and Limited Power of Amendment

The purpose of each Separate Trust is to qualify all Retirement Benefits, that allow a life expectancy payout option under the so-called Internal Revenue Code (“Code”) Section 401(a)(9) look through rules, so that the minimum required distributions from such Retirement Benefits may be calculated and paid to each Separate Trust over the life expectancy of the Primary Beneficiary of such Separate Trust. The Trustees shall interpret the terms of each Separate Trust consistent with such purpose. Prior to September 30 of the calendar year following the calendar year of my death, the Trustees shall have the power to amend the terms of this Trust Agreement to the minimum extent necessary to accomplish such purpose. Any such amendment shall be effective ab initio, retroactive to the date of my death. The Trustees may only exercise such amendment power one time, and once exercised such amendment shall be irrevocable. [Based on PLR 201021038, amending the trust after the account owner’s death will not be respected for tax purposes. I have included this language

for flexibility, in case the law changes. Some of the language in this amendment provision is based on PLR 200537044.]

Withdrawal and Distribution of Retirement Plan Assets

The Trustees of each Separate Trust shall take whatever steps are required to assure that any interest such Separate Trust has in a Retirement Plan, to the extent not previously distributed, is (and will at all times remain) immediately distributable on demand to such Separate Trust. Accordingly, the Trustees shall not make an installment distribution election unless the Trustees retain the unrestricted power to accelerate the installment distributions. The Trustees of the Primary Beneficiary's Separate Trust shall withdraw only the required minimum distribution from each Retirement Plan payable to such Separate Trust, unless more than the required minimum distribution is necessary for the support and maintenance in reasonable comfort, health, and education of the Primary Beneficiary.

The Trustees shall immediately distribute to the Primary Beneficiary all amounts received by the Separate Trust from any Retirement Plan, after reduction for any trust expenses properly allocable thereto; provided if the Primary Beneficiary is under any legal disability, then the Trustees may make such distribution to a legal guardian for the Primary Beneficiary. The Trustees may also distribute so much, none, or all of the net income and principal of the Separate Trust, to or for the use of the Primary Beneficiary, in such proportions, amounts and at such times as the Trustees, in the Trustees' discretion, may deem advisable to provide for the health, education, support, and maintenance of the Primary Beneficiary. [*For flexibility, this provision allows the trust's interest in the retirement plan to be distributed in-kind to the beneficiary.*]

Testamentary Powers of Appointment

I grant the Primary Beneficiary a Testamentary Limited Power of Appointment (as defined in Article __) over the Primary Beneficiary's Separate Trust. Notwithstanding the foregoing, if upon the death of the Primary Beneficiary a generation-skipping transfer tax would be imposed under Chapter 13 of the Code, then such Primary Beneficiary shall have a Testamentary General Power of Appointment (as defined in Article __) over those assets of the Primary Beneficiary's Separate Trust that would cause such tax.

Division Upon Primary Beneficiary's Death

The following instructions are subject to any exercised power of appointment granted to a Primary Beneficiary pursuant to this Article. Upon the death of a Primary Beneficiary, the Trustees shall divide the deceased Primary Beneficiary's Separate Trust among the deceased Primary Beneficiary's descendants, per stirpes. If the deceased Primary Beneficiary has no surviving descendants, then the Trustees shall divide the deceased Primary Beneficiary's Separate Trust among the descendants, per stirpes, of the deceased Primary Beneficiary's least remote ancestor who has any descendants who survive the Primary Beneficiary, provided such ancestor is either me or one of my descendants. As thus divided, the Trustees shall hold each share of the deceased Primary Beneficiary's Separate Trust as a Separate Trust for the bene-

fit of the person for whom the share was created and shall administer the share as provided in this Article.

If none of my descendants survive the deceased Primary Beneficiary, then the Trustees shall divide and distribute the deceased Primary Beneficiary's Separate Trust as provided in Article ____.

EXHIBIT C
SAMPLE ACCUMULATION TRUST

ARTICLE 10. SEPARATE ACCUMULATION TRUSTS FOR RETIREMENT BENEFITS

Creation of Separate Trusts for My Descendants

The Trustees shall administer, in accordance with this Article 10, any retirement benefits that are directed (by beneficiary designation) to be owned by a separate trust created below in this Article (“Retirement Benefits”). The plan, trust, account, or arrangement under which any Retirement Benefit is payable is referred to as a “Retirement Plan.”

The Trustees shall create one share for each of my children either who is living on my date of death or who is deceased on my date of death but has one or more descendants living on my date of death. The Trustees shall divide any share created for a deceased child of mine into separate shares for such deceased child’s descendants, per stirpes. As thus divided, the Trustees shall administer each share created above under this Article 10 as a separate trust (a “Separate Trust”) for the benefit of the person for whom the share was created and shall administer the Separate Trust as provided in this Article. For purposes of this Article, the person for whom a particular Separate Trust was created is referred to as the “Primary Beneficiary.”

