2024 ESTATE PLANNING AND LAW SYMPOSIUM

May 16, 2024

SECURE ACT 2.0

<u>Presenter</u>

Edwin Morrow, Esq.
Brian C. Layman, Esq.

Checklist for Post-Mortem Administration of Estates with IRAs/Retirement Plans
By Ed Morrow, J.D., LL.M (tax), CFP®

1. _______ **Gather the necessary preliminary data**:

Who are the *primary and contingent beneficiaries* for each retirement account? Ideally, get *written confirmation* of this, since clients' memories are often faulty in this area.

Are any of them *eligible designated beneficiaries* (surviving spouse, minor child of owner, disabled/chronically ill, or not more than 10 years younger)?

What is the *estimated value* and *type of account* involved (401(k), 403(b), 457(b), IRA, Roth variants, etc.)?

Obtain *most recent statements* if possible and examine those and any recent tax returns for Forms 8606 filed to determine if any traditional accounts have basis and what the basis of any employer stock inside a qualified plan might be.

If a trust is a beneficiary, obtain a copy of the trust to examine whether the trust qualifies as a see-through trust with designated beneficiaries and is a conduit, accumulation or AMBT and who the beneficiaries of the trust are and if they are "eligible designated beneficiaries".

Determine if the decedent was past their required beginning date or not for each account separately, which is usually April 1 of the year after turning age 73 (at least in 2024 - this will increase to age 75 in 2033), unless the employee was still working at that age and was not a 5% or more owner of the company (including family attribution), in which case the RBD for that employer qualified plan account would have been delayed. Roth IRAs and now due to the Secure 2.0 Act starting in 2024, other designated Roth accounts, do not have required beginning dates during an owner's lifetime so the owner/employee is always deemed to have died before their RBD for those accounts.

If the owner died with an *inherited IRA* (or other account), find out when the original owner died (e.g., before or after the Secure Act effective date 12.31.2019) and whether the now deceased beneficiary was an *eligible designated beneficiary*.

For Roth IRA accounts, find out *when it was opened*. It is sometimes relevant whether the account has been opened for at least 5 years (e.g., if someone opens a Roth IRA with $6,000 in 2022, dies in 2023 and the beneficiary withdraws all $8,000 funds in 2025, there would be a tax on the $2,000 of gains because it is not a *qualified distribution*, see Treas. Reg. § 1.408A-6, A-7(a)).

Example spreadsheet grid below for decedent age 76, still working, with two inherited IRA accounts, a Roth IRA, a traditional IRA and a traditional 401(k):

Account and Type	Value	Primary Bene	Contingent Bene	Pre/Post RBD
Inherited R.IRA from mom DOD 12/05/2017 (non-EDB),	$200k	Wife	Children	N/A
Inherited T.IRA from brother DOD 06/08/2021 (EDB)	$100k	Wife	Children	N/A
Roth IRA (est. in 2014 >5 yrs)	$80k	Wife	Children	Pre
Traditional IRA	$150k	Wife	50% charity, 50% children	Post
Traditional 401k (still working)	$700k	Wife	Children	Pre

2. _______ **Tell clients (executor/trustee(s), especially surv. spouses) NOT TO SIGN ANYTHING** with financial advisors or employee benefits personnel without reviewing with you first. Financial firms are often overeager to help grieving families. Not only do these well-meaning advisors ignore issues such as disclaimers, AB trust funding, post-mortem Roth conversion opportunities for inherited qualified plans and spousal rollover traps, but even financial firms can and have gotten IRA titling wrong and it's common to "help" by processing a lump sum distribution– the IRS has historically been extremely strict with the wording and form of the titling of accounts and once the funds are placed in a non-retirement account, they can't just be put back in!

3. ________ **If spouse is primary beneficiary, recognize and/or review with the spouse the main exceptions when an immediate rollover is *dis*advantageous from an income tax perspective**:

a) *Surviving spouses who are under 59 ½* may not want to rollover immediately because this would mean they could not access funds before 59 ½ without incurring a 10% penalty (unless another exception applies), whereas they could access funds without penalty if kept as an inherited IRA until reaching age 59 ½, at which point the IRA could be rolled over into the surviving spouse's own IRA;

b) *Where the deceased spouse was significantly younger than the surviving spouse and younger than the applicable age (now 73, to be 75 in 2033)*, since not rolling over immediately leads to longer deferral if the surviving spouse makes the

proper election under IRC Section 401(a)(9)(B)(iv). Example: Younger spouse dies first at age 60 and the surviving spouse is age 72 and named sole primary beneficiary. If the spouse rolls the IRA over into his or her own IRA, the surviving spouse must soon take RMDs for the IRA (by April 1 of year after turning age 73). By contrast, keeping the IRA as an inherited spousal IRA (**not** rollover) grants an additional 14 years of deferral, with no RMD until Dec 31 of the year the deceased would have reached their applicable age (which will be age 75 in 2033) - not until the surviving spouse is roughly 87! This does not preclude the spouse from naming his or her own beneficiaries of the inherited IRA allowing a restart/stretch upon his or her death if they are eligible designated beneficiaries, nor the surviving spouse from rolling over to his or her own IRA before RMDs under the inherited IRA scheme start.

