Estate Planning for Retirement Benefits: Selected Case Studies

What to do in real life...after SECURE

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Natalie B. Choate, Esq.
Nutter McClennen & Fish LLP/ Boston, MA

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INTRODUCTION TO THE POST-SECURE PLANNING WORLD

The SECURE Act, enacted at the end of 2019, through amendments to § 401(a)(9)of the Code, made changes to the "minimum distribution rules" that radically alter estate planning considerations for our clients' retirement benefits. Since these changes were applicable to deaths after 2019, survivors of a client who died a mere two weeks after the enactment could find themselves dealing with an estate plan rendered obsolete less than month earlier. Not only must the estate plans of all clients who own retirement plans be reviewed as soon as possible, practitioners have no authoritative (or nonauthoritative) guidance regarding several important questions that have come up under the terse language of SECURE. We know clients have a new (shortened and less favorable) menu of estate planning options for their retirement benefits—we just don't know exactly how all of those options will work.

But we must prepare plans for real live clients right now, with or without the "final word" on SECURE's provisions. How to approach this? Practitioners' reactions have varied. Here are some sample responses from some leaders in our profession, as categorized by me (without consulting the practitioners named, so I hope they don't mind my summaries and categorization of their ideas).

"It's over. Get out." Ed Slott, CPA, is one of America's leading practitioners, teachers, and writers on planning for retirement benefits and publisher of the (highly recommended) "Ed Slott's IRA Advisor." After reading SECURE, he concluded "They've taken one of the best planning assets and turned it into the worst planning asset." His general advice to wealthy clients with large IRAs is, "Look for any ways you can find to get your money out of these plans at a reasonable tax cost."

"Come up with a brilliant new tax scheme to beat SECURE." This path is for the creative tax geniuses, while the rest of us wait for them to come up with "the answer." Jonathan Blattmachr is a likely pioneer on this path....he is already studying making retirement benefits payable to an S Corp., with the S Corp stock owned by a QSST. Others are hard at work on getting the "beneficiary grantor trust" to function as a see-through designated beneficiary trust under which plan distributions will be taxed at the beneficiary's (low) individual rate but the assets and distributions are kept away from actual control by the beneficiary and his/her creditors.

"Come up with a creative way to work with SECURE." An example: The "Teapot Trust" idea authored by Alan Gassman Esq. and his colleagues, where the estate plan will be fine tuned to direct the retirement benefits to the "eligible designated beneficiaries" and/or low-tax-bracket family members with other less tax-laden assets directed to other beneficiaries.

"Do what we always do, just jiggle it a bit to get tax deferral." This could also be called the head in the sand group. Not that I'm prejudiced, but....There are no quick fixes. Most beneficiaries who inherit retirement benefits will be paying higher taxes, sooner, than they would have under pre-SECURE law. There is no how-we-always-did-it easy path to "beating" SECURE.

WHICH APPROACH WILL BEST HELP YOUR CLIENT REACH HIS/HER GOALS?

THE CASE STUDIES

Each case study describes a fact pattern, the planning problems presented by the case, the solution adopted, and other solutions considered, if any. The discussions assume you are familiar with the tax and other rules applicable to retirement benefits. At the end of some cases, the "Where to read more" section references parts of the author's book *Life and Death Planning for Retirement Benefits* (8th ed. 2019) that provide complete detail (and citations) on the issues discussed in summary fashion in that case study. For print edition of this book visit Amazon.com or www.ataxplan.com or call 800-247-6553.

For the electronic edition (online) visit https://retirementbenefitsplanning.us/

Federal income and estate tax exemptions and rates used are those in effect as of 2020.

Abbreviations and Symbols Used in this Outline

¶ Refers to a section of the author's book *Life and Death Planning for Retirement Benefits* (see above) which may be consulted for further detail on the point referenced.

§ Refers to a section of the Code unless otherwise indicated.

ADP	Applicable Distribution Period. ¶ 1.2.03.
Code	Internal Revenue Code of 1986, as amended through July 2020
DOL	Department of Labor.
ERISA	Employee Retirement Income Security Act of 1974.
IRA	Individual retirement account or individual retirement trust under § 408 or § 408A.
IRS	Internal Revenue Service.
IRT	Individual retirement trust (trusteed IRA). ¶ 6.1.07.
PLR	IRS private letter ruling.
PT	Prohibited transaction. ¶ 8.1.06.
QRP	Qualified Retirement Plan. ¶ 8.3.12.
RBD	Required Beginning Date. ¶ 1.4.01.
REA	Retirement Equity Act of 1984 (Pub. L. 98-397). ¶ 3.4.
RMD	Required Minimum Distribution. Chapter 1, first paragraph.
Reg.	Treasury Regulation.

THE REGULATION THAT DISTINGUISHES "CONDUIT TRUSTS" FROM OTHER "SEE-THROUGH TRUSTS"

Reg. § 1.401(a)(9)-5, A-7(c)(3): Compare Example 1(nonconduit see-through trust) with Example 2 (conduit trust). The regulation explains that the beneficiary of a conduit trust (the "conduit beneficiary" in this Outline) is considered the sole beneficiary of the trust and of the retirement plan payable to the trust, while in a nonconduit see-through trust the life beneficiary is not considered the sole beneficiary of the trust or plan. Under this regulation, a conduit trust for the surviving spouse is entitled to the same "RMD" benefits as the surviving spouse individually would receive if named directly as sole beneficiary (though not entitled to "rollover" rights).

CASE # I: How to Benefit the Surviving Spouse: Ken and Karen

1. Facts

Ken Koslow is a 62-year-old executive. He has two children, ages 36 and 33. His children are competent adults. Both of them have very low incomes. No family member is disabled or chronically ill. Ken's wife, Karen, is, like Ken, a high-income executive. She is 55. Ken's assets consists of:

House (joint with spouse)	$ 2,500,000
Non-plan investments	225,000
Life Insurance	500,000
Qualified plan	2,000,000
IRA	1,000,000
Total	$6,225,000

Ken's plan is to leave his life insurance and other "non-retirement-plan investments" to his children, the house to his wife (it is already in joint ownership), and all of his retirement benefits to a QTIP marital deduction trust. The trust would pay income to Karen for life and on her death the principal of the trust would pass to his children. Ken's stated goal is that "all of my family should benefit from my retirement plans, as these are my largest asset."

The Code provides special favorable treatment for retirement benefits payable to the surviving spouse as beneficiary. If a client wants to provide for his spouse, but does not want to make his retirement benefits payable outright to her as named beneficiary, what does the family lose if the client names *a trust for the spouse's benefit,* rather than the spouse herself, as beneficiary of his retirement plan?

This case discusses that question in a particular context: where the client's reason for wanting to name a trust as beneficiary is that his spouse is not the parent of his children—the so-called "second marriage" scenario.

In a second marriage situation where a client wants to leave assets for the life benefit of his spouse, but ultimately have the funds pass to his children by a prior marriage; or any situation in which a client wants to leave assets in a life trust for the spouse's benefit rather than outright to the spouse for tax or non-tax reasons; the usual solution is a "QTIP" trust.

Warning: This case study assumes that the spouse is a competent adult capable of handling his/her own financial affairs. Thus, the case assumes that the choice between leaving benefits "outright to spouse" versus "to a trust for spouse" is made solely on the basis of tax implications and choice of individuals to be benefitted. If the spouse's creditor problems or inability to handle financial affairs would put funds left outright to him/her at risk of loss, then it may be essential to leave benefits in trust for him/her, rather than outright to him/her, regardless of the tax consequences. This principle is not restated in every paragraph.

2. Options for benefitting the surviving spouse

Here are the primary methods for leaving retirement benefits "to, or for the benefit of," the participant's surviving spouse:

A. **Spouse is beneficiary; spousal rollover.** Name the spouse outright as designated beneficiary of the retirement plan; spouse rolls over to her own IRA. This has tremendous income tax advantages. The surviving spouse can "roll over" the inherited benefits to the surviving spouse's own IRA (or other eligible retirement plan). By doing so, she eliminates the need to take any "required minimum distributions" until she herself reaches age 72. Once she reaches age 72, RMDs to her will be based on the Uniform Lifetime Table, which produces much smaller RMDs (and longer deferral) than the single life expectancy table applicable to beneficiaries holding an inherited IRA. The "drawback" from Ken's perspective is that his children receive no benefit at all from the IRA.

B. **Spouse is beneficiary but does not roll over.** If the surviving spouse is named outright as designated beneficiary, but chooses NOT to roll the benefits over to her own IRA, the substantial tax advantages of the rollover are lost. There are still some advantages compared with benefits left to other individuals. The surviving spouse, as an Eligible Designated Beneficiary (EDB), is entitled to take out the benefits in annual instalments over her life expectancy—she is not subject to the 10-year rule applicable to most other designated beneficiaries (however, the 10-year rule will kick in upon her death). Furthermore, she does not have to start taking RMDs until the later of the year after the participant's death or the year the participant would have reached age 72 (other EDBs must start no later than the year after the year of the participant's death). Finally, her life expectancy would be recalculated annually (the life expectancy of any other EDB is a fixed term). Why would the surviving spouse hold inherited benefits as beneficiary rather than rolling them over to her own IRA? Usually a matter of age: If the spouse is under age 59½ she may prefer to hold the IRA as an inherited benefit (distributions from which are not subject to the 10% tax) as opposed to rolling them to her own IRA (distributions from which are subject to the 10% tax unless another exception applies). Such a spouse would normally complete the rollover after attaining age 59.5. Or, the surviving spouse may be younger than the deceased spouse. In this case the surviving spouse can defer the start of RMDs longer by waiting to complete the rollover until the year before the decedent would have reached age 72, vs. rolling them over to her own IRA from which she would have to start RMDs when she herself reaches age 72. Since there is no deadline for a spousal rollover to occur, the surviving spouse can leave the benefits in the decedent's plan for one of these age -related reasons then later roll it over to her own IRA once the age-related reason disappears (e.g. when she attains age 59½).

C. **Conduit trust for surviving spouse:** The benefits are left to a trust under which the trustee is required to distribute outright to the surviving spouse, as received, all distributions the trustee receives from the inherited retirement plan. Because Treasury regulations specify that under a "conduit trust" such as this the spouse is considered the sole beneficiary of the trust and of the plan, the conduit trust receives the same RMD treatment as under #B above—RMDs don't start until the later of year after year of death or year decedent would

have attained age 72, and spouse's life expectancy is recalculated annually. However, unlike with "B," no rollover is possible.

D. **Combination conduit/QTIP Trust.** This is a conduit trust (see "C") under which the trustee is required to take out of the IRA and distribute to the surviving spouse not just the RMD but the income of the IRA if greater; as a conduit trust, whatever the trustee does take out of the IRA must be passed out to the surviving spouse. The purpose is to qualify for both the federal estate tax marital deduction AND "EDB" treatment for RMD purposes. This trust receives the same RMD treatment as the "plain" conduit trust discussed at C.

E. **Any trust that is not a conduit trust.** If the trust for the benefit of the surviving spouse is not a "conduit trust" [i.e., a trust under which ALL distributions from the retirement plan must be forthwith distributed to or for the benefit of the spouse], then under present regulations it does not qualify for EDB treatment even if the surviving spouse is the sole life beneficiary. This would apply to a "plain" QTIP trust under which the surviving spouse is entitled to all income for life (so it qualifies for the marital deduction), and maybe even additional rights such as "principal if needed for health or support" or "principal in the discretion of the trustee" but is not entitled to receive all distributions the trustee receives from the IRA. If this trust qualifies as a see-through trust [see Chapter 6 of *Life and Death Planning for Retirement Benefits*] it will be subject to the 10-year rule. If it is not a see-through trust it will be subject to the applicable "no-DB rule" [see Chapter 1 of *Life and Death Planning for Retirement Benefits*].

Ken does not like Options A and B because those give Karen total outright control of the $3 million of retirement benefits. Ken wants her to have "life only" use of these benefits "so there will be something left for the kids."

He has the same objection to the conduit trust idea—Options C and D. Under those scenarios, if Karen lives to her life expectancy, all the retirement benefits will have been paid out to her, with nothing left for Ken's children.

He likes the idea of a plain old garden variety income only QTIP trust ((Option E) under which Karen would receive all income, plus principal for health and support and/or in the discretion of the trustee, but whatever "principal" she does not need is "saved" for the children to inherit after her death. What's wrong with that idea?