The Trustees shall take the necessary steps to ensure that each Separate Trust is treated as a “separate account,” as that term is used in Treasury Regulation Section 1.401(a)(9)-8, A-2(a)(2) & A-3.

Debts, Taxes and Expenses

Notwithstanding anything herein to the contrary, the debts, taxes and expenses described in Article ___ [the standard payment of debts, taxes and expenses clause] may not be paid from any assets that are subject to the provisions of this Article 10, after September 30 of the calendar year following the calendar year of my death.

Purpose, Interpretation, and Limited Power of Amendment

he purpose of each Separate Trust is to qualify all Retirement Benefits, that allow a life expectancy payout option under the so-called IRC Section 401(a)(9) look through rules, so that the minimum required distributions from such Retirement Benefits may be calculated and paid to each Separate Trust over the life expectancy of the oldest beneficiary of such Separate Trust. The Trustees shall interpret the terms of each Separate Trust consistent with such purpose. Prior to September 30 of the calendar year following the calendar year of my death, the Trustees shall have the power to amend the terms of this Trust Agreement to the minimum extent necessary to accomplish such purpose. Any such amendment shall be effective ab initio, retroactive to the date of my death. The Trustees may only exercise such amendment power one time, and once exercised such amendment shall be irrevocable. [Based on PLR 201021038, amending the trust after the account owner’s death will not be respected for tax purposes. I have included this language for flexibility, in case the law changes. Some of the language in this amendment provision is based on PLR 200537044.]

Withdrawal and Distribution of Retirement Plan Assets

The Trustees of each Separate Trust shall take whatever steps are required to assure that any interest such Separate Trust has in a Retirement Plan, to the extent not previously distributed, is (and will at all times remain) immediately distributable on demand to such Separate Trust. Accordingly, the Trustees shall not make an installment distribution election unless the Trustees retain the unrestricted power to accelerate the installment distributions. The Trustees of the Primary Beneficiary's Separate Trust shall withdraw only the required minimum distribution from each Retirement Plan payable to such Separate Trust, unless more than the required minimum distribution is necessary for the support and maintenance in reasonable comfort, health, and education of the Primary Beneficiary or a descendant of the Primary Beneficiary.

The Trustees may distribute so much, none, or all of the net income and principal of the Separate Trust, to or for the use of the Primary Beneficiary, in such proportions, amounts, and at such times as the Trustees, in the Trustees' discretion, may deem advisable to provide for the Primary Beneficiary's support and maintenance in reasonable comfort, health, and education.

Testamentary Powers of Appointment

I grant the Primary Beneficiary a Testamentary Limited Power of Appointment (as defined in Article __) over the Primary Beneficiary's Separate Trust. [Avoid contingent general powers of appointment that allow appointment to an estate or to creditors].

Division Upon Primary Beneficiary's Death

The following instructions are subject to any exercised power of appointment granted to a Primary Beneficiary pursuant to this Article. Upon the death of a Primary Beneficiary, the Trustees shall divide the deceased Primary Beneficiary's Separate Trust among the deceased Primary Beneficiary's descendants, per stirpes. If the deceased Primary Beneficiary has no surviving descendants, then the Trustees shall divide the deceased Primary Beneficiary's Separate Trust among the descendants, per stirpes, of the deceased Primary Beneficiary's least remote ancestor who has any descendants who survive the Primary Beneficiary, provided such ancestor is either me or one of my descendants. As thus divided, the Trustees shall hold each share of the deceased Primary Beneficiary's Separate Trust as a Separate Trust for the benefit of the person for whom the share was created and shall administer the share as provided in this Article.

If none of my descendants survive the deceased Primary Beneficiary, then the Trustees shall divide and distribute the deceased Primary Beneficiary's Separate Trust as provided in Article ____.

Elimination of Older and Non-Individual Beneficiaries

Notwithstanding anything herein to the contrary, upon the Primary Beneficiary's death, the Separate Trust's interest in all Retirement Benefits and all assets derived therefrom, may not be payable, whether outright, in trust, or pursuant to the exercise of a power of appointment, to (1) any individual older than the oldest of my descendants living on the date of my death, (2) any person or entity other than a

trust or an individual, or (3) any trust that may have as a beneficiary a person or entity other than an individual or an individual who is older than the oldest of my descendants living on the date of my death [*adjust this clause accordingly based on the identity of the beneficiaries, making sure not to inadvertently cut out any intended remainder beneficiaries*]. Any individual or entity who is disqualified as a beneficiary pursuant to the preceding sentence shall be treated as if such beneficiary was then deceased, or did not then exist.

