THE SECURE ACT
POST-DEATH DISTRIBUTIONS FROM RETIREMENT ACCOUNTS
WHAT CONGRESS (& the IRS) DID AND HOW WE SHOULD RESPOND

Version: January 2026

General comments regarding the The SECURE Act (Setting Every Community Up For Retirement Enhancement). These new laws were enacted as part of the December 2019 budget process and substantially change many of the prior rules regarding distributions from an inherited retirement account. Please remember that The SECURE Act did not abolish the prior rules relating to post-death distributions from retirement accounts. Instead, it added a new set of requirements (contained in the IRS Code §401(a)(9)(H) which is a new subsection added to the pre-SECURE Act statute) that fit on top of and modified prior law.

• The IRS released **proposed SECURE Act regulations February 2022** which were used in this author's prior outlines. Prior to the proposed regulations, it was necessary to understand both the old law and the new law. It appears that the regulations are an attempt to include most (not all) of the information we need and we may be able to spend less time studying the pre-SECURE Act law. Please also note that there are still some unanswered questions regarding how these new laws will be implemented.

• **SECURE Act 2.0 was passed into law on December 29, 2022.** Most of its changes related to plan administration during the account owner's lifetime. Only a couple of its provisions which directly relate to estate planning have been included in this outline.

• **IRS Notices 2023-54 and 2024-35** provided transitional guidence for plan administrators and beneficiaries of retirement accounts prior to the final regulations. The most significant provision provides that the provisions of the proposed SECURE Act regulations will apply "for the purposes of determining RMDs for calendar years beginning no earlier than 2024". The IRS will not impose the RMD penalties for persons subject to the 10-year rule. Please note that this penalty waiver generally only applies to designated beneficiaries subject to the new 10-year rule when the account owner died after the RBD. It does not waive the penalty or negative consequences for missing most other RMDs.

• **Final SECURE Act regulations were released on July 19, 2024.** This outline is an attempt to analyze the new Final Regulations and incorporate them into the outline. This is a work in progress and will be updated in future years as more insight is obtained.

Note: Notations of "**New*" in the margin are an attempt to highlight the changes between the proposed regulations and the final regulations or to highlight important issues that were controversial or debated in the proposed regulations.

• **SECURE 2.0 Proposed Regulations were also released on July 19, 2024.** This outline has attempted to incorporate the primary provisions of those proposed regulations into the applicable paragraphs.

The following is an attempt to give a brief summary of the major provisions and some recommendations for how to guide your clients in light of this author's review of the final regulations for The SECURE Act and the proposed regulations for SECURE 2.0.

I. Overview.

A. Important Questions. To determine the rules that apply to a beneficiary of a retirement account, you must answer the following questions:

1. What classification applies to the beneficiary?

   - Eligible Designated Beneficiary (EDB);
   - Designated Beneficiary;
   - Not a Designated Beneficiary.

2. Is an RMD (Required Minimum Distribution) required for the year of death?

   • If the account owner died before the Required Beginning Date ("RBD" or April 1 of the year after the account owner turned 73 (this age was 70 ½ and then 72 in prior years), then no RMD is required for the year of death.

   • If the account owner died after the RBD, then an RMD is required for the year of death if the account owner had not already taken it.

   Note: The decedent's remaining RMD for the year of death may not be rolled to an inherited IRA. Most investment companies will require that any portion of that RMD that has not been taken prior to the account owner's death must be withdrawn (and taxed) prior to any rollover.

   Note: If the year-of-death RMD is not taken timely, the penalty is 25% of the amount that should have been taken but was not taken. The penalty is reduced to 10% if the error is corrected by taking the RMD during a "correction period" and if you self-report the 10% penalty (these provisions were included in SECURE 2.0). The proposed regulations contain an automatic waiver of that penalty if the failure is the result of "reasonable error" and an automatic waiver for the year of the account owner's death if the missed RMD is taken by the beneficiary no later than the tax filing deadline (including extensions) for the tax year in question. IRS Reg. §54.4974-1(g)(3). Form 5329 is used to pay the penalty or to request waiver of the penalty.

3. Are RMDs required for subsequent years (the years after the owner's death)?

   • A beneficiary using the life expectancy distribution rules (only an EDB can use those "stretch" provisions) must take annual RMDs starting no later than December 31 of the year after the death and every year thereafter.
   •In addition, if the account owner died after the Required Beginning Date ("RBD" or

   April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years), then RMDs must be taken every year even if the beneficiary is not an EDB (see discussion on pages 29 - 30 regarding distributions under the 10-year rule).

4. Is there an "outer limit year" when the retirement account must be fully liquidated and taxed?

   Author's Note: Choate's Update has changed this verbiage to a "terminal distribution". This author has (at least for now) continued her prior verbiage of an "outer limit year".

B. General Rules. More details that *generally* apply to each of the three categories of potential beneficiaries:

1. *Eligible Designated Beneficiary (EDB).* These beneficiaries are the only ones who get to use lifetime distribution ("stretch") rules. See §401(a)(9)(E).