2. Drawbacks of leaving benefits to a QTIP trust rather than outright to spouse

Here are the tax drawbacks of leaving benefits to a QTIP trust for the spouse, compared with leaving the benefits outright to the spouse or to who then rolls them over to her own IRA:

A. **Distributions are subject to the 10-year rule.** Under the plain old QTIP trust, which is subject to the 10-year rule, all the retirement benefits will be distributed out of the plans within 10 years after Ken's death and will be entirely taxed to the trust at trust tax rates (except to the extent that some distributions are passed out to Karen as "trust accounting income" and/or principal needed for health or support). There will be no deferral until Karen

reaches age 72 (achievable only through outright inheritance plus spousal rollover), no life expectancy payout (achievable only with a conduit trust).

B. **High trust tax rates**. Distributions paid to the trust and held in the trust for later distribution to the children will be taxed at high trust rates even though Ken's children are in low tax brackets. So what exactly is "preserved for the children?" The after tax value of the retirement plans ($3 million X 63% = $1,890), and...

C. **Children probably have a long wait for a little money.** Karen is only 19 years older than Ken's oldest child. Thus it is quite likely that Ken's children themselves will be "old" before they see anything from the marital trust. Karen's life expectancy is currently about 30 years, according to the IRS tables.

3. Solutions offered for this problem

So we now know that leaving retirement benefits to a QTIP trust for Karen's life benefit would involve substantial income tax drawbacks, compared with leaving the benefits outright to Karen or even outright to the children. We review with Ken other possible ways to achieve his goal:

A. **Leave the benefits outright to Spouse rather than to a QTIP trust (and buy life insurance as a "replacement asset" for the children).** Some clients, upon learning all the drawbacks of leaving benefits to a QTIP trust, would decide to forget the trust idea and simply leave the benefits to the spouse outright. The decision depends on whether the advantages the client is trying to achieve by using a QTIP trust outweigh the tax drawbacks. For example, if the client's reason for desiring a QTIP trust was a concern about a potential future disability of his currently healthy spouse, he might decide to take that risk and leave the benefits outright to the spouse rather than incur the definite drawbacks of naming a QTIP trust. On the other hand, if the spouse is a drug addict or compulsive gambler, it is worth incurring the tax drawbacks of a QTIP trust in order to prevent the funds' being dissipated by the spouse. In Ken Koslow's case, he does not want to leave all the benefits outright to Karen because he wants his children have some rights to the benefits. Thus, "Solution A" is suitable for him only if he wants to take an extra step and buy life insurance to benefit the children, so they would receive the insurance in lieu of any interest in the retirement benefits.

B. **Name Spouse as outright beneficiary, but on the condition that she will name Participant's children as beneficiaries of her rollover IRA.** Ken hears this idea from his golfing buddy and asks what you think. It sounds like a neat solution, because it enables the surviving spouse to roll over the inherited benefits (thus obtaining the deferral benefits of the spousal rollover), while still protecting the children of the prior marriage, right? Wrong. This idea is a non-starter. First, the children are not at all protected by the spouse's assurance that she will name them as beneficiary of her rollover IRA. Unless they force the spouse into some kind of court proceedings, how will they know if she complied? But even if she complied, she has agreed to basically nothing, since she can withdraw all funds from the rollover IRA without anyone's consent or knowledge. Once the funds have been withdrawn

from the IRA she can spend them (or leave them to anyone she chooses if she does not spend them) and the children will get nothing. If Ken leaves the benefits to Karen on the conditions that (A) she will *not* spend them, and that (B) she must leave either the benefits themselves or the proceeds thereof to Ken's children, then he has created a terminable interest that will not qualify for the marital deduction. He has also probably eliminated the possibility of a spousal rollover (thus defeating the point of the exercise): Reg. § 1.408-8, A-5(a), provides that a spouse can elect to treat an inherited IRA as her own only if she is the sole beneficiary of the IRA *and* has an unlimited right to withdraw amounts from the IRA. Ken decides not to use this "solution," and agrees not to seek tax advice on the golf course.

C. **Leave some benefits outright to spouse and some outright to the children.** This is the solution Ken adopts. It is a sensible compromise between leaving all the benefits to a QTIP trust or all to the spouse outright. It gives each of the beneficiaries (spouse and children) a substantial financial benefit. The substantial tax savings (compared with leaving benefits to a QTIP trust) allows all the beneficiaries (spouse *and* children) to receive more money than they would receive as beneficiaries of a QTIP trust.

If adopting Solution E, how do you decide how much of the retirement benefits, and which specific plans, should be left to which beneficiary?

One approach to the "how much" question is to determine the value of what would have been the beneficiaries' respective interests in a QTIP trust. With a QTIP trust, the spouse has a life interest and the children have a remainder interest. The total value of their respective interests equals 100 percent of the value of the trust. These relative values can be determined using the IRS's tables for valuing life estates and remainder interests (or some other set of actuarial tables). See https://www.irs.gov/pub/irs-pdf/p1457.pdf and IRS Publications 1457, 1458, and 1459.

For example, if the relative value of the spouse's life interest is 65 percent of the total value of the trust assets, and the children's remainder interest, at the outset, is worth 35 percent of the total trust value, the participant might consider leaving 65 percent of the benefits outright to the spouse and 35 percent outright to the children (or to a trust for their exclusive benefit). (As the years go by, the relative value of the spouse's life estate declines as she gets older, and the value of the remainder interest increases to the same extent.) If the spouse takes full advantage of the spousal rollover for her share, and the children take full advantage of the life expectancy payout option for their shares, both spouse and children should end up with substantially more dollars in their pockets than they would if they received theoretically the same relative amounts as life and remainder beneficiaries of a QTIP trust.

The relative amounts left to the respective beneficiaries need not be exactly what their relative interests would have been in a QTIP trust; it can be whatever percentage the participant wishes. Regarding which plan to leave to whom, consider such factors as spousal rights under REA (the spouse has a right, under federal law, to all or part of the death benefit under any qualified plan; see second to last paragraph of section #4 below) and any state law rights (the spouse may have a community property right to an IRA).

Sometimes when this solution is offered the client's response is "But if I leave some of my plans directly to my children, my spouse won't have enough to live on." If that is true, and the client's primary goal is to assure the spouse's financial security, then the client should not leave any of the benefits to the children—and the client should certainly not leave benefits to a QTIP trust!

The QTIP trust will *dramatically* erode the value of the benefits during the spouse's lifetime. The only way to assure her financial security is to leave the retirement benefits to her outright.

4. How Ken implements Solution E

Note: The numbers and tax brackets in this case study solution were based on an older version of the tax code. Tax rates cited in this case study are those that were in effect at the time. 2019 income tax rates are somewhat different—for example, the top tax rate for trusts when the case was run was 39% percent, whereas for the years 2018–2025 it's only 37%. However, the structure of these taxes as applied to inherited IRAs still has the same result—benefits left to a trust for the spouse are potentially taxed *much higher* than benefits left outright to the spouse and rolled over and/or left to individual beneficiaries who are not in the highest income tier. There is no reason to believe subsequent income tax law changes would change the overall result in this case though the actual numbers would change.

Here is how Ken Koslow implements Solution E.

Using software, his planner projects the eventual value of the benefits to the family under "Scenario 1," which is leaving all benefits to a QTIP trust. The planner assumes that all income of the retirement plans is distributed annually to the QTIP trust and thence to Karen, where it is taxed at 39.6 percent. To the extent the RMD exceeds the income each year, the excess is retained in the trust and also taxed at 39.6 percent. Assuming Karen dies at the end of her 30-year life expectancy, there would be nothing left in the retirement plans at her death. At that time, the marital trust would contain essentially the date-of-death balance of the plans, as increased by capital gains (if any) and reduced by the income taxes the trust had to pay on the plan distributions. This net amount would pass to Ken's children. Karen's estate (which she could leave to her own beneficiaries) would consist of the after-tax accumulations of income from the marital trust.

This proposed scenario was compared with another alternative, "Scenario 2." Under Scenario 2 there would be no marital trust. The $2 million of qualified plan benefits would be made payable to Karen personally, and the $1,000,000 IRA would be payable directly to Ken's children. Ken would make sure his life insurance and investments outside the plan were sufficient to pay any estate taxes on the benefits passing to the children.

This scenario has many advantages over the QTIP scenario. Each beneficiary would have total control of his or her own share of the benefits, without having to compete for the attention of the trustee of the marital trust. Karen would take the plans payable to her out as a lump sum and roll them over to her own IRA. She would then defer all distributions until she reached 70½, at which time she would start withdrawing benefits using the Uniform Lifetime Table. She would name her nieces as her designated beneficiaries on the rollover IRA.

No benefits would be subject to the high income tax bracket of a trust.

Ken's children are in low income brackets. With a $1 million IRA payable to them over no more than 11 taxable years after Ken's death, each child would receive roughly 10% of $1 million, or $100,000, each year. This size distribution would put them into higher brackets, probably, but due to their minimal income levels currently it would still be a lower rate than the 37% applicable to a trust.

The children would have their inheritance immediately at Ken's death, and would not have to sit around for 30 (or more?) years waiting for Karen to die. Karen would not have to feel the children are looking over her shoulder with regard to the investments of the marital trust.

Another advantage of this approach has to do with the practicalities of plan distribution options. Qualified retirement plans (QRPs) often do not permit an installment payout to any beneficiary. Thus, if QRP benefits are made payable to a marital trust, the plan may not permit the trust to draw those benefits out gradually over the life expectancy of the oldest trust beneficiary. The trust can avoid taking a taxable lump sum by using the nonspouse beneficiary rollover to an "inherited IRA," if the trust qualifies as a see-through trust; see ¶ 4.2.04 of *Life and Death Planning for Retirement Benefits*. If these benefits are made payable to Karen personally, by contrast, even if the plan forces her to take a lump sum distribution, she can roll the benefits over to an IRA in her own name which has whatever payout options she wants, without the worry over whether a trust qualifies as a "see-through."

Furthermore, most qualified retirement plans are subject to the Retirement Equity Act of 1984 (REA), meaning that the benefits cannot be distributed to someone other than Karen (the surviving spouse) without her consent. By making the qualified plan benefits payable to Karen personally, you avoid the need for obtaining her consent, which would be required to make the benefits payable to a marital trust or some other beneficiary. Since REA does not apply to IRAs, Ken can make the IRA payable to his children without Karen's consent (subject to any requirements of state law or prenuptial agreements they may have signed).

Last but definitely not least, it is probable that through the combination of substantially increased deferral and somewhat lower income tax rates *both* Karen *and* the children would end up with *more dollars*. On Karen's death, she would still have a substantial portion of the plan she inherited still *inside* her rollover IRA; she could leave to her family her rollover IRA plus the after-tax fund of accumulated RMDs she took from the rollover IRA. The children, at Karen's death, would own their own after-tax fund of distributions they took from their inherited IRA. Based on the tax rates and estimated interest rates and other estimated factors at the time this case study was run, Karen would end up with twice as much money at the end of her 30-year life expectancy by being named outright beneficiary of 2/3 of Ken's retirement benefits as she would have had by being named sole life beneficiary of an income only QTIP trust....and the children would end up with three times as much money by being named outright beneficiaries of the $1 million IRA than they would have received as remainder beneficiaries of a QTIP trust that received 100% of his benefits!

5. Where to read more

Matters mentioned in this case study are discussed in full detail in the following sections of *Life and Death Planning for Retirement Benefits* (8th ed., 2019):

Qualifying for the estate tax marital deduction: ¶ 3.3

Special income-deferral rights granted to a surviving spouse named as beneficiary of a retirement plan, including spousal rollover: ¶ 1.6 and ¶ 3.2

Income tax and trust accounting and "see-through trust" aspects of naming a trust as beneficiary of a retirement plan: Chapter 6

Explanation of conduit trusts: ¶ 6.3.05

Comparison of RMD rules applicable to surviving spouse as beneficiary, with those applicable to trust for the benefit of spouse: ¶ 3.3.02

Uniform Lifetime Table and Single life expectancy tables: ¶ 1.2.03 (see Chart #1 and Chart #2 at end of this Outline for charts applicable after 2020)

Recalculation of life expectancy annually versus fixed-term method: ¶ 1.2.04

Federal spousal rights to inherit benefits under qualified plans: ¶ 3.4

CASE # II: Planning for "Vanilla" Beneficiaries

When the person the client wishes to benefit with his/her retirement plan death benefits ("proposed beneficiary") is not his/her spouse or minor child, and is neither disabled or chronically ill, what planning options are available?