EXHIBIT D
ACCUMULATION TRUST PRIVATE
LETTER RULINGS
(in chronological order)

PLR 200438044 (marital trust and credit shelter trust could use life expectancy of surviving spouse; no savings clause)

In this ruling the account owner died survived by his spouse and three children. The retirement account named the account owner's revocable trust as the beneficiary. Upon the account owner's death, the revocable trust assets were divided into two trusts (Trust O and Trust P) pursuant to a fractional formula to defer estate taxes until the surviving spouse's death. Trusts O and P required all of the income to be paid to the surviving spouse and permitted distributions of principal to the spouse for welfare. The surviving spouse had a testamentary power of appointing among the account owner's descendants and their spouses. The surviving spouse also disclaimed this power of appointment after the account owner's death. Due to the disclaimer, upon the surviving spouse's death, the remaining assets will pass to the account owner's descendants, per stirpes, and each share will be held in a separate trust for the beneficiary. Each separate trust was required to terminate and pay all of the remaining assets to the beneficiary upon age 30. At the date of the account owner's death, each child had already attained age 30. The ruling explained that each child had an "unrestricted right" to a portion of the remainder of Trusts O and P because they had already turned 30 (ignoring the fact that the children could have predeceased their mother and received nothing from the trusts). The ruling went on to determine that because the children had the unrestricted right to the remainder of Trusts O and P, the only beneficiaries that had to be considered were spouse and the three children.

The ruling also found that the surviving spouse would continue to be the designated beneficiary of the retirement account even if she died prior to September 30 of the year following the account owner's death. This statement is confusing as the revocable trust was the designated beneficiary and the spouse was simply the oldest beneficiary of the trust. As explained *supra* Part II *Which Beneficiaries Must Be "Considered,"* this analysis seems wrong. If a beneficiary dies before September 30 of the year following the account owner's death, then that beneficiary should not be taken into account. The ruling never discussed whether debts, expenses, or taxes could be paid from the revocable trust.

PLR 200522012 (credit shelter trust could use the surviving spouse's life expectancy; no savings clause)

In this ruling, the account owner died survived by his wife and two children. Through a series of disclaimers, a "Family Trust" became the beneficiary of the retirement account. After being modified by court order, the Family Trust provided that surviving spouse and descendants could receive distributions of income and principal for health, support, maintenance, and education. The surviving spouse had a testamentary power of appointment among her deceased husband's issue. At the

surviving spouse's death, the unappointed assets were to pass equally to the two children (the ruling does not state whether the children were to receive the assets outright or in further trust). The surviving spouse also disclaimed the power of appointment over the Family Trust (so the surviving spouse's other disclaimers would be qualified disclaimers under Code Section 2518). It was represented that no debts, taxes, or expenses of the account owner's estate were to be paid from the IRA. The ruling found that the only beneficiaries of the Family Trust were the surviving spouse and two children. The surviving spouse was the oldest of the three beneficiaries; therefore, the RMDs of the Family Trust would be based on the life expectancy of the surviving spouse.

PLR 200537044 (lifetime trust for beneficiary could use that beneficiary's life expectancy; beneficiary designation created separate accounts for the trusts; savings clause removed unwanted beneficiaries)

In PLR 200537044, the account owner named nine separate trusts created under "Trust T", as beneficiaries of his IRA, each as to a specific percentage of the IRA. After the account owner's death a trust protector exercised his right to modify the terms of one of these trusts (Trust J) to modify the trust from a conduit trust to an Accumulation Trust. After the modification, the beneficiary (J) could receive income and principal for health, maintenance, support, and education. Originally, the beneficiary also had a testamentary limited power of appointment among any individual or charitable organization, other than the beneficiary's estate, creditors, or creditors of the beneficiary's estate. The trust protector also added a provision that no income or principal may be paid (at J's death) to or for the benefit of any person who is older than J (presumably, this also removed charities from the class under the beneficiary's power of appointment). At the beneficiary's death, any unappointed assets were to pass to the other remaining eight separate trusts in proportion to their relative percentages. If no such trusts were in existence, the remaining assets were to pass to the account owner's "heirs at law."

The IRS ruled that Trust J qualified as a see-through trust by stating that as "none of the remaindermen of said trust can be older than J," the RMDs for Trust J would be based on J's life expectancy.

PLR 200608032 (lifetime trust for a child could use the life expectancy of the oldest of all the account owner's children; beneficiary designation form did not create separate accounts for trusts; savings clause removed unwanted beneficiaries)

In PLR 200608032, the account owner named his trust as the primary beneficiary of his IRA. The account owner was survived by 6 children – B, C, D, E, F, and G. The trust provided for certain distributions to charities and the remainder was divided equally among the six children. Each child received his share outright, except G.