c) When spouse may want to file a *qualified disclaimer* to shift funds to a bypass trust (common in states with a separate state estate tax and no portability) or shift funds and income tax burden to secondary beneficiaries such kids/grandkids etc. who may be in very low (or even 0%) tax brackets.

d) When the decedent had *employer securities in a qualified retirement plan*, the spouse may want to take the employer stock outright as a lump sum distribution to exploit the *net unrealized appreciation (NUA)* loophole, allowing unlimited deferral of stock gain and long-term capital gains rates upon later sale.

e) When surviving spouse may want to convert their own (or a newly inherited) non-deductible IRA with high basis to a Roth IRA, and effectuating an immediate rollover in the same year of no basis traditional IRAs from the decedent-spouse would force counting all of the surviving spouse's traditional IRAs (including the recently inherited/rolled over one) together under the "cream in the coffee rule". It may be better to wait until after the contemplated Roth IRA conversion is completed, then rollover in a future year.

4. _____ **Get exact date of death (and possibly alternate valuation date if it is a taxable estate) values if an estate tax return is necessary, even if there is no expected estate tax due, and remember to report on new Form 8971**. If the IRA provider will not give the trustee/executor any valuations regarding the account balance on date of death (or Alternate Valuation Date) because the estate/trustee is not the beneficiary, consider sending them a letter informing them that the IRS will require them to prepare and file an estate tax return regarding the asset under IRC § 6018(b) unless the appropriate information is provided to complete the return. Note - a trustee or anyone else in possession of inherited property may nonetheless be responsible for filing tax returns as deemed executor in the event there is no personal representative

(executor, administrator) appointed.[1] Also remember that under newly enacted IRC § 6035, if a Form 706 estate tax return is required, the new Form 8971 will also be required to report basis to beneficiaries (unless passing under marital/charitable deduction) and could even be required for IRA/qualified plan accounts. Although there is an exception that permits not reporting on Form 8971 for income in respect of a decedent (IRD), qualified plan and IRA accounts may have a portion of the account that *does* have basis ("investment in the contract"), making such accounts less than 100% IRD. Unless and until the IRS corrects this, be safe and provide a Form 8971 Schedule A for such assets.

5. _____ **If no BDF is filed and there is no default beneficiary, or the beneficiary is not who the decedent intended** (and the dollar amount merits), check to see if any document can function as a "substantial compliance" substitute beneficiary designation form (this will likely require a court order to effect). The IRS has allowed a beneficiary designation form to be construed post-mortem when the intent of the decedent was clear, but the proper form not filled out with the new IRA provider.[2] However, they have also in several recent rulings refused to honor the effect of post-mortem court ordered reformations for "designated beneficiary" purposes.[3] In light of this trend it may well be a waste of funds to seek a ruling absent very compelling facts. It's a different story if your client is completely disinherited and the question is who receives the money, not just whether someone is "designated beneficiary". Consider "Schedule As" attached to trusts, correspondence with advisor/custodian, attempted beneficiary designations or paperwork from other prior account designations. Don't give up just because the decedent did not comply with the custodian/trustee's formalities.[4] Discourage the IRA custodian from filing an interpleader action if there is a dispute - not only might this be more costly, but it may disqualify the IRA if funds are placed with the court in escrow.

6. _____ **Take any year of death RMD not taken**. If an IRA/retirement plan owner dies on or after his/her required beginning date (RBD), any remaining required distribution that had not been paid prior to the date of his/her death must be paid to the beneficiary or beneficiaries of the IRA/retirement plan owner. This RMD is based on the decedent's life expectancy prior to death under the Uniform Lifetime Table (unless decedent had a spouse (or conduit trust therefore) as their primary beneficiary who was greater than 10 years younger) rather than the beneficiaries' life expectancy and the Single Life Table. Note that it is possible to have passed the required beginning date (RBD) for IRAs and not for retirement plans (e.g. if the decedent was an employee still working at a company that they don't constructively own 5% or more of and contributing

to their qualified plan). Roth IRAs, now including other Roth retirement accounts starting in 2024, will not have a RBD, so this issue goes away for Roth accounts.

