CHOATE'S NOTES: WEB VERSION

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Many people ask me whether there is a way they can leave their IRA "with strings attached," such as specifying that the beneficiary cannot take more than the minimum required distribution (MRD) or designating a successor beneficiary to take over if the original beneficiary (having survived the account owner) later dies before withdrawing all the benefits. There are two ways to accomplish this.

One is to leave the benefits to a trust that spells out all these terms. The drawback of this approach is the necessity of complying with the complicated and confusing "minimum distribution trust rules," if you want the trust to be able to use the beneficiary's life expectancy to measure MRDs.

The other way is to use a "trusteed IRA," that is, an IRA that is in the legal form of a trust (IRC § 408(a)) rather than the more common custodial account (IRC § 408(h)). The trusteed IRA typically offers several choices of restricted beneficiary designations, as well as lifetime disability management, already drafted into the agreement. Many IRA providers offer trusteed IRAs (sometimes only for larger accounts; may also involve higher fees), including Merrill Lynch.

Attention retired 403(b) participants: some 403(b) plans will now permit you to make *post-retirement* contributions for the first five years following retirement, based on the new definition of "includible compensation" in § 403(b)(3). Thanks to Ed Kaake for alerting me to this opportunity.

Another alert I received from a seminar attendee (one of those darn retired engineers): For retirees with otherwise-low taxable income, taking an MRD can increase adjusted gross income (AGI) to the point that Social Security benefits become 85% taxable, when they would have been nontaxable but for the MRD. Adding further insult, the increase in AGI reduces the medical expense deduction. Maybe IRAs are a bad deal for the non-rich?

When the Plan Administrator Won't Cooperate with the Executor

I have now heard of three cases in which a plan administrator refused to provide information to the executor of the estate of a deceased employee, because the estate was not the named beneficiary of the plan benefits. The plan administrator took the position that it would deal only with the named beneficiary (and wouldn't tell the executor who the beneficiaries were). Needless to say, this stance makes it impossible for the executor to complete the federal estate tax return.

To avoid this conundrum, I recommend including a provision in the beneficiary designation form requiring the plan administrator to provide information to the participant's executor or administrator, regardless of who is named as beneficiary. The following is excerpted from the "Master Beneficiary Designation Forms" in Appendix B of my book *Life and Death Planning for Retirement Benefits* (Ataxplan Publications, 5th ed., 2003; www.ataxplan.com; $89.95 plus shipping):

"Information to be provided to Personal Representative. The Administrator shall provide to my Personal Representative any information such representative shall request in connection with the performance of such representative's duties (including the preparation of any tax return) regarding the benefits, the Plan, and the beneficiaries, including information as to matters prior to such representative's appointment, and including copies of Plan documents and returns, to the same extent and on the same terms that such information would have been provided to me had I requested it. Any beneficiary, by accepting benefits hereunder, shall be deemed to have consented to the release of information to my Personal Representative as provided in the preceding sentence."

If you are an executor faced with this type of obstruction, consider sending a letter like the following, with a copy to the District Director of the IRS; one lawyer told me this "worked like a charm" (the plan administrator backed down immediately). Another lawyer told me he got a Probate Court subpoena served on the plan administrator; same effect.

"To the Plan Administrator of the [NAME OF RETIREMENT PLAN] (hereinafter "the Plan"):
"Re: Benefits of [NAME OF DECEASED PARTICIPANT], deceased (hereinafter "Participant")

"I am the executor of the estate of the Participant, who was a participant in the Plan. I enclose a certificate evidencing my appointment.

"I have requested from you certain information in order that I may fulfill my responsibility to prepare and file a federal estate tax return for the Participant's estate. You have informed me that you will provide no information regarding the Participant's benefits under the Plan to anyone other than the Participant's designated beneficiary. You will not tell me the name of the Participant's designated beneficiary.

"As required by § 6018(b) of the Internal Revenue Code, I will include with the estate tax return I will file for the Participant's estate a statement that I am unable to make a complete return regarding the Participant's interest in the Plan, and I will submit your name and address as the person holding legal title to this property. The Internal Revenue Service will then require you to prepare and file an estate tax return regarding this asset on behalf of the Participant's estate.

"Very truly yours,

"[SIGNATURE OF EXECUTOR]"