After being modified by court order after the account owner's death, the trust provided that: (1) the trustee may not distribute any portion of the IRA to or for the benefit of the decedent's estate, any charity, or any non-individual beneficiary, after September 30 of the year following the year of the decedent's death, (2) after Sep-

tember 30 of the year following the year of the decedent's death, the IRA may not be used for payment of the decedent's debts, taxes, expenses of administration or other claims against decedent's estate, or for the payment of transfer taxes due on account of decedent's death, (3) the income and principal may be distributed for G's education, health, maintenance, comfort, and general welfare, and (4) at G's death, the remaining assets pass to G's descendants, or if none to G's spouse, and if G's spouse is not living, then any remaining portion of the IRA *may not be paid to any non-individual beneficiary or to any individual older than the oldest of the six children.*

The IRS found the RMDs for G's trust would be based on the life expectancy of the oldest of the six children.

PLR 200610026 (trust for grandson could use life expectancy of son; beneficiary designation form did not create separate accounts; no savings clause)

In this ruling, the account owner was survived by his son and grandson (a minor). The primary beneficiary of the retirement account was the account owner's revocable trust. The trust provided that, at the account owner's death, the trust was to be divided equally between son and a trust for grandson. The trust for the grandson provided that the grandson would receive all of the net income and principal for grandson's support, care, maintenance, and education. All of the remaining assets were to be distributed outright to the grandson at age 25. If the grandson died before age 25, the remaining assets would pass to the grandson's heirs at law (grandson's heirs were his parents). The ruling found that the only beneficiaries that had to be considered were his son, his son's wife, and his grandson. The son was the oldest of these three beneficiaries. Therefore, the RMDs for both sons' 1/2 of the retirement account and the grandson's trust's 1/2 of the retirement account were based on the life expectancy of the son—the oldest of the three beneficiaries of the revocable trust.

PLR 200843042 (trust for child could use life expectancy of surviving spouse who was remainder beneficiary of trust; no savings clause)

In this ruling, the account owner died and was survived by his spouse and only child. The child had no descendants. The beneficiary of the retirement account was a trust created for the child under the account owner's will. The child was to receive all of the net income from the trust and principal distributions for the child's health, education, support, and maintenance. The principal of the trust was required to be distributed to the child in 1/3 increments with full payment made at age 40. If child died before age 40, then the remaining assets were to be distributed to the child's then living descendants, if any; otherwise the remaining assets would be distributed to the account owner's heirs at law (the sole heir at law was the account owner's surviving spouse). The ruling determined that the surviving spouse had an "outright claim to the remainder interest" of the trust because she would have been the sole heir at law if she survived the son and the son had no descendants that survived him. The ruling found that the oldest beneficiary of the trust for the child was the surviving spouse, and the RMDs would be based on the spouse's life expectancy.

PLR 201203033 (Marital Trust could use life expectancy of surviving spouse; no savings clause)

In this PLR, the account owner died with a surviving spouse and two children from a previous relationship (the spouse was older than the children). The daughter was over age 35 and the son was between ages 30 and 35. The account owner named the Marital Trust to be created under his revocable trust as the primary beneficiary of his retirement account. The Marital Trust provided that the surviving spouse would receive all of the net income and the trustees could distribute principal to the spouse for health, support, and maintenance. Upon the spouse's death, the amount of spouse's remaining GST exemption was to pass equally to "Exemption Trusts" for the account owner's then living children, and the remaining assets were to pass equally to "Primary Trusts" for the account owner's then living children. Each Exemption Trust provided that the child beneficiary would receive income and principal for health, education, maintenance, and support. Upon the child's death, the child could appoint the remaining assets among the account owner's descendants. The unappointed assets would pass to the child's descendants, per stirpes, and if none to the account owner's descendants per stirpes (the ruling does not state whether distributions to these descendants were to be in trust or outright).

Each Primary Trust provided that the child beneficiary would receive all of the net income, plus principal for health, education, maintenance, and support. The child could withdraw up to one-half of the principal of the child's Primary Trust at age 30 and could withdraw the remaining principal at age 35. If a child died before age 35, the child had a power of appointment among any persons, organizations, or the child's estate; however, the child could not appoint any assets to himself, his estate, or the creditors of either, unless a GST tax would be payable if the child had no power of appointment. The unappointed assets were to pass to the child's descendants, per stirpes, and if none, to the account owner's descendants, per stirpes.

Under the contingent beneficiary clause, if any property was not effectively disposed of under the provisions of the trust, such remainder would pass to "Charity F", if then in existence. Prior to September 30 of the year following the account owner's death, the son disclaimed his right to appoint the assets of the Primary Trust to any beneficiary who is not a natural person or who was born before the account owner's spouse. Son had no children as of September 30 of the year following the account owner's death.