Remember that a beneficiary can take this year of death Required Minimum Distribution WITHOUT affecting their subsequent right to later disclaim any or all of the remaining account.[7]

A COMMON MYTH is that the estate takes any year of death RMD not taken by the decedent – this is false. **The named beneficiary(ies), unless they wish to disclaim, should take the decedent's year of death RMD**.[8]

Prop. Reg. § 54.4974-1(g)(3) now waives any penalty for failure to take the year of death RMD automatically as long as the RMD is taken by the beneficiary's tax filing date in next year (e.g. typically April 15, or October 15 with extension filed, with additional days if that falls on a weekend). What if there are 4 beneficiaries and three file for an extension but one doesn't? Remember, the RMD for the year of death need not be taken equally pro rata by beneficiaries but may be satisfied by any combination of beneficiaries as long as the full amount is taken. If the trustee or other beneficiary fails to properly take the RMD, see Treas. Reg. §54.4974-2 A-7 for waiver of the excise tax for reasonable cause. See also IRS Form 5329 and instructions.

7. _____ **Counsel beneficiaries (or encourage them to consult their attorney if you do not represent them) to consider disclaimer issues**.[9] For instance, it is common to name spouse and then bypass trust for spouse as the contingent beneficiary. Should spouse disclaim to allow some retirement plan assets into the bypass trust? This depends on what other assets are there to fund the bypass trust, the bypass trust terms (e.g. would it allow the spouse/family/trust to spray and shift income tax to younger beneficiaries in lower tax brackets via distributions), the total assets of the surviving spouse, the applicable exclusion amount (including state estate tax!) and, of course, whether the trust qualifies as a see-through trust. Similarly, perhaps a child may wish to disclaim a percentage in favor of a trust for their children. Counsel the client regarding consequences of "acceptance of benefits", such as active investment management or taking stock dividends, that might preclude a qualified disclaimer. Mere retitling, however, does not constitute acceptance and preclude a disclaimer (e.g. changing title to John Doe, deceased, IRA fbo Daughter Doe and giving the custodian the social security number). Watch out for surprises as to who the alternate beneficiaries are on the custodian's account agreement and BDF, as discussed previously. An IRA beneficiary may be able to disclaim a pecuniary amount of an IRA, but it's probably safest and easier to disclaim a percentage.[10]

If someone wants roughly $100,000 to go to their children who would take in the event of a qualified disclaimer for instance, the disclaimant can disclaim a fraction in which the numerator is $100,000 and the account balance as of the date of death is the denominator. Of course, if the account value fluctuates up or down between the date of death and later division, the amount passing to them would change accordingly, but this can easily be taken into account and in most cases the minor deviation would be inconsequential.

8. _____ If the trust does not qualify as a see through trust, consider whether **it even matters much** whether it does. In some cases, the beneficiaries expect to withdraw over 5 years or less anyway, or the "ghost" life expectancy may apply, which may even exceed the 10 years normally afforded to designated beneficiary/see through trusts if the decedent was aged 73-81 and died after their required beginning date (remember, someone dying after the ordinary required beginning date would not be relevant for a Roth which has no such date while the owner is living, and there may be a delayed RBD when the decedent had an employer plan if the employee-decedent was still working).

9. _____ If the trust does not qualify as a see through trust, consider whether **early terminating distributions** to a beneficiary may remove a beneficiary from consideration (e.g. paying off a charity).

10. _____ If the trust does not qualify, **consider whether qualified disclaimers or releases of certain *powers*** (such as powers of appointment, overbroad trust protector powers) might remove the impediments to qualifying as a see-through trust.

11. _____ If the trust does not qualify, and nine months has passed or a qualified disclaimer is for any reason otherwise unavailable, **consider a "non-qualified" disclaimer or a common law release** of such powers under applicable state law.[11] Do NOT execute a *non-qualified* disclaimer over IRA or qualified plan benefits themselves, unless you can get a private letter ruling, since the deemed gift might trigger income taxation on the value of the plan/IRA gifted.

12. **_____ Check to make sure the IRA provider receives a copy of the trust instrument (or appropriate substitute) by October 31 of the year following death**

(unless it is desirable to *not* be considered a see through trust, see #9 above). This is a prerequisite for getting see-through trust treatment.[12] While not required, I recommend sending Certified Mail, Return Receipt Requested.

13. _____ If the trust does not qualify as a see through trust, examine whether a trust protector or amendment clause could allow a change of the terms. Also consider post-mortem reformations under the UTC or other state law (e.g., Ohio Trust Code's provisions Ohio RC §5804.11, §5804.12, §5804.15 and especially §5804.16 allow retroactive modification for tax reasons). It used to be quite unclear whether the IRS would honor such post-mortem reformations to have any tax effect on see through trust status.[13] However, the Proposed Regulations issued after the Secure Act are now much more lenient in this regard. See Prop. Reg. 1.401(a)(9)-4(f)(5)(iii).