The life expectancy payout option has been taken off the table for this proposed beneficiary unless he or she is "not more than 10 years younger than" the participant. Planning considerations for the retirement benefits are therefore as follows:

A. Not more than 10 years younger

If the individual is "not more than 10 years younger," than the participant he/she qualifies as an "eligible designated beneficiary" and therefore qualifies for the life expectancy payout even post-SECURE. This situation will arise if the client is leaving benefits to his parents or other older-generation relatives, siblings, or a not-too-much-younger "significant other" or friend. Thus this situation will be encountered uncommonly but not rarely. It would be desirable if possible to leave the benefits to this beneficiary in a way that preserves the option of the life expectancy payout—in other words, name him/her as outright beneficiary or leave the benefits to a conduit trust for him/her.

What are the rules/limitations on the life expectancy payout option here? At this writing there is as yet no guidance other than pre-SECURE regulations (which answer some but not all questions), so here is the landscape:

1. **How is the "10 years younger" measured?** No word yet from Treasury on how this will be calculated. The author's expectation is that it will be calculated based on birth year (not on actual birth DATE), as is already the case when determining whether the participant's spouse is more than 10 years younger for purposes of determining the participant's Applicable Distribution Period.

2. **Will a trust for the sole life benefit of the individual qualify for the life expectancy payout, even if it is not a conduit trust?** "No" is the answer under pre-SECURE regulations so this would require a modification by the Treasury. At this time there is no authority for allowing Eligible Designated Beneficiary status to a trust for the benefit of an Eligible Designated Beneficiary unless it is a conduit trust. See "THE REGULATION" p. 2 of this Outline.

3. **What if it is a nonconduit trust for the sole life benefit of the individual, if all the remainder beneficiaries of the trust are also EDBs?** See answer to #2.

If the proposed beneficiary is of an older generation, also consider whether a charitable remainder trust would fit with the client's planning goals. See "Trio of Problems" Case Study.

B. More than 10 years younger

SECURE has one word for this proposed beneficiary: Gotcha!

The nondisabled non-chronically ill individual who is more than 10 years younger than the client and who is not the client's spouse or minor child is the direct target of SECURE's revenue raising intent. SECURE dictates that any retirement benefits payable to this individual must be distributed by the end of the year that contains the 10th anniversary of the client's death. If the benefits are in a "traditional" retirement plan, they will be distributed and taxed no later than that date. If the benefits are in a Roth plan, they will be distributed (and tax-free accumulations will cease) no later than that date. The massive income tax increase created by SECURE's changes to the minimum distribution rules falls primarily though not exclusively on this beneficiary.

Planning options:

1. **Name the individual as outright beneficiary of the plan.** This way the beneficiary will decide when, during the 10/11 taxable year period after the client's death, to withdraw the benefits and all distributions will be taxed at the beneficiary's personal rate.

2. **Name a conduit trust for this individual as beneficiary of the plan.** The advantages are, the trust is guaranteed to qualify for the "10-year rule" payout, all traditional-plan distributions will be taxed at the individual beneficiary's rate (since all such distributions are paid out to such beneficiary upon receipt), but the trustee (rather than the individual beneficiary) controls the investments and controls when the plan distributions are taken. Thus, for example, if the client's goal with a Roth IRA is to force the beneficiary to delay distributions until the end of the 10-year period, a conduit trust can accomplish that goal. The disadvantage is that there is no ability to keep the funds in trust beyond the end of the 10-year period.

3. **Name a nonconduit see-through trust for this individual as beneficiary of the plan.** A trust does not have to be a conduit trust to qualify for the 10-year payout—it only has to be a "see-through trust." To understand the difference, read Chapter 6 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019). One of the "trust rules" that must be complied with to have a "see-through trust" is that the oldest trust beneficiary must be "identifiable." The point of that regulation, pre-SECURE, was that the oldest trust beneficiary's life expectancy would be the Applicable Distribution Period for the trust. Since the life expectancy payout no longer applies to a nonconduit see-through trust [for possible exception see "A Tale of Two Families" Case Study] the rule appears obsolete, but since it hasn't been formally rescinded it is recommended that drafters continue to comply. The advantages of using a nonconduit see-through trust are that (i) the retirement plan qualifies for the 10-year payout but (ii) the plan distributions do not have to be paid out to the individual beneficiary at any particular point during his life. The client, through the trustee and trust terms, can control when and why money is distributed from the trust

to the individual beneficiary. The drawback? All distributions from the plan that are NOT passed out to the individual beneficiaries will be taxed at trust rates. Gotcha!

4. **Name a non-see-through trust as beneficiary.** If the trust doesn't qualify as a see-through, it will be subject to the "no Designated Beneficiary" (no-DB) payout rules—all benefits from plans as to which the client died before his/her Required Beginning Date must be distributed by the end of the year that contains the fifth anniversary of the client's death, all benefits from other plans must be distributed in annual instalments over what is left of the client's life expectancy. See ¶ 1.5.06 and ¶ 1.5.08 of *Life and Death Planning for Retirement Benefits* (8th ed. 2019) for explanation of how benefits are distributable under the no-DB rules. The advantage for the client is that the trust can say whatever the client wants it to say, without regard to the restrictions of the see-through trust rules.

5. **....Or find the holy grail "fifth option?"** See the Introduction to this Outline for the efforts of Jonathan Blattmachr, Alan Gassman, and others to find creative ways around SECURE—some way to carry out the client's estate planning goals without subjecting all the death benefits to rapid distribution and/or high tax rates. Watch and listen for developments from these gurus!

CASE # III: Married Clients: How to Use the Federal Estate Tax Exemption

Each and every American receives an exemption from federal estate tax. In recent years, the size of the exemption has ranged from $600,000 (for deaths in years 1987–1997) to $5 million adjusted for post-2011 inflation to $11,580,000 (as of 2020). A key element of estate tax planning for married couples has always been making sure that each spouse made use of his/her exemption. The rule prior to 2011 was "use [your exemption] or lose it." Since 2011, we have had a wonderful new alternative to "use it or lose it": "Portability" of the estate tax exemption. The first spouse to die can leave his/her unused estate tax exemption to the surviving spouse, who will then have in effect a double estate tax exemption. No longer must married couples divide their assets and leave assets to a "credit shelter trust" on the first death to avoid losing the benefits of the first spouse's estate tax exemption—they have an additional option called portability.

Portability can create problems and issues, and is not "the right answer" for every married couple, but it has a <u>huge</u> and <u>favorable</u> impact on married couples who have *substantial retirement assets*.

A. Summary of the current federal estate tax landscape

Following enactment of the American Taxpayer Relief Act of 2012 in January 2013 and the Tax Cuts and Jobs Act in December 2017, we have the following federal estate tax system for deaths in 2018-2025. The federal estate tax is continued in effect largely as it applied to deaths in 2001–2009 (including "stepped up basis" for income tax purposes), but with the following significant changes:

- ✓ There is a federal estate tax exemption (the "basic exclusion amount") of $11.58 million [as of 2020] per person. This new exemption is significantly LARGER than the exemption applicable in most earlier years.

- ✓ The tax rate applicable to the taxable estate (after all exclusions and deductions etc. have been applied) is 40 percent. § 2001(c). This rate is LOWER than the rates applicable in most prior years (45% or even more).

- ✓ A surviving spouse can add to his or her own "basic exclusion amount" the unused exemption amount of her or his "last deceased spouse" (the deceased spousal unused exclusion amount, or "DSUEA"), provided such last deceased spouse died after 2010 and provided that the executor of such last deceased spouse timely filed an estate tax return for the estate of such last deceased spouse, computing (and irrevocably electing to allow the surviving spouse to use) the DSUEA. § 2010(c)(2)(B), (4), (5)(A). This is called "**portability**" of the estate tax exemption, because the exemption can essentially be transferred to the surviving spouse by the estate of the first spouse. Unlike the basic exclusion amount, the DSUEA amount is frozen at the first death—it does not increase with inflation.

The case studies in this section focus on federal estate tax credit planning for married couples who have substantial retirement benefits in light of the above regime.

B. Background: Credit Shelter Trust Planning for Married Couples Pre-2011

Even though it has "always" been true that each spouse was entitled to his or her own federal estate tax exemption, it has also always been true that, prior to 2011, careful planning was needed to avoid wasting one spouse's exemption. If the first spouse to die ("first spouse") left all of his or her assets outright to the surviving spouse ("second spouse"), then there would be no estate tax on the first death, because the marital deduction for assets left to the surviving spouse meant there would be a 100 percent deduction, and no taxable estate. No taxable estate meant there was nothing for the first spouse's exemption to apply to. Now the second spouse owned all the assets (his/her own, plus those inherited from the first spouse) but had only one estate tax exemption (i.e., his or her own).

So Step #1 in basic estate tax planning for married couples, pre-2011, meant having the first spouse to die leave assets equal to the exemption amount to a beneficiary OTHER THAN the surviving spouse or charity…such as directly to the children, or (more commonly) to a trust that would benefit the surviving spouse for life but not be included in his/her estate upon his/her later death (because he/she was only a life beneficiary of it). This type of trust is usually called a "credit shelter trust" (because it makes use of the federal estate tax credit or exemption equivalent of the first spouse to die), "bypass trust" (because it "bypasses" inclusion in the surviving spouse's estate), or "family trust" (because that is the name often given to it in estate planning documents). This Outline uses the term **credit shelter trust**.

Even though the credit shelter trust estate plan is only needed at the death of the first spouse to die, *both* spouses had to create credit shelter trust estate plans—because you never know which spouse will die first. And then the couple also had to arrange their assets to make sure that EACH

spouse owned assets equal to the exemption amount (or equal to half the couple's assets, if less), so that (regardless of which spouse died first) the correct amount of assets would flow into the deceased spouse's credit shelter trust and be sheltered from estate tax, both on the first death (by the first spouse's exemption, which would apply to it) and on the second death (by being excluded from the surviving spouse's taxable estate because he/she didn't own the assets).

Portability of the estate tax exemption has made much of this planning (document drafting and asset-rearranging) unnecessary for many married couples.

C. Portability makes estate planning easier for benefits-heavy couples

"Standard" credit shelter planning necessitated a hard choice for married couples (1) whose total wealth was large enough to make them concerned with federal estate taxes and (2) who had a substantial portion of their wealth in IRAs or other retirement plan benefits. The difficulty involved choosing between the *income tax benefits* of the "spousal rollover" (obtainable only by leaving the retirement benefits outright to the surviving spouse) and the *estate tax benefits* of the credit shelter trust estate plan (obtainable only by giving up on the spousal rollover, and accepting a faster rate of distribution of the benefits, and income taxation at a higher rate) by making the retirement benefits payable to a credit shelter trust.

For a detailed discussion of the income tax advantages of leaving retirement benefits outright to the surviving spouse and the income tax drawbacks of making benefits payable to a trust for the life benefit of the surviving spouse, see the *Ken Koslow* case study earlier in this Outline. With portability of the estate tax exemption, couples no longer have to choose between saving estate taxes and saving income taxes. They can save both.

We will look at how the new estate tax landscape impacts planning for three couples: Peter and Penny Poore (combined assets $11 million); Ron and Rita Rich (combined assets $50 million); and Mark and Mary Middle (combined assets $22 million). In each case, assume the following:

- ♦ This is a first marriage for both spouses.
- ♦ All the couples are in their 60s.
- ♦ Each couple has three adult children.
- ♦ In each case, the couple's only asset is a traditional IRA in the name of the wife.
- ♦ The spouses and the children are all happy, healthy, financially responsible individuals who have no concerns about creditors, divorce, substance abuse, state taxes, or any other unpleasant eventuality.
- ♦ Each couple's only goal is to minimize federal taxes for their children without impairing the financial security of the surviving spouse, but they do not want to make lifetime gifts.
- ♦ At the time they come to see you, each couple's estate plan consists of simply "I love you" wills leaving everything outright to the surviving spouse if living, otherwise outright to the children, and the beneficiary designation for the IRA is the same.

Note: For ease of discussion, these case studies use an exemption of $11 million, rather than referring constantly to "$11.4 million adjusted for inflation."

D. Peter and Penny Poore

Peter and Penny are truly poor, because their combined assets of only $11 million (all in Penny's IRA) are less than the federal estate tax exemption of $11.4 million. Barring an increase in their estate value or a change in the law reducing the exemption amount, they don't have to worry about (or plan for?) federal estate taxes.

The question is *whether there is any reason for them to change their estate plan*. Is there any reason we should advise Penny to leave some or all of her IRA to a beneficiary other than Peter (such as directly to the children, or to a credit shelter trust for Peter's life benefit)? Is there any reason we should advise her to cash out some of her IRA and put some of the resulting after-tax cash in Peter's name to equalize the estates?

My answer would be no. Under the current estate tax regime, regardless of which spouse dies first the survivor would have a federal estate tax exemption of $11.4 million, which is more than their combined assets. Thus, even without "portability," they don't have to worry about federal estate taxes. If the executor of the first spouse to die (regardless of whether that is Peter or Penny) takes the step of timely filing a federal estate tax return and electing to leave the first spouse's DSUEA to the surviving spouse, then the surviving spouse will have a *$22 million exemption*.