As the Marital Trust was not a conduit trust, the ruling stated that the remainder beneficiaries—the Exemption Trusts and Primary Trusts—must also be considered. First, the ruling analyzed the Exemption Trusts and found that the only remainder beneficiaries were the descendants of the account owner. As the daughter was the oldest then living descendant, there could be no potential beneficiary older than the surviving spouse.

Next, the ruling analyzed the Primary Trusts. As the daughter had already turned 35 at the time her father's death, the ruling found that she was the "sole beneficiary" of her trust because she had the right to withdraw all of the trust assets. As the son had

already turned 30, the ruling found that the son was the sole beneficiary of one-half of his Primary Trust. As to the one-half of the trust the son could not withdraw, the default beneficiary was the daughter (as son had no descendants) and, due to his disclaimer, the power of appointment could not be exercised in favor of anyone older than the surviving spouse or in favor of any non-individuals. The ruling determined that the Marital Trust could use the surviving spouse's life expectancy to determine the RMDs as she was the oldest beneficiary of the trust.

EXHIBIT F
Life Expectancy from "Single Life Table"
(Applicable to *beneficiaries* of retirement plan; not applicable
while original account owner is alive)

See Treas. Reg. Section 1.401(a)(9)-9, A-1

Age	Life Expectancy		Distribution %		Age	Life Expectancy		Distribution %		Age	Life Expectancy		Distribution %	
	Age	Expectancy	%	Distribution		Age	Expectancy	%	Distribution		Age	Expectancy	%	Distribution
0	82.4		1.21		19	64	1.56		38	45.6	2.19			
1	81.6		1.23		20	63	1.59		39	44.6	2.24			
2	80.6		1.24		21	62.1	1.61		40	43.6	2.29			
3	79.7		1.25		22	61.1	1.64		41	42.7	2.34			
4	78.7		1.27		23	60.1	1.66		42	41.7	2.40			
5	77.7		1.29		24	59.1	1.69		43	40.7	2.46			
6	76.7		1.30		25	58.2	1.72		44	39.8	2.51			
7	75.8		1.32		26	57.2	1.75		45	38.8	2.58			
8	74.8		1.34		27	56.2	1.78		46	37.9	2.64			
9	73.8		1.36		28	55.3	1.81		47	37	2.70			
10	72.8		1.37		29	54.3	1.84		48	36	2.78			
11	71.8		1.39		30	53.3	1.88		49	35.1	2.85			
12	70.8		1.41		31	52.4	1.91		50	34.2	2.92			
13	69.9		1.43		32	51.4	1.95		51	33.3	3.00			
14	68.9		1.45		33	50.4	1.98		52	32.3	3.10			
15	67.9		1.47		34	49.4	2.02		53	31.4	3.18			
16	66.9		1.49		35	48.5	2.06		54	30.5	3.28			
17	66		1.52		36	47.5	2.11		55	29.6	3.38			
18	65		1.54		37	46.5	2.15		56	28.7	3.48			

EXHIBIT F, continued

Age	Life Expectancy	Distribution %	Age	Life Expectancy	Distribution %	Age	Life Expectancy	Distribution %
57	27.9	3.58	76	12.7	7.87	95	4.1	24.39
58	27	3.70	77	12.1	8.26	96	3.8	26.32
59	26.1	3.83	78	11.4	8.77	97	3.6	27.78
60	25.2	3.97	79	10.8	9.26	98	3.4	29.41
61	24.4	4.10	80	10.2	9.80	99	3.1	32.26
62	23.5	4.26	81	9.7	10.31	100	2.9	34.48
63	22.7	4.41	82	9.1	10.99	101	2.7	37.04
64	21.8	4.59	83	8.6	11.63	102	2.5	40.00
65	21	4.76	84	8.1	12.35	103	2.3	43.48
66	20.2	4.95	85	7.6	13.16	104	2.1	47.62
67	19.4	5.15	86	7.1	14.08	105	1.9	52.63
68	18.6	5.38	87	6.7	14.93	106	1.7	58.82
69	17.8	5.62	88	6.3	15.87	107	1.5	66.67
70	17	5.88	89	5.9	16.95	108	1.4	71.43
71	16.3	6.13	90	5.5	18.18	109	1.2	83.33
72	15.5	6.45	91	5.2	19.23	110	1.1	90.91
73	14.8	6.76	92	4.9	20.41	111+	1	100.00
74	14.1	7.09	93	4.6	21.74			
75	13.4	7.46	94	4.3	23.26			