14. _____ Make sure any post-mortem amendment of the trust, via Private Settlement Agreement (PSA), Trust Protector or otherwise, goes to the IRA custodian/trustee by the October 31 of year after death cutoff along with the original trust, or a new trust summary compliant with the regulation is sent (unless you have a case where the decedent died after their required beginning date but before age 81 and qualifying as a designated beneficiary would have no benefit or even a detriment).

15. _____ If a qualified retirement plan (especially an ESOP) is involved, BEFORE TAKING A DISTRIBUTION OR CONSIDERING A TRANSFER TO AN INHERITED IRA, **investigate whether and to what extent employer stocks/bonds are part of the plan assets**. Often the HR Dept/Plan Administrator can help verify and determine the basis of the various lots of employer stock for NUA purposes. Employer stock can be rolled out post-mortem, taking only the basis of the stock into income under Net Unrealized Appreciation (NUA) rules.[14] This allows the stocks/bonds to be sold later with the amount above "basis" qualifying as long-term capital gains rather than ordinary income. Beware that the timing and manner of such "lump-sum distributions" is critical to qualify as NUA and avoid other pitfalls. *The tax deferral from NUA is infinite in duration – there are **no** required minimum distributions from the stock distributed out of the plan and qualified dividends can qualify for reduced tax rates that would not be available if held inside an IRA/Qualified Plan!*

16. _____ If the trust can otherwise qualify as a see-through trust (designated beneficiary), and is beneficiary of any non-IRA *qualified retirement plan* accounts, such as a 401(k), **investigate whether a post-mortem conversion to an inherited Roth IRA may be advantageous** to the beneficiaries (e.g. perhaps there is basis in the plan, or perhaps there are losses that might soak up additional income upon conversion). Contact retirement plan administrators to rollover any accounts into an inherited Roth IRA pursuant to the Pension Protection Act.[15] *What situations would be good candidates for post-mortem Roth conversions?* If the estate is large enough to pay estate tax and therefore has a §691(c) IRD deduction, this deduction may offset most if not all of the tax liability of conversion (and sometimes the 691(c) deduction can be wasted year by year since fewer beneficiaries itemize). Beneficiaries of large estates (and trusts) would be more likely to have enough to pay the tax as well. If the estate/trust is large enough to be split into GST exempt and non-exempt shares (which may become more common again after December 31, 2025), it would be advantageous to fund a Roth IRA into the GST exempt trust and this may also be a reason to convert to the Roth and pay the tax *before* the trust is divided into GST exempt and GST non-exempt trusts. Fully utilizing the 691(c) deduction is somewhat analogous to the rationale of those with basis in their non-deductible traditional IRAs converting to Roth IRAs because they won't pay tax on most of the conversion.

17. _____ If there is a federal estate tax attributable to traditional IRAs and qualified plans (a.k.a. "Income in respect of a decedent", not Roth accounts), **make sure the tax preparer considers and makes it clear to trustee and/or other beneficiaries the implication and mechanics of the §691(c) IRD deduction** – otherwise it can easily go to waste. It is an itemized deduction, not subject to any 2% floor. It may cause taxpayers to jump from standard deduction takers to itemizers, and for some taxpayers whose deductions are close to the standard deduction, it may merit taking the IRA/QP funds in a "bunching" strategy for similar reasons to the strategy used to maximize itemized charitable deductions.

18. _____ If there is a federal estate tax attributable to IRAs, **make sure the executor considers guidance for the alternate valuation date (generally six month after death, or potentially sooner if assets are sold).**[16]

19. _____ If the trust is a "mere probate avoidance tool" that simply pays outright to beneficiaries (or at a certain age that has passed), **consider an in-kind and**

trustee-to-trustee transfer from John Doe, Deceased IRA fbo John Doe Trust to John Doe, Deceased IRA fbo his son James and John Doe Deceased IRA fbo his daughter Mary.[17] IRAs can also be transferred from estates to beneficiaries. If an IRA provider is difficult to deal with in making in-kind transfers (and many are), GET ANOTHER IRA PROVIDER – you can always make a trustee-to-trustee transfer with the account titled the same way at another institution, and then change the beneficial owner. Don't waste precious hours and months of time trying to reach and convince the legal department of some IRA custodian when in that same time you could just move the accounts to another custodian much sooner.

Caveat: when Congress changed the law to permit post-mortem transfers from inherited qualified plans to inherited IRAs, they only permitted "designated beneficiaries" to do this - see IRC 402(c)(11). Thus, individuals and qualifying see through trusts can move inherited qualified plan funds into inherited IRAs, but an estate or non-qualifying trust cannot. Thus, a 401(k) or other qualified plan that pays to an estate is the "worst of all worlds" because the plan might force funds out of the plan within a year in a lump sum distribution even if the tax law might otherwise allow the five year rule or "ghost" life expectancy stretch even for non-designated beneficiaries. Qualified plans do not have to allow beneficiaries to have the maximum stretch that the IRS permits.