There are arguments why the Poores should consider adopting a "traditional" credit shelter plan or taking some other steps to guard against federal estate taxes. One could speculate that the surviving spouse will by some other means grow the estate beyond its current $11 million of value, even beyond $22 million, and thus benefit from credit shelter planning on the first death. Also, it's true the present large exemption amount "sunsets" and the exemption goes back down to about $5 million for deaths in 2025—and a change in political control of Congress could cut the exemption down even sooner.

But for the Poores to do credit-shelter type planning, they would have to sacrifice some of the income tax deferral benefits that their estate plan now incorporates. For example, Penny would have to cash out some of her IRA *now* to get assets to put in Peter's name so he can leave assets to a credit shelter trust if he dies first. At the very least she would have to leave some of the IRA to a credit shelter trust for Peter's benefit, or directly to the children, rather than leaving the whole IRA outright to Peter as she does now. Leaving the IRA direct to the children would impair Peter's financial security. Leaving it to a credit shelter trust would cause accelerated distribution of the IRA (compared with the long-term deferral available with the spousal rollover) and taxation of the IRA distributions at a higher tax rate (the trust would be in a higher tax rate than Peter personally). See discussions in the *Ken Koslow* case study regarding the drawbacks of making retirement benefits payable to a trust for the life benefit of the surviving spouse. While these alternatives could be discussed with Mr. & Mrs. Poore, it seems unlikely that they would want to pay a high income tax price for speculative estate tax savings.

E. Ron and Rita Rich

The estate tax planning picture is completely different for the Riches, with combined assets of $50 million (all in Rita's IRA). Regardless of any foreseeable scenario for the federal estate tax law, their estate will be subject to a substantial federal estate tax bill no later than the death of the surviving spouse. They agree that the surviving spouse could live well on just a $30 million IRA, so they can accept some acceleration of income taxes and diversion of assets to the next generation without impairing the surviving spouse's financial security in order to save estate taxes.

For a couple in this position, the focus is on making maximum use of each spouse's federal estate tax exemption. One goal is to use the exemption as early as possible, so that post-transfer appreciation on the exemption amount can be removed from the couple's estate. That factor would often prompt a suggestion that the couple should make lifetime gifts to use up their estate tax exemptions. At the very least, this would indicate that the first spouse's exemption should be used to transfer the exemption amount to the next generation at the first death, so that subsequent growth in the value of the assets (through income or appreciation) does not increase the size of the second spouse's estate.

The Riches should consider the following steps to get the most use out of their two $11 million estate tax exemptions.

First, Rita should consider leaving some of her assets (up to the federal exemption amount) directly to the children rather than leaving her whole estate plus her entire exemption amount outright to Ron. Leaving all to Ron would mean leaving him her "frozen" $11 million exemption amount plus a $50 million IRA that would continue to grow in value after her death. Her DSUEA would not shelter the whole asset from estate tax at Ron's later death—far from it.

But simply leaving a $11 million traditional IRA to the children does not maximize the value of her exemption. Some of her exemption will be "wasted" when the children have to pay income tax on distributions from that traditional IRA. She should consider, instead, leaving them a $11 million Roth IRA. She can convert $11 million of her IRA to a Roth and name the children as beneficiaries of the Roth IRA. That way they will inherit the full $11 million, not $11 million minus income taxes. To pay the income tax on the Roth conversion Rita would have to cash out $17.468 million of her IRA to have enough cash to pay the income tax on an $11 million Roth conversion and on the IRA distribution taken to pay such taxes (assumes 37% tax rate).

Next, Rita needs to transfer some assets to Ron to make sure he has $11 million of assets to leave direct to the children in case he dies first. To get $11 million of cash to give to Ron, she must cash out another $17.468 million of her IRA to pay the income tax on the distribution itself and have $11 million left over to give Ron. After these transactions, Rita would own an $11 million Roth IRA and a $15 million traditional IRA and Ron would own $11 million of after-tax assets. The nominal family assets would be less, but the after-tax value is arguably the same and arguably much better arranged, with more diversification of ownership and tax attributes:

Pre-planning: Rita owns a $50 million traditional IRA. Ron owns nothing.
Total value: Nominal $50 million; after tax $31 million.

Post-planning: Rita owns a $15 million traditional IRA and an $11 million Roth IRA.
Ron owns $11 million of non-IRA assets.
Total value: Nominal $37 million; after-tax $31 million.

The family's projected estate tax bill would be reduced from $11 million to $6 million.

This plan works even if portability ceases to exist for some reason (which seems unlikely), because it does not use portability at all. Portability is for the poor and the middle class. Rich people shouldn't use it anyway, so they don't care if it goes away.

F. Mark and Mary Middle

Note: The "middle" estate plan has gotten a bit distorted. When the estate tax exemption was ca. $5 million, you could plausibly describe a couple with $10 million of assets as being the "mass affluent" or "top of the middle" class. With the $11 million exemption, what used to be middle is now considered "poor", and we end up with $22 million as a "middle" scenario even though that level of wealth is above most definitions of "middle class."

Assume that Mark and Mary, with $22 million of assets (all in Mary's IRA) are not inclined to leave money to the children on the first death (as Ron and Rita plan to do) because they desire that the entire estate should remain in the hands of the surviving spouse for his/her financial well being. For Mark and Mary, portability is a godsend. Prior to portability, they would have had to make that tough choice: Either to—

- Leave all assets outright to the surviving spouse, to maximize income tax deferral, at the cost of wasting one spouse's estate tax exemption and incurring a projected $4,400,000 of "unnecessary" federal estate tax (40% X $11 million) at the second death; or

- If Mary dies first, have Mary leave half her IRA to a credit shelter trust and half to Mark outright, so each spouse's estate would be within the $11 million exemption, thereby giving up on the spousal rollover as to the half left to the credit shelter trust, paying high trust income tax rates on that half, but saving estate taxes on Mark's later death; but knowing that if Mark dies first half of Mary's estate would be subject to estate taxes because there would be only one exemption available at that point.

Under portability, they don't have to make that unpleasant choice. If Mark dies first, his executor can leave his DSUEA to Mary, and her $22 million IRA will then be sheltered by a $22 million exemption (Mary's own exemption plus the DSUEA she inherited from Mark). If Mary dies first, she can leave her IRA outright to Mark as beneficiary and her executor can leave her DSUEA to Mark, and the $22 million IRA will still be sheltered by a $22 million exemption (Mark's own exemption plus the DSUEA from Mary). The couple and their children get income tax savings AND estate tax savings.

Portability of the estate tax exemption creates many thorny issues when a surviving spouse who possesses "DSUEA" from a deceased spouse remarries. Remarriage risks losing the DSUEA (a surviving spouse can use DSUEA only from her "last" deceased spouse). Another portability issue is the necessity of timely filing an estate tax return for the first spouse. That step will be missed in many cases where the first spouse's estate is too small for a federal estate tax return to be required, and thus many potential DSUEAs may be lost. These problems are not covered in this Outline because they apply to all estate plans, not just retirement benefit-heavy estates. For a benefits-heavy asset picture, like Mark and Mary's, the sure tax-saving benefits of portability outweigh these other potential risks.

G. Exemption planning alternatives

Here are some other ideas that might be considered when a client is facing the dilemma that he wants to make use of his federal estate tax exemption, but the only asset he has to fund a "credit shelter gift" is a retirement plan:

- **Make the credit shelter trust a conduit trust (or trusteed IRA).** Conduit trusts and trusteed IRAs are explained in the "Koslow" case study section (3)(B). The drawback of using a conduit trust as a credit shelter trust is the same as the drawback of using a conduit trust as a QTIP trust: most of the retirement benefits will be paid out to the surviving spouse over her lifetime, assuming she lives to or beyond her normal life expectancy. Thus, there will be little left in the trust on her death, unless she dies prematurely. If a conduit trust is being used as a credit shelter trust, therefore, the trust will not save estate taxes unless the spouse dies prematurely, because all the money in the retirement plan will be back in her estate as a result of the conduit distributions.

- **Disclaimer-funded credit shelter trust**. A client may choose to name his spouse as primary beneficiary of the IRA, and names a credit shelter trust as contingent beneficiary if the spouse predeceases him or disclaims the benefits. The disclaimer estate plan does not eliminate the problem of funding a credit shelter trust with retirement benefits; if the situation hasn't changed when the participant dies, activating the credit shelter trust by having the surviving spouse disclaim the IRA will have exactly the same drawbacks as naming the credit shelter trust as beneficiary in the first place—along with the new burdens of implementing a disclaimer. However, the surviving spouse might choose to disclaim if something has changed: for example, if her financial situation has improved, or if her life expectancy was severely shortened, or the tax laws, at the time of the participant's death, had changed so that having the IRA pass to the credit shelter trust would no longer have a negative effect on her financial security.

H. Where to Read More

Matters mentioned in this case study are discussed in full detail in the following sections of *Life and Death Planning for Retirement Benefits* (8th ed., 2019):

Special income-deferral rights granted to a surviving spouse named as beneficiary of a retirement plan, including spousal rollover: ¶ 1.6 and ¶ 3.2

Income tax and trust accounting aspects of naming a trust as beneficiary of a retirement plan: Chapter 6

Comparison of RMD rules applicable to surviving spouse as beneficiary, with those applicable to trust for the benefit of spouse: ¶ 3.3.02

Explanation of conduit trusts: ¶ 6.3.05

Uniform Lifetime Table and Single Life Expectancy Table: see Chart #1 and Chart #2 at end of this Outline.

CASE # IV: Trio of Problems with One Solution: a Charitable Remainder Trust (CRT)

For use of a CRT to benefit a disabled child, see the "Dingle" case.

A. Keeping substantial retirement distribution out of children's direct control

Felicia Fallon is 66. She has $8 million in total assets: $3 million in the qualified retirement plan (QRP) of her employer, and another $5 million of liquid investments and residential real estate. She has two children, ages 48 and 45, and several grandchildren. The children are well provided for financially. While her children are to be the principal beneficiaries of her estate, Felicia has some interest in charitable giving. She does not want her children to cash out the retirement plan on her death, but she is afraid they will do just that. She reviews several options.

1. Annuity option under the plan.

One is to force the children to take an annuity distribution from the retirement plan. The plan offers her the option of restricting her beneficiaries to an annuity payout. The drawback of that is that the children are left at risk if the employer and/or the plan itself gets into financial troubles. Also, the plan offers only fixed annuities, which Felicia considers too vulnerable to inflation.

2. Leave benefits to see-through trust, rely on beneficiary rollover

Another possibility is to leave the benefits to a see-through trust for the benefit of her children. Although the plan offers a lump sum distribution as the only form of benefit, the trustee could direct the plan to transfer the lump sum to an "inherited IRA" payable to the trust as beneficiary. See ¶ 4.2.04 of *Life and Death Planning for Retirement Benefits* for details on such nonspouse beneficiary rollovers.

There are two drawbacks to relying on the nonspouse beneficiary rollover.

First, drafting a see-through trust is a complicated and perilous undertaking, in view of the IRS's problematic regulations. See ¶ 6.2–¶ 6.3 of *Life and Death Planning for Retirement Benefits*. If the trust for some reason does not qualify as a see-through (for example, because the trustee forgets to send required documentation to the plan administrator by October 31 of the year after the year of the participant's death) the nonspouse beneficiary rollover to an inherited IRA is not available (it's available only to "designated beneficiaries"). IRS Notice 2007-7, A-16.

Second, there is the risk that the lump sum benefits, instead of being transferred by direct rollover to an inherited IRA as instructed by the trustee-beneficiary after the participant's death, will by mistake (either of the plan trustee or the IRA provider) be transferred to a taxable account, causing immediate income taxation of the entire lump sum, with no ability to correct the mistake by rolling the money back into the plan or into an IRA. Transferring intended rollover distributions into a taxable account is one of the most common mistakes made in the retirement benefits area. See, *e.g.*, PLRs 2007-03036, 2007-04038, 2007-27027, 2007-09068, 2007-17027, 2007-22030, 2007-27022, 2007-27025, and 2007-32025. When this mistake happens after the participant's death it cannot be corrected (unless the beneficiary happens to be the participant's surviving spouse).

3. Roll benefits to an IRA while living

Another approach is to roll the benefits over to an individual retirement trust (IRT, or "trusteed IRA") while Felicia is still living; the IRT can then provide for a restricted payout to her children after her death. But since they are neither disabled nor chronically ill, this would put the entire retirement plan into their hands and outright control within about 10 years after her death. She does not want them to have outright control of the entire sum at any time. See ¶ 6.1.07 of *Life and Death Planning for Retirement Benefits* for more explanation of IRTs.