EXHIBIT G
Marital Conduit Trust Distributions

Year	Surviving Spouse's Age	FMV of IRA on 1st Day of Year	6% Growth (income and appreciation)	Life Expectancy (divisor)*	Current Year RMD Distributed Outright to Beneficiary	RMD as a Percentage of the Trust FMV	FMV of IRA on Last Day of Year	Cumulative Amount Distributed Outright to Spouse
2013	80	5,000,000	300,000				5,300,000	
2014	81	5,300,000	318,000	9.7	546,392	10.31%	5,071,608	546,392
2015	82	5,071,608	304,296	9.1	557,320	10.99%	4,818,585	1,103,711
2016	83	4,818,585	289,115	8.6	560,301	11.63%	4,547,400	1,664,012
2017	84	4,547,400	272,844	8.1	561,407	12.35%	4,258,836	2,225,419
2018	85	4,258,836	255,530	7.6	560,373	13.16%	3,953,993	2,785,793
2019	86	3,953,993	237,240	7.1	556,900	14.08%	3,634,332	3,342,693
2020	87	3,634,332	218,060	6.7	542,438	14.93%	3,309,955	3,885,131
2021	88	3,309,955	198,597	6.3	525,390	15.87%	2,983,162	4,410,520
2022	89	2,983,162	178,990	5.9	505,621	16.95%	2,656,531	4,916,141
2023	90	2,656,531	159,392	5.5	483,006	18.18%	2,332,918	5,399,147

Amount passing to trust remainder beneficiaries: \$ 2,332,918

Assumptions:

Joe Smith died on January 1, 2013 at the age of 90, survived by Wife.

Wife turned 80 on January 1, 2013.

The sole primary beneficiary of Joe's IRA was a conduit marital trust for Wife.

Joe Smith owned a \$5 million IRA.

As Joe died during calendar year 2013, the conduit trust must take its first RMD by December 31, 2014.

Wife dies at age 90.

The IRA income is less than the RMD each year.

*As the spouse is considered the sole beneficiary of a marital conduit trust, the recalculation method is available.

EXHIBIT G, continued
MARITAL ACCUMULATION TRUST DISTRIBUTIONS

Year	Surviving Spouse's Age	FMV of Trust on 1st Day of Year	6% Growth (income and appreciation)	IRA Income + Trust income (interest and dividends) at 3%	Income of IRA and Trust Distributed to Spouse	FMV of Trust on Last Day of Year	Cumulative Amount Distributed Outright to Spouse
2013	80	5,000,000	300,000	150,000	(150,000)	5,150,000	150,000
2014	81	5,150,000	309,000	154,500	(154,500)	5,304,500	304,500
2015	82	5,304,500	318,270	159,135	(159,135)	5,463,635	463,635
2016	83	5,463,635	327,818	163,909	(163,909)	5,627,544	627,544
2017	84	5,627,544	337,653	168,826	(168,826)	5,796,370	796,370
2018	85	5,796,370	347,782	173,891	(173,891)	5,970,261	970,261
2019	86	5,970,261	358,216	179,108	(179,108)	6,149,369	1,149,369
2020	87	6,149,369	368,962	184,481	(184,481)	6,333,850	1,333,850
2021	88	6,333,850	380,031	190,016	(190,016)	6,523,866	1,523,866
2022	89	6,523,866	391,432	195,716	(195,716)	6,719,582	1,719,582
2023	90	6,719,582	403,175	201,587	(201,587)	6,921,169	1,921,169

Amount passing to trust remainder beneficiaries: \$ 6,921,169

Assumptions:

Joe Smith died on January 1, 2013 at the age of 90, survived by Wife.

Wife turned 80 on January 1, 2013.

The sole primary beneficiary of Joe's IRA was an Accumulation marital trust for Wife.

Joe Smith owned a \$5 million IRA.

As Joe died during calendar year 2013, the Accumulation Trust must take its first RMD by December 31, 2014.

Wife dies at age 90.

The trust and IRA both earn 3% income/year after taxes.

Distributions of principal are not allowed (or not needed).