20. _____ Whenever in-kind transfers are made, instruct the transferring IRA provider to **contact you prior to doing so if they plan to report the transfer as a distribution despite IRS guidance on pages R-3, 4 of the 1099-R instructions**. This gives you the opportunity to find a more agreeable IRA provider.

21. _____ Divide/segregate the account if there are multiple beneficiaries by December 31 of the year after death, otherwise the oldest beneficiary's LE will have to be used for all of them in the case where the beneficiaries are DBs and the deceased IRA owner died after reaching his RBD (where this rule still controls RMDs for years 1-9) or if any beneficiaries are EDBs. Plus, it's just a mess tax wise if you don't. Usually beneficiaries are chomping at the bit to get at funds so this is done as a matter of course, but it's not uncommon (especially when people try to resolve an estate without an estate attorney) for inertia or a recalcitrant beneficiary to prevent this, or sometimes litigation may ensue. In some rare cases, you might even want to divide an IRA for one beneficiary (e.g. if partial QTIP, GST or state partial QTIP applies). Inform the trustee/subtrustees/beneficiaries of what measuring life to use for the minimum required distributions (or better, warn them to seek their own counsel on that point if they are not a client).

22. ______ If the account pays to an eligible designated beneficiary and the decedent died before their required beginning date for the particular account, look out for situations in which the beneficiary may want to **elect to use the 10 year rule** if the plan permits. This is permitted under the Proposed Regulations, but the plan does not have to grant this election. This may be desirable for someone with wildly varying income who would prefer not to have forced RMDs each year, or someone whose life expectancy would be close to 10 years anyway (e.g. age 81 or older).

23. ______ If the **spouse is the sole beneficiary, or the sole beneficiary of the trust that is beneficiary** (e.g. a conduit trust or trusteed IRA), inform the surviving spouse about the new election enacted in Section 327 of the Secure 2.0 Act effective January 1, 2024 (IRC Section 401(a)(9)(B)(iv), which will usually be advantageous, and file with the IRA custodian/trustee. See article: *Ed Morrow: Secure 2.0 Offers Longer Stretch for Conduit Trusts, but Contains Traps for Surviving Spouses,* LISI Estate Planning Newsletter #3010 (January 24, 2023).

24. ______ **Review QRP/IRA investments for compliance with the Uniform Prudent Investor Act, when a trust or estate is the beneficiary.** It may NOT be sufficient to simply keep the same assets intact – even if it will be distributed in kind nine months later. ESPECIALLY when there is significant employer stock in a Qualified Retirement Plan, such as an ESOP, or any other concentrations of assets. An executor or trustee may have liability for investments even if the trust will be distributed outright after administration.

25. ______ **Know how the applicable state's version of the Uniform Principal and Income Act applies to divide retirement plan payments to the trust as beneficiary between principal and income.**[19] Distributions of RMDs may differ radically from distributions of amounts greater than RMDs, and this might factor in greatly if the five year rule is applicable. For example, John died leaving his Roth IRA in a non-qualifying trust. The trustee must withdraw the IRA by December 31 after the 5th anniversary of John's death. If the trustee takes it all out in year 4, this may be 100% "principal" for trust accounting because the distribution was not yet required, yet if the trustee takes it all out the last year, when it is arguably "required", the distribution is probably 90% principal and 10% income (UPIA §409(c) default, but see new UFIPA, which takes a

different approach). E.g., Trust has to take $40,000 RMD, but the trustee withdraws $60,000. $4,000 is income, $56,000 is principal under many trusts/UPIA. Example with Roth: Trust receives $40,000 traditional IRA RMD distribution, and $40,000 Roth IRA RMD distribution. $8,000 may be accounting income, but $40,000 is taxable income. All of it will be distributable net income (DNI), however, so in a typical conduit trust, if $80,000 is distributed to beneficiaries, all $80,000 is part of DNI and the $40,000 of taxable income is passed out to the beneficiaries. In other words, *just because a portion or all of an IRA distribution is principal, not accounting income, does not mean it is not part of DNI* and potentially taxed the beneficiary to the extent of distributions.

26. _____ If the trust is an **accumulation trust** that does not mandate the payment of all IRA distributions from the trust annually, **consider trust distributions at least annually before March**. The trustee may have time to make additional distributions to beneficiaries so that ordinary income is not trapped in the trust in higher income tax brackets. The trustee can then elect under IRC § 663(b) to make distributions made within 65 days of the end of the taxable year treated as distributions made in the prior year.

27. _____ Check to make sure the executor/tax preparer elected QTIP for both the marital trust and any IRA/plan payable thereto (or the trusteed IRA functioning as such) on the Form 706.