4. Leave benefits to a charitable remainder trust

Finally, Felicia considers leaving the benefits to a charitable remainder trust (CRT). The CRT that would pay a six percent unitrust payout to the children for their joint lifetime and for the life of the survivor. The advantage of this scenario is that the CRT pays no income tax on the $3 million lump sum distribution it receives. The children would then receive, for life, the 6 percent income stream from the entire $3 million fund. Their income distributions would fluctuate depending on whether the CRT's investments grew at more or less than 6 percent per annum. The children would have to pay income taxes on these distributions. On the death of the surviving child all funds remaining in the CRT would go to Felicia's favorite charity.

In addition to eliminating income taxes on the lump sum distribution, this approach produces an estate tax charitable deduction to Felicia's estate for the value of the remainder interest. The value the children receive (in the form of a lifelong stream of income from the CRT, plus decreased estate taxes) would presumably be less than the net value they would receive if they were outright beneficiaries of a lump sum distribution of the entire plan balance on Felicia's death but since the trust is fulfilling Felicia's charitable goals and her goal of not giving the children control of a lump sum, that price may be worth paying..

Also, the CRT scenario assumes that at least one child lives for 44 years. If both of them die before the 44 years are up, the entire trust at that point moves to the charity. Thus, in case of premature death, the value to the family of the CRT scenario would be much lower. The children can overcome this risk by buying decreasing term insurance on their lives; or, Felicia could decide that this risk is not of concern to her.

B. Multiple beneficiaries.

Ogden is single, age 45. He has worked for several companies and as a result he has money in several different qualified plans, 403(b)s, and IRAs. His estate planning goals are: to provide for his parents' needs, if either or both of them survive him and need additional funds; to provide something for his siblings; and to benefit charity. He creates a CRT which will pay a five percent unitrust payout in equal shares to the living members of the group consisting of his parents (who are in their 70s) and two siblings (ages 42 and 48). His estate has other assets to pay the estate taxes applicable to his other assets and to the noncharitable interests under the CRT.

The CRT achieves all his goals: It provides income to his family beneficiaries as long as any of them is/are living; the ones who live longest get some "inflation protection" from the fact that their incomes will increase as other members of the group die off; it takes care of his charitable goals; it is much simpler than trying to draft or administer a "see through trust" for all the

beneficiaries; and it is tax-favored (because there will be no income tax on the retirement benefits themselves as they are paid to the CRT) (of course the income payments made to the family beneficiaries will be income taxable).

C. Older beneficiary.

Hilda, age 68, has a $3 million IRA. Her goal is to provide a life income to her sister Justine (age 71) and remainder to a charitable foundation. Leaving the benefits to a typical family trust that provided life income to Justine and remainder to charity would require a rapid fully income-taxable distribution of the account after Hilda's death. Such a trust would not qualify as a see-through (because of its nonindividual remainder beneficiary, the charity), so the IRA would have to be entirely distributed within five years after Hilda's death. Even if the trust were a conduit trust (so it qualified as a see-through despite the charitable remainder beneficiary), the benefits would have to be entirely distributed (and taxed) over Justine's relatively short life expectancy (a conduit trust for Justine would qualify for the life expectancy payout because Justine is an EDB, being "not more than 10 years younger than" Hilda).

Assuming the income stream from a CRT would provide sufficient funds for Justine, Hilda should leave her IRA to a CRT for Justine's life benefit. Then there would be no income tax on distribution of the benefits from the IRA to the CRT, and Hilda's estate would get an estate tax charitable deduction for the value of the charitable remainder. Justine would receive a reasonably predictable income stream that would last for her entire life, not just her life expectancy.

This solution assumes there are other assets available to pay any applicable estate expenses and taxes.

Where to read more

Regarding charitable giving with retirement benefits, see Chapter 7 of *Life and Death Planning for Retirement Benefits* (or the downloadable *Special Report: Charitable Giving with Retirement Benefits*, www.ataxplan.com). See ¶ 7.5.04–¶ 7.5.07 regarding making retirement benefits payable to a charitable remainder trust.

CASE # V: Sol's Roth IRA Conduit Trust for his Grandchildren

Sol had a $1 million IRA. A few years ago, realizing that he didn't need this asset for his living expenses (he had ample other assets and income for his modest lifestyle in retirement), he read about the "stretch IRA" and decided this would be a great way to leave an inheritance for his five grandchildren, now in their teens. Using a stash of about $400,000 of cash to pay the taxes he converted the $1 million traditional IRA to a trusteed Roth IRA. The trusteed Roth RIA terms provided that, upon Sol's death, the designated beneficiaries would be his five grandchildren. Each grandchild's share would be paid out to him or her in annual instalments, tax-free, over the grandchild's life expectancy. The prospect of leaving each of his beloved grandchildren a 60-year tax-free payout from this Roth IRA please Sol greatly.

Then along came SECURE. There can be no more 60-year payout to the grandchildren. Under the terms of the trusteed Roth IRA (similar to a "conduit trust") each grandchild will receive full outright (nontaxable) distribution of his or her share of the Roth IRA within 10 years after Sol's

death. Sol's great plan is now in shambles. He paid $400,000 of income taxes for his plan, and is not going to get what he paid for.

What can he do? If he is concerned about the grandchildren getting too much money at too young an age (however old they will be 10 years after his death), he could leave the Roth IRA, instead, to a "see through trust" that would hold the benefits for the benefit of the grandchildren until they reach more mature ages. Though the entire Roth IRA would be distributed to the trust within 10 years after Sol's death, there would not be the problem of high trust income tax rates, because distribution of the Roth IRA to the trust is tax-free. After the trust has cashed out the Roth IRA, it can invest the money for the benefit of the grandchildren, and pass the investment income out to them, thereby in some way approximating the long-term payout that Sol originally designed.

CASE # VI: Non-citizen Spouse: Pedro and Pepper

1. Facts and problem

Pedro has a defined benefit plan and a $500,000 profit sharing plan through his employer, and a $600,000 IRA. He would like to leave all of these assets to his wife, Pepper, and have them qualify for the estate tax marital deduction. Pepper is a U.S. resident, but not a U.S. citizen. Assets left to a U.S.-resident surviving spouse who is not a U.S. citizen do not qualify for the federal estate tax marital deduction unless the assets are left to a "qualified domestic trust" (QDOT) (or transferred to such a trust by the surviving spouse).

For non-retirement plan assets, Pedro can simply leave the asset to a marital deduction trust that is also a QDOT. However, there are income tax drawbacks to leaving *retirement plan benefits* to a marital trust (see the *Ken Koslow* case study, above). Also, the only death benefit provided by the defined benefit plan is a non-transferable life annuity payable to the surviving spouse individually; benefits under this plan cannot be left to a trust, because the spouse is the only permitted beneficiary.

Pedro wants to make sure, to the extent he can do so, that all the benefits will qualify for the marital deduction, while at the same time minimizing negative income tax effects.

2. IRA: name QDOT as primary beneficiary, wife as contingent

On his IRA, Pedro names a QDOT-marital trust as beneficiary of the IRA, with Pepper as the contingent beneficiary. The QDOT gives Pepper the right to withdraw all assets from the QDOT at her discretion (subject only to the right of the U.S. trustee of the QDOT to withhold estate taxes, as required by the Code). For income tax purposes, if she is a U.S. resident, she should be deemed the owner of the trust's assets under § 678(a)(1) and § 672(f). Thus IRA distributions to the trust will be taxed to Pepper at her personal tax bracket which is expected to be lower than the trust rates.

Also, as the surviving spouse and deemed "owner" of the IRA held in the trust (under § 678), she would be able to defer any distributions from the IRA until Pedro would have reached age 70½. However, the regulations say that a trust cannot exercise the spouse's election to treat the IRA as her own even if the spouse is the sole beneficiary of the trust. Thus, although this asset will qualify for the marital deduction without the necessity of any post-death actions by Pepper, it apparently will not be eligible for the most favorable income tax treatments.

If it appears (after Pedro's death) that the income taxes would be more favorable by having the IRA pass outright to Pepper, the QDOT can disclaim the IRA and let it pass to Pepper outright as contingent beneficiary. However, she will then have to transfer it to a QDOT if she wants to preserve the estate tax marital deduction. She can "roll" it over into a trusteed IRA that is in her own name and that is also a QDOT—though finding a bank willing to serve as trustee of a QDOT-IRA can be challenging.

3. Profit sharing plan: name wife as primary, QDOT as contingent

Regarding the profit sharing plan, there is less flexibility. The plan's only form of death benefit payment is a lump sum in cash. The plan has been known to balk at permitting disclaimers, saying these are "prohibited by ERISA."

On this plan, Pedro decides to name Pepper as primary beneficiary, with his QDOT as contingent beneficiary. Pepper can roll the benefits over to a trusteed IRA that also qualifies as a QDOT. This way she will get the income tax deferral benefits they are seeking, and also the gift will qualify for the marital deduction, though such qualification depends on post-death action by Pepper.

If Pedro wants to eliminate the uncertainty of depending on Pepper to take action after his death, he could make the profit sharing plan payable to the same QDOT as the IRA.

4. Defined benefit plan: Leave to Pepper, who will sign contract with IRS

Regarding the defined benefit plan there is even less flexibility. Marital deduction qualification must be left up to Pepper who, after Pedro's death, would have to enter into an agreement with the IRS. Under such an agreement (the details of which are spelled out in the regulations) Pepper would promise that, as she received payments from the defined benefit plan, she would transfer the "principal" portion of such payments to a QDOT (alternatively, she could promise to pay estate taxes on such principal payments as received).

5. Where to read more

The QDOT rules are found in IRC § 2056(d) and § 2056A, and Treas. Reg. § 20.2056A-1 *et seq.* These rules, and their planning implications for retirement benefits, were the subject of Chapter 4 of the 5th edition (2003) of *Life and Death Planning for Retirement Benefits*. This subject is NOT covered in the 8th edition (2019), but can be purchased as a Special Report, *Retirement Benefits and the Marital Deduction (Including Planning for the Noncitizen Spouse)*, at www.ataxplan.com.

CASE # VII: Pre-age 59½ Spousal Rollovers: Nancy

Nancy is age 48. Her husband Ned recently died at age 51, leaving her as beneficiary of his 401(k) plan ($500,000) and his IRA ($100,000). As the surviving spouse, she is entitled to roll over all these benefits to an IRA in her own name. The problem is, once the benefits are in her own IRA, she cannot withdraw from them without paying a 10 percent penalty under § 72(t) (unless one of more than 13 exceptions applies), because she is under age 59½.

At first it appears that she should just leave the plans in Ned's name for now. As the surviving spouse and sole beneficiary, she is not required to take any distributions until the year *Ned* would have reached age 72 (21 years from now). If she needs money to live on, she can withdraw funds as needed from Ned's retirement plans without paying a penalty because death benefits are not subject to the 10 percent penalty (of course she will have to pay income taxes). Once she reaches age 59½, she could roll over the remaining benefits to her own IRA and after that she can withdraw money as needed without penalty because she will be over 59½. However, there are several drawbacks of leaving money in the plans:

1. She does not like the limited investment alternatives in the 401(k) plan.

2. Under the minimum distribution rules, if Nancy dies before she takes the money out of Ned's plans, and if her death occurs before Ned would have reached age 72, the "five year rule" is applied as if *she* were the participant: all benefits would have to be distributed within five years after Nancy's death unless payable to her designated beneficiary, in which case the benefits could be distributed over the life expectancy of the designated beneficiary. See ¶ 1.6.05 of *Life and Death Planning for Retirement Benefits*. That's fine for the IRA, which allows Nancy to name a designated beneficiary; but the 401(k) plan does not allow Nancy to name a beneficiary for her rights in the plan. The 401(k) plan provides that if Nancy dies after Ned but before withdrawing all of Ned's benefits, the account belongs to Nancy's estate. Since (according to the IRS) an estate cannot be a designated beneficiary, all the benefits would have to be distributed within five years after *Nancy's* death in that case.

3. Other factors may affect the rollover decision, such as the vulnerability of the different types of plans to claims of Nancy's creditors (if she has any concerns on this issue), and any state law differentiation between IRA and 401(k) benefits.

How much weight should be given to factor #2? If Nancy strongly favored the investment options in the 401(k) plan, or if other factors (such as vulnerability to creditors' claims) favored leaving money in the 401(k) plan, factor #2 could be considered unimportant; after all, Nancy is unlikely to die in the next 21 years, and the risk of her premature demise could easily be insured against. Since Nancy does not like the investment options in the 401(k) plan, however, factor #2 adds to the reasons to move the benefits out of that plan.