   • Surviving spouses of the account owner;
   • Minor children of the account owner until they reach the age of majority-- when the minor reaches age 21 under the new proposed regulations;
   • Disabled beneficiaries;
   • Chronically ill beneficiaries;
   • Beneficiaries who are less than 10 years younger than the account owner.

   Author's Note: The following three pages contain the general rules for all EDBs. There are specific rules that apply only to a specific EDB class which are discussed in more detail in section III of this outline (i.e., specific rules that apply only to surviving spouses are discussed on pages 15 - 20 and to minor children on pages 21 - 23).

   a. Required Minimum Distributions (RMDs)—**Death before RBD.** If the account owner died before the Required Beginning Date, ("RBD" or April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years), the EDB may choose one of these two methods:

      1) The default rule is to use the life expectancy method and calculate RMDs based on the beneficiary's life expectancy using the Table I - Single Life Expectancy Table--(the "bad" table). The annual RMD distributions must begin by December 31 of the year after the account owner's death. The basic rules for calculating RMDs for beneficiaries were not changed by the SECURE Act.

         Example: Jack (age 62) dies in 2024 leaving his $1,000,000 IRA to his four siblings (all within 10 years of Jack's age or any other non-spouse EDB). The beneficiary(ies) want to stretch distributions as long as possible because they are in their peak earning years and want to delay most distributions until after they retire.

         If the separate share rule applies (see pages 10 and 41 for the timely creation of separate accounts), each beneficiary computes his/her own RMD. IRS Reg. §1.401(a)(9)-8(a).

If there are multiple EBDs and the separate share rules are not met (i.e., separate accounts are not created before the Dec. 31 of the year after death deadline), then the oldest EDB's age is used to calculate RMDs for all beneficiaries.

Use the beneficiary's age on their birthday in the year after the account owner's death.

Example: If the beneficiary is age 60 in that first distribution year (the year after the owner's death), the applicable RMD factor is 27.1 and the first RMD is calculated as:

Account (1/4 share) balance 12/31/2024	250,000
Divided by applicable RMD factor	÷ 27.1
2025 RMD (for each sibling)	9,225

For each subsequent year, use the account balance on Dec. 31 of the prior year and subtract one from the first applicable RMD factor.

2) Optional use of 10-year rule: The beneficiary (EDB) may elect to have the 10-year rule apply if this election is permitted under the retirement account plan. The requirement that the plan permit this election will likely require an affirmative change to these plans and should be investigated before making this election. IRS Reg. §1.401(a)(9)-3(c)(3).

No RMDs are needed until December 31 of the year that includes the 10th anniversary of the death (because the account owner died before the RBD).

Author's Note: This election may be prudent if a high income EDB is near retirement age and wants no distributions until after retirement (which is within 10 years). This could allow the EDB to use distributions from an inherited IRA account as a bridge after retirement and before taking Social Security and/or starting distributions from his/her own retirement accounts.

Author's Note: The election generally must be made before RMDs are required (see IRS Reg. §1.401(a)(9)-3(c)(5)(iii)(B)). But, if an individual EDB fails to follow the rules for lifetime distributions (i.e., does not take RMDs in a timely manner), the penalty for failing to take RMDs is automatically waived if the EDB elects to use the 10-year rule before the end of the ninth year after the account owner's death. IRS Reg §54.4974-1(g)(2). This waiver only applies if the account owner died before the RBD.

b. RMDs—**Death After RBD.** If the account owner died after the RBD, normal RMDs must be taken according to the pre-SECURE Act life expectancy rules. Use Table I - Single Life Expectancy (bad) Table. RMDs are calculated based on the longer of:

• The life expectancy of the beneficiary using the beneficiary's age in the first distribution year--the year after the death. IRS Reg. §1.401(a)(9)-2(a)(4) and §1.401(a)(9)-5(d)(1)(ii); or,

• The life expectancy of the deceased account owner based on the account owner's age in the year of death;

Author's Note: This rule (allowing an older beneficiary to use the account owner's remaining "ghost" life expectancy) is a gift from the IRS that should not be overlooked.

c. **Death of EDB.** Upon the death of an EDB, the successor beneficiary must continue to take RMDs based on the remaining life expectancy being used by the EDB. However, the retirement account is also subject to a new outer-limit rule which requires that the account be liquidated by December 31 of the year that contains the 10th anniversary of the EDB's death. IRS Reg. §1.401(a)(9)-5(e)(3).

2. *Designated Beneficiary (who is not an EDB).* Most persons inheriting a retirement account will fit into this category. These beneficiaries must use the new 10-year rule which is created by cross-reference to the statute that created the old 5-year rule; but, which doubles the distribution period to ten years. See IRS Code §401(a)(9)(H)(i).

a. 10-year rule. The account must be liquidated by December 31 of the year that contains the tenth anniversary of the account owner's death. Thus, if the account owner died in 2025, the entire account must be liquidated by December 31, 2035. IRS Reg. §1.401(a)(9)-3(c)(3).

Author's Note: Choate in her latest versions of her Choate Update makes a distinction between how to characterize the various circumstances when the 10-year outer-limit payout rules are implemented (see page 22 of her September 2025 Update at https://ataxplan.com/secure-act-update/). However, this author prefers to not view them as separate rules but as different circumstances in which variations of the new 10-year rule are implemented. You may want to review her materials to obtain a slightly different (perhaps more nuanced or better) perspective.

b. RMDs. Required Minimum Distributions during the 10-year period.