28. _____ Check if surviving spouse could demand (or the trustee in its discretion could distribute) a portion or even the entire IRA under distribution standards of the trust or estate, if so, bring up for discussion w. spouse and/or attorney for estate. A spousal rollover may still be allowed *even if an estate or trust is beneficiary* if the spouse can demand and is entitled to the IRA – this is a complicated issue, but there are literally dozens and dozens of taxpayer/spouse-friendly PLRs.[20] Most recently, see PLR 202348009. You may have to research which custodians will go along with this without requiring a PLR, however.

29. _____ Check to see if you can cash out any undesirable beneficiaries (e.g. older individuals, charitable entities) via distribution prior to September 30 (the *beneficiary designation date*). For example, if there is a $10,000 bequest to charity or to

a family friend who is much older than other beneficiaries, pay them off as early as possible. It's easier administratively anyway. If they are no longer a beneficiary as of Sept 30, they are not counted. The older beneficiary is irrelevant if the 10 year rule applies and the deceased owner died *before* their required beginning date, but may still be relevant in calculating RMDs even if the 10 year rule applies if the deceased owner died ***after*** their required beginning date (assuming Prop. Reg. § 1.401(a)(9)-5(d)(1)(i) continues into the final regulations - see IRS Notice 2022-53 and Notice 2023-54 for temporary relief from these RMDs for years 2022 and 2023).

30. _____ Check to see if you have **charitable beneficiaries** which should be **distributed all or a portion of a traditional IRA in kind** as part of their residuary distribution share, provided non-pro rata distributions are permitted (most trusts do). Beware! Do not do this when charities receive a pecuniary amount – in such case try to satisfy the bequest with other non-IRD assets.

31. _____ Double Check the IRA Agreement and/or Form 5305 when transferring an inherited retirement plan to a newly created inherited IRA (e.g., not when simply keeping the same agreement/firm). Is the trustee of the trust that is the beneficiary (or the individual) inadvertently signing the new agreement as the "grantor" ("depositor" for custodial accounts)? Should the agreement be modified to clarify that the beneficiary is not establishing the new IRA as grantor/depositor, but as *beneficiary*? Read through the agreement and make sure it makes sense when the person signing the new document is a beneficiary rather than an initial grantor/depositor of the IRA. This is likely only an issue for smaller IRA custodians that do not customize their documents as much and rely on IRS provided prototype forms.

32. _____ For the year after the year of death, make sure to take both the RMD for traditional IRAs and the RMD for Roth IRAs (and the RMDs from other types of retirement accounts until after they are consolidated) SEPARATELY. After taking any RMD for the decedent for the year of death (if death after the required beginning date), take the required minimum distributions for the year after death (unless it is a surviving spouse or conduit trust therefore able to exploit the special delayed required beginning date exception). Don't wait until the last week of December. Repeat every year.

Just as you have to take your RMDs from your qualified plans separately from RMDs for IRAs during your lifetime, a similar rule will apply post-mortem. If you have $15,000 RMD resulting from an inherited traditional IRA and $10,000 RMD resulting from an inherited Roth IRA (even if from the same decedent), you cannot take all $25,000 from either one and none from the other to satisfy the required distribution, you have to take those minimums from each computed separately.[21] You can aggregate all of one type (traditional 403(b) and 401(k) into traditional IRA or Roth 403(b) and Roth 401(k) into inherited Roth IRA) if inherited from the same decedent, which is desirable for administrative and financial and investment planning convenience.[22]

Remember that spousal inherited IRAs (including conduit trusts for spouses) *recalculate* the divisor anew every year, rather than simply subtracting one from the original denominator every year, until after the surviving spouse's death, and may have a delayed required beginning date and be able to use the Uniform Lifetime Table (see notes above about the new IRC Section 401(a)(9)(B)(iv) election).[23]

33. ____ Counsel beneficiaries (or better, have them consult their own counsel) about naming their own beneficiaries if they now have an inherited IRA/plan, or exercising their testamentary powers of appointment often granted in trust and integrating that with their own financial and estate plan. A majority of trusts nowadays have limited or general testamentary powers of appointment. Most require a *specific* reference in a will, trust or other document.

34. ____ Don't make a §643(e)(3) election to trigger gains on transfers to beneficiaries in the same year you might distribute an IRA/QP in kind to a beneficiary. While this election is not used very often, you don't want to trigger gains to the trust/estate when there are IRA/QP assets distributed.