How likely is it she will really want to take money out and spend it? If she is financially needy, and maximum flexibility to take penalty-free death benefits is her highest priority, she could roll over Ned's 401(k) plan to an IRA still in Ned's name. Reg. § 1.408-8, A-7; see ¶ 3.2.07 of *Life and Death Planning for Retirement Benefits*. That way she can name her own beneficiary for benefits remaining in the IRA at her death, *and* get the investment options she wants, without giving up the right to take penalty-free death benefits.

On the other hand, if she is extremely concerned about factor #2, and/or if she does not think she will need much if any of the money to live on prior to age 59½, she could simply roll over everything right away to an IRA in her *own* name. Then, if she later *does* need money to live on prior to age 59½, she can start taking a series of substantially equal periodic payments (SOSEPP) penalty-free from her own IRA at that later time.

Another problem that *formerly* existed in the young-widow situation has disappeared. Although neither the Code nor the IRS regulations contains any indications of such an election, at least one IRS ruling *had* hinted that the spouse must elect: either she takes the benefits as penalty-free death benefits, or she rolls them over to her own account. The final minimum distribution regulations eliminated any concern about such a forced either-or election; the regulations now clearly allow the spouse to elect to treat an inherited IRA as her own even after she has taken some distributions as beneficiary, so she can do some of each.

4. Where to read more

See Chapter 3 of *Life and Death Planning for Retirement Benefits* regarding spousal rights in retirement plans and spousal rollovers. See Chapter 9 regarding the 10 percent penalty on pre-age 59½ distributions, and ¶ 9.2–¶ 9.4 regarding the SOSEPP and other exceptions.

CASE # VIII: Duncan: Estate Planning with Roth Accounts

"Roth" retirement plans are encountered with increasing frequency among estate planning clients, especially since (beginning in 2010) the availability of Roth "conversions" was extended to high-income individuals.

Naming the "right" beneficiary for a client's retirement plans is always a very important step in creating an estate plan. Failing to name the right beneficiary for a traditional retirement plan can cause loss of the "stretch" life expectancy payout for the benefits, and the resulting acceleration of income taxes (loss of deferral) can be financial detrimental.

Some planners mistakenly conclude that naming the right beneficiary is *less* important for a Roth plan than for other plans, because the Roth distributions are income tax-free. Therefore (they think) if the benefits are "dumped" out of the Roth plan shortly after the client's death due to a faulty estate plan there is no great harm, because there is no acceleration of income tax.

This idea is mistaken. The stakes are actually even higher with a Roth plan simply *because* distributions from the Roth plan are tax-free. Thus the longer the assets can accumulate inside the Roth plan, the more tax-free income the client and his beneficiaries will receive. If the benefits are "dumped" out of the Roth plan shortly after the client's death due to a faulty estate plan, then the potential of future tax-free investment growth is gone forever.

When a traditional retirement plan gets distributed immediately after the client's death due to a faulty estate plan, the financial damages are a little speculative. It's true the income tax has been accelerated when it could have been deferred, but the beneficiaries would have had to pay that tax sooner or later anyway so maybe they are not really harmed so much. But when an account that was supposed to generate tax-free distributions over the beneficiary's entire lifetime gets distributed prematurely, the damage is severe. Just compare the value of that tax-free life-long stream of payments with the present value of an investment fund that will generate taxable income forever and see the difference.

The moral is: Proper estate planning is even more important for Roth accounts than for traditional plans!

A. Duncan's problem

Duncan wants to leave some of his assets to charity, some to his wife, and some to his children. He has some assets in a traditional retirement plan, some in a Roth plan, and some in "outside" (nonretirement) investments. Which asset should he leave to which beneficiary?

Charity is NOT a tax-favored choice of beneficiary for a Roth plan. Because distributions from a Roth plan are generally income tax-free, there is no advantage to leaving this asset to an income tax-exempt entity. So right away we know the Roth should go to either the children or the surviving spouse, not the charity.

If federal estate taxes are a concern, there is a strong argument *against* making the traditional IRA payable to the children. By inheriting the traditional IRA, they would be inheriting an asset that has a built-in income tax "debt." Duncan does not get a marital or charitable deduction for leaving assets to his children; the only estate tax "shelter" there is for bequests to his children is the federal estate tax exemption. Part of that exemption is "wasted" if the children inherit an asset that they then have to pay income tax on. Part of the "exempt" amount goes to the IRS! See discussion under the "Ron and Rita Rich" case study, above. So the children should inherit either the Roth plan or the nonretirement assets; either way, they will owe no income tax on their inheritance.

As for who should inherit the traditional IRA, the surviving spouse gets better treatment on that asset than the children would. It could pass to her estate tax free under the marital deduction,and income taxes could be deferred quite a while through the spousal rollover. But sooner or later she would have to pay income taxes as the traditional IRA is paid out to her. The charity, in contrast, can inherit the traditional IRA income tax and estate tax-free, so it's settled: The charity gets the traditional IRA.

We have figured out that the charity SHOULD inherit the traditional retirement, and the children should NOT inherit it; that leaves the Roth plan and the nonretirement assets to be divided somehow between the spouse and the children. The question is, what is the best income tax scenario for the Roth plan?

If a Roth IRA is left to the children, they would have to withdraw it within 10 years after Duncan's death. Withdrawals would be tax free, but that tax-free accumulation can only last for 10-11 years (assuming no child is disabled, chronically ill, or a minor).

But if the Roth plan is left to the surviving spouse she gets a much better scenario: She can roll the inherited Roth plan over to her OWN Roth IRA (only the surviving spouse has this right). Then she will be able to stretch out the tax-free distributions much longer than the children possibly could: She does not have to take *any RMDs at all* from the rollover Roth IRA during her lifetime. After her death it can be left to the children for tax-free distribution within 10 years after her death.

Duncan's choice is made: Leave the traditional retirement plan to the income tax-exempt charity, the Roth plan to the wife for her to roll over and keep accumulating tax-free, and the nonretirement assets to the children.

C. Practical problems

Duncan has one problem. His "traditional retirement plan" is an account in a 401(k) plan, and his "Roth retirement plan" is a designated Roth account (DRAC) in the very same plan. It is not clear whether plan administrators will sometimes, always, or never allow an employee to make a "split" beneficiary designation (traditional account to one beneficiary, DRAC to a different

beneficiary). If the plan administrator of Duncan's plan balks at allowing his proposed split beneficiary designation, Duncan may have to roll his plan benefits over to individual retirement accounts (a traditional IRA and a Roth IRA respectively) to carry out the proposed estate plan.

Here is another practical problem we are bound to see with Roth beneficiary designations: As discussed above, the tax-favored choice of beneficiary is not the same for a Roth plan as for a traditional plan. Unfortunately, with many individuals doing Roth conversions these days, it is to be expected that many clients will neglect to inform their estate planners about the conversion, and either neglect to prepare a beneficiary designation for the new Roth IRA or just carry over the beneficiary designation from the former traditional plan. This could have negative effects; for example, if a client who named charity as beneficiary of his traditional IRA converts the account to a Roth and keeps the same beneficiary designation. WE NEED TO IMPRESS ON CLIENTS THAT THEY MUST CONSULT WITH THE ESTATE PLANNER IF A ROTH CONVERSION IS DONE.

CASE # IX: Estate Taxes on Large Retirement Plan Balance: Dr. Della

Dr. Della is 68. She has a $20 million IRA, a home worth $2 million and few other assets. She wants to leave all her assets to her three children, and save taxes. Among her concerns are the large minimum distributions she faces in a few years, when she reaches age 70½.

Before considering ways to reduce taxes, we first face the question of how estate taxes will be paid if she dies with this asset picture. Assume an $11 million estate tax exemption and 40 percent tax rate on assets in excess of the exemption amount. If she leaves the IRA directly to her children, the executor of the estate will be liable for $4 million+ of estate taxes and no assets with which to pay that tax other than the $2 million home. The executor might have to sue the children to try to collect their share of the estate taxes, or somehow forfeit the estate to the IRS and let the IRS figure out how to collect from the children.

To avoid putting the executor in this difficult position, make sure the person who is primarily responsible for paying the estate taxes also has control of the money! For example, make the IRA payable to a trust, and make sure the trustee is the same as the executor of the estate. That way, the executor can be sure the friendly trustee (himself) does not run away with the IRA money before taxes are paid. Or, make the three children co-executors as well as beneficiaries, so they are primarily as well as secondarily liable for the estate taxes.

Another approach is for Della to buy life insurance to assure the availability of funds to pay estate taxes. Again, she must make sure that the life insurance proceeds end up in the hands of the person who will need them to pay the estate tax.

Next Della invites everyone she knows to send her ideas for how to reduce the estate tax value of her IRA. Here are the ideas she has received so far:

A. Roll the IRA back into a corporate retirement plan, then buy life insurance inside the plan, then distribute the policy out of the plan after a few years when the policy value is lower than the sum of premiums paid.

The idea here is that, for the first several years of its existence, a life insurance policy is worth less than you paid for it, and it takes many years for the cash value to catch up to what it would have been had you invested in (say) bonds rather than life insurance. An IRA cannot hold life

insurance, so the possibility of using this scheme depends on having a qualified retirement plan (QRP) you can roll the IRA into. In Della's case, she would have to go to work for a company that had a plan that would permit her to roll her IRA into it and also would permit the purchase of life insurance in the plan. Because of abuses in the valuation of plan-owned life insurance (basically, schemes designed to lower the value of the policy, artificially and temporarily, to reduce the income tax impact of distributing the policy), the IRS will no longer accept "cash surrender value" as the proper valuation of a policy. See Reg. § 1.402(a)-1(a)(2) and Rev. Proc. 2005-25, 2205-17 I.R.B. 962 (April 2005).

B. Invest in a venture capital (or real estate development) partnership or other form of investment that temporarily reduces the value of the plan.

The idea is to invest the IRA in something that the client believes is a good investment over the long term, but that actually declines in value right after the investment is made. The decline is due to a lack of transferability or lack of marketability of the investment during a lockup phase while the venture investments are still in the start-up stage (or while the real estate development is still just a hole in the ground). The key to success is that the client must either (a) die or (b) withdraw the investment from the plan *while the investment is still in its reduced-value stage* in order to capture the benefit of the low value for purposes of achieving lower estate taxes or lower income taxes.

C. Make IRA assets subject to a "Restricted Management Agreement" (RMA).

Some practitioners argue that an investment manager should be hired for a fixed term such as five years, rather than on the more customary at-will terms. An investment manager who knows he has a five-year time horizon will produce better investment results, the theory goes, because he will not have to focus on producing short-term quarter-by-quarter results. By promising your investment manager that you won't fire him for five years, and that you won't even LOOK at his investment returns until the five years are up, you will supposedly benefit from the superior investment results produced by a long-term investment horizon. Oh, incidentally, proponents argue, your account will be entitled to valuation discounts for estate and gift tax purposes because of the lack of marketability created by your restrictive contract with the investment manager. The proponents add that the RMA is a superior vehicle to other "discount" entities (such as the family limited partnership) because it requires fewer state law formalities and no business purpose.

If the RMA works for assets outside a retirement plan it should work for assets inside a retirement plan. One concern is the fiduciary investment standards applicable to trustees of QRPs; however, if the "superior investment results" argument is demonstrably true, then the RMA approach should pass muster here. The fiduciary requirements are not applicable to IRAs.

A skeptic would suspect that RMAs are entered into only to obtain the supposed valuation discounts, not to obtain the supposed superior investment results. If I were advising a client proposing to enter into an RMA, I would ask the investment manager these questions: Are you really saying that you invest most of your clients' money only to produce the best quarter-to-quarter results? Is it true that I must lock my money up for five years to get the benefit of your best investment wisdom? Is that what your advertising brochures say? Can you show me some portfolios that have and have not used RMAs, to demonstrate that the RMAs have had superior investment results? Can you show me two typical client portfolios, one that is subject to an RMA and one that

isn't, and show me how they are invested differently? If the investment manager cannot show any difference between the investment processes and choices and results applicable to RMAs and those applicable to other accounts, the entire argument (for both investment and tax results) falls apart. The articles that have appeared on RMAs do not address this point.

In Rev. Rul. 2008-35, 2008-29 I.R.B. 116, the IRS announced that it would not recognize any alleged reduction in value based on a restricted management agreement: "The fair market value of an interest in an RMA for gift and estate tax purposes is determined based on the fair market value of the assets held in the RMA without any reduction or discount to reflect restrictions imposed by the RMA agreement on the transfer of any part or all of the RMA or on the use of the assets held in the RMA."