EXHIBIT H
Conduit Trust Distributions

Year	Beneficiary's Age	FMV of IRA on 1st Day of Year	8% Growth (income and appreciation)	Life Expectancy (divisor)	Current Year RMD Distributed Outright to Beneficiary	RMD as a Percentage of the Trust FMV	FMV of IRA on Last Day of Year	Cumulative Amount Distributed Outright to Beneficiary
2013	10	1,000,000	80,000				1,080,000	
2014	11	1,080,000	86,400	71.8	15,042	1.39%	1,151,358	15,042
2015	12	1,151,358	92,109	70.8	16,262	1.41%	1,227,205	31,304
2016	13	1,227,205	98,176	69.8	17,582	1.43%	1,307,799	48,886
2017	14	1,307,799	104,624	68.8	19,009	1.45%	1,393,415	67,894
2018	15	1,393,415	111,473	67.8	20,552	1.47%	1,484,336	88,446
2019	16	1,484,336	118,747	66.8	22,221	1.50%	1,580,862	110,667
2020	17	1,580,862	126,469	65.8	24,025	1.52%	1,683,306	134,692
2021	18	1,683,306	134,664	64.8	25,977	1.54%	1,791,994	160,669
2022	19	1,791,994	143,359	63.8	28,088	1.57%	1,907,265	188,757
2023	20	1,907,265	152,581	62.8	30,370	1.59%	2,029,476	219,127
2024	21	2,029,476	162,358	61.8	32,839	1.62%	2,158,995	251,967
2025	22	2,158,995	172,720	60.8	35,510	1.64%	2,296,205	287,476
2026	23	2,296,205	183,696	59.8	38,398	1.67%	2,441,503	325,874
2027	24	2,441,503	195,320	58.8	41,522	1.70%	2,595,301	367,397
2028	25	2,595,301	207,624	57.8	44,901	1.73%	2,758,024	412,298
2029	26	2,758,024	220,642	56.8	48,557	1.76%	2,930,109	460,855
2030	27	2,930,109	234,409	55.8	52,511	1.79%	3,112,006	513,366
2031	28	3,112,006	248,961	54.8	56,788	1.82%	3,304,179	570,154

EXHIBIT H, continued

Year	Beneficiary's Age	FMV of IRA on 1st Day of		8% Growth (income and appreciation)	Life Expectancy (divisor)	Current Year		RMD as a Percentage of the Trust FMV	FMV of IRA on Last Day of Year	Cumulative Amount Distributed Outright to Beneficiary
		Year	Year			RMD Distributed Outright to Beneficiary	Year			
2032	29	3,304,179	3,304,179	264,334	53.8	61,416	1.86%	3,507,097	631,570	
2033	30	3,507,097	3,507,097	280,568	52.8	66,422	1.89%	3,721,242	697,992	
2034	31	3,721,242	3,721,242	297,699	51.8	71,839	1.93%	3,947,103	769,831	
2035	32	3,947,103	3,947,103	315,768	50.8	77,699	1.97%	4,185,172	847,530	
2036	33	4,185,172	4,185,172	334,814	49.8	84,040	2.01%	4,435,947	931,569	
2037	34	4,435,947	4,435,947	354,876	48.8	90,901	2.05%	4,699,922	1,022,470	
2038	35	4,699,922	4,699,922	375,994	47.8	98,325	2.09%	4,977,591	1,120,795	
2039	36	4,977,591	4,977,591	398,207	46.8	106,359	2.14%	5,269,439	1,227,153	
2040	37	5,269,439	5,269,439	421,555	45.8	115,053	2.18%	5,575,941	1,342,207	
2041	38	5,575,941	5,575,941	446,075	44.8	124,463	2.23%	5,897,554	1,466,670	
2042	39	5,897,554	5,897,554	471,804	43.8	134,647	2.28%	6,234,711	1,601,317	
2043	40	6,234,711	6,234,711	498,777	42.8	145,671	2.34%	6,587,817	1,746,988	
2044	41	6,587,817	6,587,817	527,025	41.8	157,603	2.39%	6,957,239	1,904,591	
2045	42	6,957,239	6,957,239	556,579	40.8	170,521	2.45%	7,343,297	2,075,112	
2046	43	7,343,297	7,343,297	587,464	39.8	184,505	2.51%	7,746,256	2,259,617	
2047	44	7,746,256	7,746,256	619,700	38.8	199,646	2.58%	8,166,311	2,459,262	
2048	45	8,166,311	8,166,311	653,305	37.8	216,040	2.65%	8,603,576	2,675,302	
2049	46	8,603,576	8,603,576	688,286	36.8	233,793	2.72%	9,058,069	2,909,095	
2050	47	9,058,069	9,058,069	724,646	35.8	253,019	2.79%	9,529,696	3,162,114	
2051	48	9,529,696	9,529,696	762,376	34.8	273,842	2.87%	10,018,229	3,435,956	
2052	49	10,018,229	10,018,229	801,458	33.8	296,397	2.96%	10,523,290	3,732,353	
2053	50	10,523,290	10,523,290	841,863	32.8	320,832	3.05%	11,044,322	4,053,185	