35. ____ Don't be afraid to make the §645 election with the estate, but beware of "bunching" when retirement benefits pay to a trust/estate on fiscal year. If your client has a separate revocable living trust or even a separate standalone trust that was revocable at the time of death, these can be combined with the estate for tax purposes and the IRS will not try to claim this somehow makes the "estate" a beneficiary of the retirement benefits/IRA and somehow taint the trust as a designated beneficiary.[24] *However, you might apprise the beneficiary of a potential negative to using a fiscal year for the trust/estate where there are significant RMDs payable to ongoing trust.* Just like

waiting until Jan 1- April 1 of the year after turning 70 ½ forces two RMDs into one year, potentially causing bracket creep, the same may occur when the fiscal year ends for the trust – delaying tax by a year is *usually* a good thing, except when it causes more bracket creep:

E.g., John dies (after RBD, w/o taking RMD) May 20, 2016 with IRA payable to trust. Trust takes RMD for 2016, elects §645 and fiscal year, pays $50,000 RMD to Susie, the beneficiary, who then gets K-1 for tax year 2017 (even if she received it in 2016). If the estate is settled and reverts to a calendar year for the trust, the trust will take another RMD for 2017, pay to Susie, who then has two RMD payments for 2017. If the excess drove her from the top of the 28% bracket into a 33% bracket, the deferral cost her up to $2,500, the 5% delta between the two tax brackets. By contrast, her having the benefit of the interest/dividends on that $16,667 tax for an additional year, if we assume a safe money market type rate of 1%, would only be $167.

Tax deferral for only a year is generally only advantageous if you don't increase your tax bracket, since there is a trade off with any deferred income being taxed higher (ordinary rates) than income earned outside the IRA (which may be unrealized or qualified dividend/long-term capital gains rates).

36. ____ Add qualified plan and IRA related deadlines to your probate administration deadlines for one master deadline tickler for the file.

a. Key deadlines

1) December 31 following date of death – if decedent was old enough to be required to take RMD, but did not take it, the beneficiary (which might be a trust) must take it. If it's too late, e.g. death in December, take as soon as possible and the IRS will waive the excise tax penalty for reasonable cause.

2) Six months after date of death – alternate valuation date applicable only to taxable estates

3) Nine months following date of death – qualified disclaimer under IRC §2518

4) Nine months following date of death – Form 706, QTIP election, if no extension

5) Fifteen months following date of death – Form 706, QTIP election, with extension

6) September 30 of the year after year of death – beneficiary designation date

7) October 31 of the year after year of death – documentation requirement for trusts

8) December 31 of the year after year of death – beneficiary must take 1st RMD (unless the beneficiary elects or is forced to use the 5 year rule where the IRA owner dies before his/her required beginning date or where there is a Roth IRA)

9) December 31 of the year after year of death – must establish separate accounts for separate beneficiary life expectancy usage

10) 5th Year anniversary of death (not the December 31 following) – deadline for *non-qualified* tax deferred annuities payable to trust (an annuity that is not an IRA, 403(b) etc).

11) December 31 of the 5th year following the IRA owner's death – deadline to distribute the entire amount if the beneficiary elects or is forced to elect 5 year rule

12) Nine months after beneficiary turns 21 – deadline for qualified disclaimer (but what 21 year old would ever disclaim?)

13) Also mark decedent's final Form 1040 and estate/trust's Forms 1041 income tax return filings based on whether calendar or fiscal year.

14) Also mark (especially for accumulation trusts, but even for conduit trusts because a trustee could get sloppy, delay distributions and even potentially cause an *Atkinson* issue), whether to make additional distributions within 65 days of the end of the prior tax year and elect under IRC §663(b) to have them considered as prior year distributions. This can often avoid trapping retirement plan distributions, which are usually ordinary income (if not Roth, no basis from non-deductible contributions), at the highest tax rates (39.6% (not 43.4%) federal rate, above $12,500 for tax year 2017).

Tasks that you might think have deadlines, but don't:

1) There is no tax law deadline or requirement that a new account agreement be executed with the IRA provider by the beneficiary(ies) after the IRA owner's death (although as a practical matter custodians will require it).

2) There is no deadline for retitling (though you would still have the separate account rule).

3) There is no deadline for spousal rollovers. A surviving spouse might rollover ***many years later.***

4) We are waiting on guidance from the IRS on whether/what deadlines might be for surviving spouses to file the new special spousal election (effective January 1, 2024) under Section 327 of the Secure 2.0 Act (new IRC Section 401(a)(9)(B)(iv)).

---

[1] IRC §2202, §2203, Ohio R.C. Section 5731.37(B)

[2] PLR 2006-16039, PLR 2006-16040, PLR 2006-16041

[3] PLR 2007-42026 refused to honor a post-mortem beneficiary designation reformation. More recently, in PLR 2016-28004, PLR 2016-28005 and PLR 2016-28006, the IRS refused to give retroactive effect to a state court reformation of a decedent's IRA beneficiary designation, and insisted that the decedent's three children calculate their RMDs based on the decedent's remaining life expectancy on the date of his death. The IRS stated that the decedent's estate was named as the beneficiary, and an estate cannot qualify as a "designated beneficiary" under IRC § 401(a)(9). In light of this trend it may well be a waste of funds to seek a ruling absent very compelling facts. However, the Proposed Regulations issued in 2022 are much more liberal in this regard.

