

Planning for Post-death and Post-disability Rollovers

Scenario 1: Participant has significant benefits in a QRP. The plan offers only the lump sum distribution form of death benefit. Participant expects that, when he retires, he will roll the benefits over to an IRA that will offer the life expectancy payout option to Participant's beneficiaries. What will happen if Participant becomes mentally disabled before he retires, when the money is still in the QRP? The distribution and rollover must be carried out, if at all, by Participant's guardian or conservator, or by the holder of Participant's durable power of attorney (DPOA).

Scenario 2: Participant's beneficiary designation form leaves her benefits to her husband as primary beneficiary. Both spouses' expectation is that husband will roll the benefits over to his own IRA and name the children as his beneficiaries. What will happen if husband is mentally disabled when Participant dies? The distribution and rollover must be carried out, if at all, by husband's guardian or conservator, or by the holder of husband's DPOA.

Scenario 3: EGTRRA makes clear that an executor or guardian can roll over a distribution the decedent/ward received prior to death/disability, provided the rollover is completed within 60 days after the distribution (or even later in some cases, once the IRS gets around to writing regs).

What's not clear in any of these situations is: who will be the beneficiary of an IRA created (or funded) by a rollover that is carried out by a fiduciary or DPOA-holder? Does the executor, guardian, conservator or DPOA-holder get to choose the beneficiary? Is he compelled to name the decedent's (or ward's) "estate," to avoid being in the position of creating an estate plan rather than merely executing an estate plan – even though naming the estate usually has negative consequences under the minimum distribution rules? Does the Probate Court choose a beneficiary or supervise the selection of beneficiary?

You may be able to avoid these sticky questions in some cases with appropriate provisions in the client's documents. For example, suppose Eloise wants her retirement plans to go to Mildred as beneficiary. Eloise (with spousal consent, if necessary) names Mildred as beneficiary of the plans. In her durable power of attorney, Eloise gives the DPOA-holder the power to roll over Eloise's plans (including plans inherited from Eloise's spouse) to a new or existing IRA, and directs the attorney to name Mildred as beneficiary of any rollover IRA. In her will Eloise specifically bequeaths any retirement plans to Mildred. This way all bases are covered. Hopefully, the DPOA is sufficient to carry out the plan. If not, and Eloise's guardian, conservator or executor is involved in carrying out the rollover, the supervising Court should easily be persuaded to allow naming Mildred as beneficiary of the rollover IRA, since Eloise's intent is made clear in all the documents, and since Mildred would inherit the plans under the will in any case (so naming her as beneficiary does not change the disposition of the asset).

Unfortunately, this solution will not be so simple in many cases – for example, if the estate plan for the retirement benefits involves formulas, or different dispositions in different circumstances. Also, it is difficult to draft for the disposition of funds that are distributed during the decedent's life but are to be rolled over after death, especially since (under EGTRRA), post-death rollovers could occur more than 60 days after the distribution, with (as yet) no known outer limit. Should the executor be

required to roll over such funds if legally permitted to do so? Or permitted to do so in its discretion? And, if the rollover by the executor is to be discretionary, whose interests does he consider? There will be a conflict if the probate estate and the retirement benefits are to pass to different beneficiaries.

The first step to resolving the problems is to figure out which problems the client will have. If the client is unmarried (or the client's spouse doesn't own any retirement plans) you don't have to anticipate rolling over benefits inherited from the spouse. If the client owns only IRAs, and no qualified plans, you don't have to anticipate rolling over distributions from a qualified plan. The easiest case is if all the client's assets (retirement plans as well as "probate" assets) are to pass to the same beneficiaries (e.g., "my surviving issue"). Happy drafting!