Where to read more: David A. Handler and David Sennett, "Avoid FLPs: Try restricted management accounts instead," *Trusts & Estates*, Vol. 142, No. 5 (May 2003), p. 30; Owen Fiore and David A. Handler, "FLPs vs. RMAs," *Trusts & Estates*, Vol. 142, No. 8 (Aug. 2003), p. 24; Randy A. Fox and Scott Hamilton, "Experts Discuss the Transfer Tax Benefits of Restricted Management Accounts Owned by FLPs," *Insights & Strategies*, Vol. 14, No. 5 (May 2003), p. 2**.**

D. Transfer IRA assets to family limited partnership.

The idea here is to form a family partnership (FLP) among the IRA (which contributes all its investments to the FLP), the IRA owner (as general partner, perhaps) and (say) the client's children. The goal is to get the same "valuation discounts" for the investments inside the IRA as clients get for their outside-the-IRA investments that are held in FLPs. The main obstacle is whether having the IRA enter into a partnership with the IRA owner and other related parties constitutes a "prohibited transaction" under § 4975. This is a subject for analysis by an ERISA lawyer. Department of Labor Advisory Opinion #2000-10a gives an example of the analysis to be followed when determining whether a transaction of this type is a prohibited transaction. In that opinion, the DOL stated that there were three separate prohibited transaction rules that could potentially be violated by investment of IRA assets in a FLP. The DOL found that the particular transaction in question was not a violation of *one* of those rules, and might or might not later violate the other two rules. The opinion can be found at the DOL website; search "Department of Labor Advisory Opinion #2000-10a."

In analyzing whether a proposed transaction is a "prohibited transaction" (PT), do not be lulled into thinking that all you have to do is pass certain mechanical and numerical tests. § 4975 and the DOL regulations convey the impression that as long as your transaction does not involve certain specified categories of relationships (such as parent-child), and/or stays below certain percentages of cross ownership (such as 50%), there is no PT problem. This impression is false. There is a catch-all category of PT under § 4975 under which a court can find that the transaction is a PT because it indirectly benefitted the participant by benefitting someone he cared about, even though none of the listed categories of relationships was involved and none of the specified percentages was exceeded.

So, when you are trying to determine whether something is a prohibited transaction, you have two separate tests you must pass. First is the mechanical by-the-numbers test: if you flunk that, there is no need to go on to the second test—you have a prohibited transaction. But if you pass the

first test that does not mean you are home free. You still must pass the second test under § 4975(c)(1)(E): is there any possible *indirect* benefit to the fiduciary/disqualified person?

Where to read more: See the *Natalie Choate Special Report: Buyer Beware! Self-Directed IRAs and Prohibited Transactions*, downloadable at https://www.ataxplan.com

CASE # X: Oliver's Family Trust: What's a Poor Trustee to Do?

Oliver died in 2020, leaving his $1 million traditional IRA, $400,000 Roth IRA, and $3 million of other assets to a trust for the benefit of his three adult children, Jr. (age 30), Melissa (age 27), and Lucas (age 25). All three children are legally competent adults, working at the start of their promising business or other careers. None of them is "disabled or chronically ill" or has any particular concerns about creditors. The older two are married, one has a child. The trust provides that the trustee will pay each child the (trust accounting) income of his or her share, plus principal in the trustee's discretion for any reason, with each child becoming entitled to withdraw the principal of his or share in instalments, 1/3 at each of ages 35, 40, and 45. If a child dies before attaining 45, the nonwithdrawn portion of his or her share passes to his or her issue if any otherwise to Oliver's issue, outright.

This trust qualifies as a "designated beneficiary" or "see-through" trust. Under pre-SECURE law, the retirement benefits would have been payable to the trust over the life expectancy of Junior as the oldest beneficiary. The expectation of Oliver and of the trustee, when this trust was established, was that the trustee would manage and invest the retirement assets (inside their respective plans) and the nonretirement assets for the family's benefit in accordance with usual trust management principles; and withdraw from the retirement benefits only the minimum annual "required minimum distribution" (RMD)**.** The expectation was that the trustee would withdraw more than the RMD only if unusual circumstances (such as tax increase foreseen in the future, or severe financial need of a child with other assets not available or suitable to use for such need. It was expected that the trustee would pass out to the children, annually, the RMD from the traditional IRA if that would result in a lower income tax rate, but retain the (taxfree) distributions from the Roth IRA.

In other words, the distribution schedule for the retirement plans was a "no-brainer" under pre-SECURE law. Just take the RMD each year....pass it out if that seems like a good idea...and NEVER take more than the RMD unless some (currently-unforeseen) situation makes such extra distribution desirable.

But now....?

Under SECURE, the trustee faces an entirely different scenario and set of choices. The only "RMD" for Oliver's IRA is now, "Withdraw 100% of both accounts no later than 12/31/2030." The trustee has a new job he never had before----THINK about and DECIDE, WHEN it would be advisable to withdraw HOW MUCH from each IRA (and then WHETHER to pass such distribution out to the individual beneficiaries).

Actually, this is still a "no brainer" for the Roth IRA: Since the investment income inside the Roth IRA is tax-free as long as the money stays inside the Roth IRA, the plan should be: Don't take ANY withdrawals from the Roth IRA until near the end of 2030, and cash out the entire account that year tax-free." Maybe the estate plan (and the trustee's investment/distribution strategies for the rest of the trust) should be designed to make it possible for the trustee to keep accumulating the Roth

money until 2030. If the trust terms or beneficiary circumstances require the trustee to withdraw from the Roth earlier, that would be a "waste" of the tax-free compounding potential of the Roth.

But the traditional IRA....? Administering the traditional IRA in this trust requires the trustee to be a math whiz who can predict the future while compassionately protecting the beneficiaries and their wealth.

The trustee COULD conclude, "the kids need a lot of money now to start families, buy houses, pay off student loans, start businesses etc. and they are in low brackets relative to their likely future career trajectories, and the government is probably just going to raise tax rates in the future due to the substantial deficit and the new administration, so we should cash out big chunks of the traditional IRA each year starting now and pass that income out to the children because the income tax situation is not going to get any better."

Or the trustee COULD conclude, "Oliver wanted these children protected from themselves until they reached more mature ages, even though taxes might be higher then, and who knows what the future holds, so let's keep that IRA as a reserve fund and think about draining it down when we get closer to the end of the 10 years." Of course the trustee could cash out the IRA and NOT pass out the IRA distributions to the children, but that would mean socking each distribution with the highest income tax rate (37%).

Or the trustee COULD decide, as each child reaches a distribution-age-stage, I'll give him/her his/her appropriate distribution amount in the form of a transfer of a chunk of the IRA, and let THEM worry about when to take the distributions.

Or the trustee COULD decide, since I can't predict the future, I'll spread the risk by taking out the IRA in annual instalments of 1/11th in 2020, 1/10th in 2021, 1/9th in 2022, etc. until taking out the final 1/1th (100%) in 2030, and pass out of much of the resulting income as seems likely to be taxed at a lower rate in each beneficiary's hands.

The trustee COULD hire an actuary to predict based on assumed investment return rates and assumed applicable tax brackets what distribution schedule will produce the most money for the children.

This would be even more complex if the children have very different circumstances from each other. Melissa is an investment banker earning $12 million a year while baby Lucas wants to be a sheepherder and weaver while living "off the grid." Tax science would tell us Lucas should get the IRA distributions while Melissa gets her share in other less tax sensitive assets. How is the trustee supposed to figure that out—CAN he give compensating extra distributions to a beneficiary who receives income-taxable assets while another beneficiary receives nontaxable stepped-up-basis assets?

The when-to-take distributions issue is a problem with every trust that qualifies for the 10-year rule (or even the 5-year rule). And, don't forget, it is also a problem for a trustee administering the trust of a pre-2020 decedent (where it is too late to draft the "best" clauses for dealing with the problem), because his expectation was that there would be a life expectancy payout to the trust over the oldest trust beneficiary's life expectancy even if the oldest trust beneficiary died before the end of his/her IRS-determined life expectancy. Thanks to SECURE, the trustee must now keep in mind the possibility that such oldest trust beneficiary could die at any time and cause the payout period to flip to the 10-year rule. If the life beneficiary is only 50 years old, but is suffering from a possibly-terminal medical condition, should the trustee start planning for a flip from "We've got over 30 years remaining on this annual life expectancy payout" to "We have to take out everything sometime in the next 10/11 years?"

To the trustee: Good luck with all that! Trustees may wish to raise their fees and/or try to get either no-discretion language into the trust or exculpatory language regarding the exercise of discretion.

What should a drafter do?

Some drafters wish to dictate in the instrument how and when the trustee shall withdraw from the retirement plans....for example, by requiring annual distributions over the 10/11-year payout period. This may make the trustee's life easier, and hedge the bets; it makes no attempt to figure out how to get the lowest tax bite.

Other drafters may insert exculpatory language protecting the trustee against claims on this point if he acted in good faith.

Should the drafter consider the impact of retirement benefits on the trustee's compensation and on the trustee's decision-focus regarding when to cash out the retirement plan? Suppose the trustee's fee is computed as a flat 1% of investable assets. If the $1 million IRA counts as $1 million of investable assets (as it should, since the trustee has to invest it), the trustee is getting $10,000 a year for that asset. If the trustee cashes it out and pays 37% tax at the trust level, the principal is reduced to $630,000 and the fee is reduced to $6,300.

So much for the poor trustee....let's turn to the planning options for clients seeking to benefit their spouses, children, and other "significant others." In each case, we will find planning options are more restricted and less attractive than pre-SECURE.

CASE # XI: A Tale of Two Families: Special Needs Beneficiaries

Mr. and Mrs. Dingle have three children, ages 23, 18, and 16, one of whom, Daisy (the 18-year-old), is severely disabled and will need lifelong care. Mr. and Mrs. Ringle also have three children, ages 35, 25, and 23, one of whom, Ronnie (age 25), is severely disabled. Both the Dingles and the Ringles have $1 million in IRA funds among their other assets, and both seek to use the IRA asset to help their respective disabled children. However, there the similarity ends.

A. Supplemental needs trust for family of modest means

The Dingles have no other substantial assets they will be able to leave for Daisy's benefit. Daisy Dingle qualifies for government-provided medical care and other need-based welfare-type benefits. Thus, the Dingles want the IRA to be held in a trust to provide for Daisy's needs that are not covered by the benefits programs she qualifies for, and they want to be sure that after their deaths the trust and the IRA it holds are not considered "countable assets" that would disqualify Daisy for the benefits she now receives. They similarly do not want trust distributions for Daisy's benefit to disqualify her for need-based assistance. The type of trust they need is called a "supplemental needs" trust.

Mr. and Mrs. Dingle will name each other as outright beneficiary of their IRAs, with a supplemental needs trust for Daisy's benefit as contingent beneficiary. They hire a Medicaid specialist-attorney to draft the trust.

The Dingles cannot name a "conduit trust" for Daisy as beneficiary of their IRAs. Because a conduit trust mandates that all distributions from the IRA to the trust be paid out forthwith to or for the benefit of the individual trust beneficiary, such a trust would disqualify Daisy from the

various need-based benefits programs. The required minimum distributions from the IRA would be treated as "countable income" of Daisy for purposes of her qualification for the various benefit programs. Thus the trust must be an accumulation trust, not a conduit trust.

Due to her disability, Daisy is an "Eligible Designated Beneficiary" (EDB) under SECURE, entitled to a life expectancy payout for benefits that are payable to her outright. As we have seen, benefits left to a conduit trust for her would be entitled to the same EDB treatment she individually is entitled to—a life expectancy payout. But it is not possible to name either Daisy individually or a conduit trust for her as beneficiary without sacrificing her eligibility for government benefit programs. Fortunately for the Dingells...

Under SECURE, a see-through accumulation trust for the benefit of a disabled (or chronically ill) EDB *is* entitled to the EDB treatment/life expectancy payout—even though see-through accumulation trusts for other categories of EDB are not so entitled.

It would be desirable for Daisy's supplemental needs trust to qualify for the life expectancy payout so that distributions from the IRA to the trust could be spread out over her long life expectancy as long as she is living (it would have to switch to a 10-year payout beginning upon her death).

Under SECURE, in order to qualify for the life expectancy payout, the trust for Daisy must provide that no one other than the disabled beneficiary (Daisy) can receive any distributions during Daisy's lifetime. Oddly, SECURE does not seem to require that the trust actually make any distributions at all to Daisy—as long as no one else receives any distributions during her life.