[4] In addition to the strange case of *Stephenson*, discussed in footnote 18, see the successful attempt in getting a "substantially compliant" BDF approved even where the formal BDF requirements of the IRA custodian/trustee were not met *In re Estate of Golas*, 751 A.2d 229 (Pa. Sup. 2000) – neither case addressed the see through income tax issue, however. You may be able to get around strict IRA custodian requirements for a BDF if equity favors acceptance, particularly if the custodian interpleads the dispute, see *LeBlanc v. Wells Fargo*, 2012-Ohio-5458. This may be true even for ERISA plans, see *Mays-Williams v. Williams*, 777 F.3d 1035 (9th Cir. 2015)

[5] *United States v. Windsor*, 133 S. Ct. 2675 (2013), *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015)

[6] See *Herring v. Campbell*, 2012 U.S. App. LEXIS 16397 (5th Cir. 2012)

[7] See Rev. Rul. 2005-36

[8] Treas. Reg. §1.401(a)(9)-5, Q&A4

[9] IRC §2518 for gift/estate issues, IRS CGM 39858 for income tax effect of qualified disclaimer

[10] See PLR 9630034, in which a disclaimer of an interest in an IRA, construed to be a pecuniary disclaimer, did not accelerate IRD.

[11] See PLR 2012-03033 for a good example of how this planning can save the day

[12] Treas. Reg. § 1.401(a)(9)-4, A6

[13] The trend is not favorable, see PLRs discussed above about post-mortem reformation of beneficiary designations, but most important to this topic is PLR 2010-21038, in which the IRS refused to recognize post-mortem reformation of a trust for see through trust qualification purposes. Update: Proposed Regulations regarding post-mortem changes to trusts issued after the Secure Act in 2022 are very taxpayer-favorable now: see Prop. Reg. 1.401(a)(9)-4(f)(5)(iii).

[14] IRC § 402(e)(4).

[15] IRC § 402(c)(11).

[16] IRC §2032(a), see *IRAs and the Alternate Valuation Method*, Natalie Choate, Trusts and Estates, January 2009, and her follow up, *Estate Tax Alternate Valuation Method*, December 2011

[17] See, *Transferring IRAs,* by Michael Jones in 145 Trusts and Estates No. 4 (April 2006)

[18] PLR 2006-44022. See also Steve Leimberg's Employee Benefits and Retirement Planning Newsletters by Natalie Choate (#395) and Barry Picker (#405) on this PLR. This author agrees with Ms. Choate that the IRS clearly got this ruling wrong, but it doesn't cost anything to file a new Beneficiary BDF to be certain, bizarre as it sounds.

[19] Uniform Principal and Income Act, http://www.law.upenn.edu/bll/archives/ulc/upaia/2000final.htm (2000), §409 and (2008 version) http://www.law.upenn.edu/bll/archives/ulc/upaia/2008_final.htm

[20] Most recently, see the surprising PLR 2017-36018, where a spouse was net income plus HEMS beneficiary, followed by 5% to charity and 95% to children at death. The spouse and children petitioned the court and got an order to terminate the trust and distribute to spouse (it's unclear if church consented or waived rights) – surprisingly the IRS permitted the spouse to rollover the IRA. See https://www.irs.gov/pub/irs-wd/201736018.pdf

[21] Treas. Reg. §1.408A-6, A15

[22] Treas. Reg. §1.401(a)(9)-8, A-1, or Treas. Reg. §1.403(b)-3, A-4 for §403(b)s. The IRS has a nice rollover chart with the various retirement plans on a grid at:

rollover_chart.pdf (irs.gov)

[23] Treas. Reg. §1.401(a)(9)-5, A5(c)(2) "Spouse designated beneficiary. If the surviving spouse of the employee is the employee's sole beneficiary, the applicable distribution period is measured by the surviving spouse's life expectancy using the surviving spouse's birthday for each distribution calendar year after the calendar year of the employee's death up through the calendar year of the spouse's death. For calendar years after the calendar year of the spouse's death, the applicable distribution period is the life expectancy of the spouse using the age of the spouse as of the spouse's birthday in the calendar year of the spouse's death, reduced by one for each calendar year that has elapsed after the calendar year of the spouse's death."

[24] TD 8987 at https://www.irs.gov/pub/irs-regs/td8987.pdf: "Commentators asked for clarification as to whether an election by a revocable trust to be treated as part of an estate under section 645 causes the trust to be treated as an estate for purposes of section 401(a)(9). On this point, the IRS and Treasury intend that a revocable trust will not fail to be a trust for purposes of section 401(a)(9) merely because the trust elects to be treated as an estate under section 645, as long as the trust continues to be a trust under state law."