EXHIBIT H, continued

Year	Beneficiary's Age	FMV of IRA on 1st Day of		8% Growth (income and appreciation)	Life Expectancy (divisor)	Current Year		RMD as a Percentage of the Trust FMV	FMV of IRA on Last Day of Year	Cumulative Amount Distributed Outright to Beneficiary
		Year	Year			RMD Distributed Outright to Beneficiary	Year			
2054	51	11,044,322	11,580,562	883,546	31.8	347,306	3.14%	11,580,562	4,400,491	
2055	52	11,580,562	12,131,014	926,445	30.8	375,992	3.25%	12,131,014	4,776,483	
2056	53	12,131,014	12,694,414	970,481	29.8	407,081	3.36%	12,694,414	5,183,564	
2057	54	12,694,414	13,269,189	1,015,553	28.8	440,778	3.47%	13,269,189	5,624,342	
2058	55	13,269,189	13,853,416	1,061,535	27.8	477,309	3.60%	13,853,416	6,101,651	
2059	56	13,853,416	14,444,770	1,108,273	26.8	516,918	3.73%	14,444,770	6,618,570	
2060	57	14,444,770	15,040,477	1,155,582	25.8	559,875	3.88%	15,040,477	7,178,445	
2061	58	15,040,477	15,637,244	1,203,238	24.8	606,471	4.03%	15,637,244	7,784,915	
2062	59	15,637,244	16,231,197	1,250,980	23.8	657,027	4.20%	16,231,197	8,441,943	
2063	60	16,231,197	16,817,798	1,298,496	22.8	711,895	4.39%	16,817,798	9,153,837	
2064	61	16,817,798	17,391,763	1,345,424	21.8	771,459	4.59%	17,391,763	9,925,296	
2065	62	17,391,763	17,946,962	1,391,341	20.8	836,142	4.81%	17,946,962	10,761,438	
2066	63	17,946,962	18,476,307	1,435,757	19.8	906,412	5.05%	18,476,307	11,667,850	
2067	64	18,476,307	18,971,629	1,478,105	18.8	982,782	5.32%	18,971,629	12,650,633	
2068	65	18,971,629	19,423,537	1,517,730	17.8	1,065,822	5.62%	19,423,537	13,716,455	
2069	66	19,423,537	19,821,257	1,553,883	16.8	1,156,163	5.95%	19,821,257	14,872,617	
2070	67	19,821,257	20,152,448	1,585,701	15.8	1,254,510	6.33%	20,152,448	16,127,127	
2071	68	20,152,448	20,402,992	1,612,196	14.8	1,361,652	6.76%	20,402,992	17,488,779	
2072	69	20,402,992	20,556,754	1,632,239	13.8	1,478,478	7.25%	20,556,754	18,967,257	
2073	70	20,556,754	20,595,298	1,644,540	12.8	1,605,996	7.81%	20,595,298	20,573,253	
2074	71	20,595,298	20,497,557	1,647,624	11.8	1,745,364	8.47%	20,497,557	22,318,618	
2075	72	20,497,557		1,639,805	10.8	1,897,922	9.26%	20,239,440	24,216,540	

EXHIBIT H, continued

Year	Beneficiary's Age	FMV of IRA on 1st Day of Year	8% Growth (income and appreciation)	Life Expectancy (divisor)	Current Year RMD Distributed Outright to Beneficiary	RMD as a Percentage of the Trust FMV	FMV of IRA on Last Day of Year	Cumulative Amount Distributed Outright to Beneficiary
2076	73	20,239,440	1,619,155	9.8	2,065,249	10.20%	19,793,346	26,281,789
2077	74	19,793,346	1,583,468	8.8	2,249,244	11.36%	19,127,570	28,531,032
2078	75	19,127,570	1,530,206	7.8	2,452,253	12.82%	18,205,523	30,983,285
2079	76	18,205,523	1,456,442	6.8	2,677,283	14.71%	16,984,682	33,660,568
2080	77	16,984,682	1,358,775	5.8	2,928,393	17.24%	15,415,063	36,588,961
2081	78	15,415,063	1,233,205	4.8	3,211,471	20.83%	13,436,797	39,800,433
2082	79	13,436,797	1,074,944	3.8	3,535,999	26.32%	10,975,741	43,336,432
2083	80	10,975,741	878,059	2.8	3,919,908	35.71%	7,933,893	47,256,339
2084	81	7,933,893	634,711	1.8	4,407,718	55.56%	4,160,886	51,664,058
2085	82	4,160,886	332,871	0.8	4,493,757	108.00%	0	56,157,815

Assumptions:

Joe Smith died on January 1, 2013 at the age of 40 with one living child (Junior Smith).

Junior Smith turned 10 years old on January 1, 2013.

The sole primary beneficiary of Joe's IRA was Junior's conduit trust.

Joe Smith owned a \$1 million IRA.

As Joe died during calendar year 2013, the conduit trust's first RMD is due by December 31, 2014.

No distributions are needed in excess of the RMD.