So, at first, it appears that all is well—the Dingells can leave their IRA to a see-through supplemental needs trust for Daisy that will qualify for the life expectancy payout, just as they could have done before SECURE. However there is an important difference between their pre- and post-SECURE options:

- Under pre-SECURE law, the Dingells might have provided that, in any particular year, if the RMD taken from the IRA exceeded Daisy's "supplemental needs" expenses for such year, the excess could be paid to (for example) Daisy's siblings. That would have enabled the trustee to pass out such "excess" income to the siblings who are probably in lower income tax brackets than the trust itself is. That clause cannot be included post-SECURE without losing the life expectancy payout...so RMDs that come in to the trust and exceed the amount that can be spent that year on Daisy's supplemental needs will be taxed at (high) trust tax rates.

- Under pre-SECURE law, some practitioners would have recommended including a "poison pill" clause in the trust that would cause the trust to terminate and be distributable outright to other beneficiaries (such as Daisy's siblings) if at any time its continued existence would cause Daisy to lose her eligibility for government benefits. Post-SECURE this clause cannot be included due to the requirement that no beneficiary other than Daisy can receive any benefits from the trust during her lifetime.

- Under pre-SECURE law, if Daisy were to die before the end of her "life expectancy" payout period, the IRA could continue to be held by the trust (or by the trust's remainder beneficiaries) with distributions continuing to be paid out gradually over what was left of Daisy's original life expectancy. Post-SECURE, all benefits must be distributed within 10

years after Daisy's death regardless of whether her "remaining life expectancy" was more or less than 10 years.

If the trust is also a "qualified disability trust," the trust would get an annual exemption of $2,000 for federal income tax purposes (compared with the $100/$300 exemption applicable to other trusts), although this exemption is subject to a phaseout in case of income over $100,000. See § 642(b)(2)(C) for the special exemption rule and the definition of qualified disability trust.

Because the trust is payable to one life beneficiary and on her death it terminates and passes immediately outright to two other named individual beneficiaries, the trust qualifies as a see-through trust; see ¶ 6.3.08 of *Life and Death Planning for Retirement Benefits* for discussion of this type of "see-through accumulation trust." The applicable distribution period (ADP) for required minimum distributions (RMDs) to the trust under pre-SECURE law would be the life expectancy of the oldest of the three siblings. Under SECURE, it appears that the drafters' intent was that the ADP for this type of trust would be the life expectancy of the EDB-life beneficiary of the trust, but the statute does not actually so state.

Another approach the Dingles could consider would be to name a charitable remainder trust (CRT) as beneficiary of the IRA; see "Trio of Problems" Case study. The annual unitrust or annuity payments from the CRT could be paid to a special needs trust (SNT) for Daisy so as not to disqualify her from her government benefit programs. Rev. Rul. 2002-20, 2002-1 I.R.B. 794. While this approach might be suitable for some families, it is not suitable for the Dingles because this approach would cause the bulk of their IRA to pass to charity. Their intent is to have the IRA pass exclusively to family members. Note: Rev. Rul. 2002-20 appears to require that the SNT be includible in Daisy's estate on her death; see the Ruling for details.

Another approach that some planners might consider is, using a conduit trust as beneficiary of the benefits, then having Daisy (through her guardian) transfer the conduit distributions, as she receives them, into a "(d)(iv)(A)" (self-settled) supplemental needs trust, if that approach is permitted under applicable state law without causing Daisy to lose her qualification for need-based benefit programs. A (d)(iv)(A) is a supplemental needs trust created by the disabled individual him or herself with his or her own assets. While permitted by applicable federal need-based benefit programs, this kind of trust does require that any trust assets remaining at the beneficiary's death must be transferred to the state that paid Daisy the welfare benefits, up to the amount of such benefits Daisy received after contributing those assets to the trust.

2. Conduit trust for disabled beneficiary: Very wealthy family

In contrast to the Dingles, the Ringles have substantial wealth, and intend to provide for Ronnie's needs from their wealth without attempting to qualify him for any need-based government benefit programs. They expect that their other children will always have very high incomes, while Ronnie will have no income other than what he receives from trusts they provide for him. Also, Ronnie will always have very high medical expenses. Thus, it makes sense to leave the IRA to a trust for Ronnie's benefit. IRA distributions to Ronnie through the trust will be includible in his gross income, but the income tax impact will be low due to his low income tax bracket and high medical expenses. If the IRA is paid to the other children, the income tax impact on the IRA distributions would be much higher.

Ideally, because of Ronnie's youth, it would be desirable for the trust to qualify as a see-through trust with an ADP equal to Ronnie's life expectancy.

Ronnie's parents want to provide that the trust (including the IRA it holds) would pass at Ronnie's death to a charity that does research into the medical condition Ronnie suffers from. Naming that charity directly as the remainder beneficiary of Ronnie's trust would give the trust a nonindividual beneficiary.

The trust cannot qualify as a see-through if it has a nonindividual beneficiary unless it is a Conduit Trust. Under a Conduit Trust, only the "conduit" beneficiary is considered a beneficiary for purposes of the IRS's RMD trust rules, and the remainder beneficiary is ignored. Accordingly, the Ringles' trust provides that, so long as Ronnie is living, the annual RMD, and any other amounts the trustee withdraws from the IRA, must be passed out immediately to Ronnie or applied for Ronnie's benefit. Thus, the trust is a Conduit Trust, Ronnie is deemed the sole beneficiary, and the trust qualifies as a see-through trust for purposes of the RMD trust rules.

Ronnie's right to receive the annual RMD is "countable" for purposes of need-based government benefit qualification requirements, but this is not important to the Ringles because it is not intended that he will ever qualify for such programs.

Where to read more

Matters mentioned in this case study are discussed in full detail in the following sections of *Life and Death Planning for Retirement Benefits* (8th ed., 2019): Regarding trusts as beneficiaries of retirement benefits, see Chapter 6. See ¶ 6.3.05–¶ 6.3.06 regarding Conduit Trusts, and ¶ 6.3.08 regarding see-through accumulation trusts.

CASE # XII: Providing for Minor Children

FACTS: Stan and Stacey Steinmetz are in their 30s. They have four children ages 2 to 12. They have combined net assets of $1.5 million, including Stan's $100,000 401(k) plan, Stacey's $250,000 IRA, their $1,200,000 home with a $500,000 mortgage, life insurance (through Stan's job), and various liquid investments acquired through savings and inheritance.

They are leaving all of their assets outright to each other. On the death of the surviving spouse, they would like to have all assets of both spouses pour into a "family pot" trust for the benefit of the children. The trustee would be instructed to use the principal and/or income of the trust as the trustee deems advisable for the care, support, and education of all four children until there is no child living who is under the age of 25 years, at which time the trust would terminate and be distributed outright to Stan's and Stacey's issue then living by right of representation. In the highly unlikely event that at any time there are no issue of Stan and Stacey living, while there are still assets remaining in this trust, the remaining trust assets would pass equally to Stan's brother Fran (now age 38) and Stacey's sister Lacy (now age 36).

Where do the retirement benefits fit into this?

The first step is to determine whether the "life expectancy payout" is even attainable for benefits left to the Steinmetz children post-SECURE. We find that it is—theoretically. As minor children of the plan owner they are "eligible designated beneficiaries"—but only up to a point. Specifically, as each child "attains majority," he or she ceases to be an EDB and the 10 year rule

kicks in. The Steinmetzes face several obstacles and unknowns in trying to capture the benefit of a life expectancy payout for benefits payable to their minor children:

- In their home state, a child attains majority at age 18. The Treasury can (and to some extent probably already has and undoubtedly further will) define "majority" as some later point, such as "age 26" or "completion of a course of education." However until there is some word from the Treasury, in order to put an estate plan into effect NOW, the Steinmetzes have to assume that outright distribution of their retirement benefits after both spouses die would occur no later than age 28 (10 years after age 18) for each child.

- Barring future expansion of options by fiat from the Treasury, the only now-known way to achieve EDB status for a trust for the benefit of an EDB is if the trust is a conduit trust (except in the case of a disabled or chronically ill beneficiary). Therefore the pot trust would have to be a conduit trust requiring the trustee to pass out all distributions to the children or for their benefit as received. This would result in outright distribution of all the benefits to the children no later than age 28 (based on age 18 majority)...this feature is not a problem for the Steinmetzes since they want the pot trust to be paid out to the children when the youngest reaches 25 anyway.

- Though all the children are minors now, they will attain majority in different years. When will the trust "flip" to the 10 year rule? Conservatively we would assume it is when the oldest child attains majority. The Treasury will need to issue regulations indicating how the "minor child" EDB exception applies to a trust for multiple minor children. To achieve a more certain result some parents might choose to leave the benefits to multiple separate conduit trusts, one for each minor child, so each child's RMD is based on his/her own life expectancy and each child's flip to the 10-year rule will occur based on such child's attaining majority not on the majority age of the oldest child.

These points indicate the uncertainties and/or drawbacks of planning for minors under SECURE.

Stanley and Stacey should evaluate the desirability of the "fake" life expectancy payout allowed for minor children and determine whether it is worth shaping their estate plan to fit the requirements of this fake life expectancy payout. For example, the family pot trust strongly appeals to them—is it worth giving that up so each child can have his/her own life expectancy and majority-age apply to his/her separate share of the benefits?

If it is not, then Stan and Stacey could simply name each other as primary beneficiary of their respective plans, and name the family pot trust as contingent beneficiary, without worrying about whether the trust qualifies for "EDB" status or even as a "see-through" trust, acquiring life insurance (if required to compensate for taxes on the retirement benefits).

Stan's 401(k) plan: Stan and Stacey and their attorney decide qualification as a see-through trust could indeed matter with respect to Stan's 401(k) plan. Although the only form of death benefit permitted under that plan is a lump sum distribution in cash, the trustee of a see-through trust named as beneficiary of the plan would be allowed to direct the plan to transfer the lump sum, by direct trustee-to-trustee transfer (also called direct rollover) to an "inherited IRA" in Stan's name, thus

preserving the possibility of either the sort-of-life expectancy payout allowed for minor children of the participant or at least the 10-year rule. See ¶ 4.2.04 of *Life and Death Planning for Retirement Benefits* regarding this "nonspouse beneficiary rollover" option.

Stacey's IRA: Stacey's IRA does offer the life expectancy payout form of benefit. Thus, if the trust that is named as contingent beneficiary of Stacey's IRA qualifies as a see-through trust, the trustee will be subject to the 10-year rule, not the "no-DB rules," and could even have the option of using the sort-of-life- expectancy payout applicable to minor children of the participant if the trust for the children is designed to qualify for that. This would be a desirable outcome. It would be nice for the trustee to have the option of deferring distributions from the IRA as long as possible. One "blessing" of SECURE is, if the trust qualifies as a see-through, the life expectancy of the oldest contingent remainder beneficiaries (the parents' siblings) does not adversely affect the payout period.

Here are four options Stan and Stacey have regarding how to name their family pot trust as contingent remainder beneficiary of Stacey's IRA and Stan's 401(k) plan ("plans" or "benefits"):

Approach #1: Make the trust a Conduit Trust as to the benefits. Under this approach, the trustee would be required to distribute any distribution the trustee received from the IRA to (or apply it for the benefit of) such one or more of Stan's and Stacey's children as the trustee would select in its discretion. The RMDs could be distributed to any one or more of the children outright, or to a custodian or legal guardian for them, or used for the children's benefit. Many practitioners routinely adopt this approach for minors' trusts on the theory that the RMDs will be very small (because the oldest child has such a long life expectancy), and the trustee could presumably always find a use for such RMDs that would justify distributing them to or for the benefit of one or more of the children. A conduit trust would qualify for EDB treatment, but it is not clear when EDB status would terminate causing the payout period to "flip" to the 10-year rule—presumably when the oldest child attains majority (whatever that means!).

Approach #2: Ignore see-through trust status. Stan and Stacey might decide that the complexities, uncertainties, and compromises involved in trying to qualify for see-through trust/EDB status are not worth the prize. Once upon a time the potential prize was a life expectancy payout over the long life expectancy of a minor child....but after SECURE, there is no more "long life expectancy payout"—the best deal for minor children is a 10-year payout commencing upon attaining majority, AND it appears the trust must be a conduit trust to achieve that goal. Rather than pay lawyers and trustees to draft and administer multiple trusts, or revise their trust to say things they don't want it to say, Stan and Stacey could assume the plans will *not* qualify for the "fake life expectancy" treatment available to minor children, and purchase term life insurance to assure adequate funds for payment of any extra income taxes. This maj reduce legal fees while allowing Stan and Stacey to have the trust say exactly what they want it to say for the benefit of their children.

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