1) Death Before RBD. If the account owner died prior to the Required Beginning Date ("RBD" or April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years), RMDs are not required during the 10-year distribution period. IRS Reg. §1.401(a)(9)-5(d)(2) [RMDs are only required if using life expectancy rule which is not allowed for these beneficiaries who are not EDBs].

*New:

2) Death after RBD. The final regulations confirmed that RMDs are needed during the 10-year distribution period if the account owner died after reaching the RBD. Reg. §1.401(a)(9)-5(d)(1).

Author's Note: This provision initially surprised most commentators because the new 10-year rule was created by explicit reference to the prior 5-year rule (when RMDs are never needed) but extended the distribution period to 10 years. The IRS reached this conclusion by resurrecting the old "at least as rapidly" rule which had been deemed obsolete and irrelevant prior to the proposed regulations. Please note that IRS Notices 2023-54 and 2024-35 waived the penalty for failing to take RMDs for these designated beneficiaries subject to the 10-year rule until 2025.

Author's Note: The waiver of the RMD penalty during 2021 - 2024 only waives the penalty for failing to take the RMD for beneficiaries where the proposed regulations created confusion (i.e., these beneficiaries subject to the 10-year rule). It does <u>not</u> change the other RMD rules relating to the distributions which were supposed to be taken. Choate's Update clarifies the following:

• Because there is no penalty for these beneficiaries failing to take the RMD in 2021 - 2024, the beneficiary may leave those amounts in the inherited IRA account and has no obligation to "make up" any applicable RMDs.

• If another rule requires RMDs (i.e., EDBs must take RMDs to get the life expectancy treatment), then there was no confusion caused by the proposed regulations and that obligation is unaffected by these notices.

3. *Non-Designated Beneficiary.* A person's estate, a charity or a trust that does not meet the Designated Beneficiary Trust (DBT) rules (see discussion regarding trusts starting on page 32) are not designated beneficiaries. The rules for these beneficiaries are largely unchanged by the SECURE Act.

For most clients, this is the worst category. An estate can NEVER be a designated beneficiary. It does not matter if the estate transfers the retirement account to a person (who *could* have been a designated beneficiary) or a trust (that *could* have qualified as a DBT). If there is no named beneficiary, the retirement account is by definition an estate asset. Similarly, if the beneficiary designation names "my estate" as the beneficiary, there can never be a designated beneficiary. But, please see my additional comments for this category on pages 30 - 32.

a. Death Before RBD. If the account owner dies prior to the Required Beginning Date ("RBD" or April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years), the non-designated beneficiary is subject to the old 5-year rule which requires that the entire account be liquidated by December 31 of the

year that contains the fifth anniversary of the account owner's death. No RMDs are required during those five years (or six tax years if a distribution is made during the year of death). This gives flexibility to determine when to take distributions; but, has a short final deadline for full liquidation of inherited retirement accounts.

b. Death After RBD. If the account owner dies after the RBD, the non-designated beneficiary must continue to take RMDs annually based upon the remainder of the account owner's "ghost" life expectancy but is required to shift from Table III Uniform Lifetime Table (the good RMD chart) to Table I (Single Life Expectancy Table--the bad RMD chart) which uses a substantially shorter life expectancy. The 5-year rule is not available if the account owner died after the RBD. See Choate Update (September, 2025 page 21).

C. The new "Outer Limit Year" rule. This new term (this term was apparently originated by Natalie Choate–see notes regarding Choate Update on page 84 under Other Resources–and has been replaced by the term "Terminal Distribution" in her latest Update), creates the final distribution date that must be used in the following circumstances:

1. *Pre-SECURE Act: Death of Beneficiary.* If the account owner died prior to 2020 (i.e., the SECURE Act rules did not yet apply at the account owner's death) and the beneficiary is a designated beneficiary taking lifetime distributions, continue to take distributions according to the old (pre-SECURE Act) rules until the beneficiary dies. Then, the new beneficiary (anyone who is a successor to that interest) is now subject to the new 10-year rule starting in the year of the beneficiary's death.

   Example: If the account owner died in 2018 and the beneficiary died in 2025, the new outer limit year is 2035. The account must be liquidated no later than December 31, 2035. IRS Reg. §1.401(a)(9)-1(b)(2)(iii). In the interim, the successor beneficiary must continue to take RMDs based upon the longer of the original beneficiary's life expectancy or if the owner died after the RBD the remainder of the account owner's remaining ghost life expectancy. IRS Reg. §1.401(a)(9)-5(d)(1)(ii).

* New:

   NOTE: If there are multiple beneficiaries of the account, IRS Reg. §1.401(a)(9)-1(b)(2)(iii)(B) imposes the 10 year rule upon the death of the oldest beneficiary unless separate accounts are properly established before December 31 of the year after death (see pages 10 and 41). If the separate accounts are properly and timely established, then each beneficiary's share is treated separately. IRS Reg. §1.401(a)(9)-8(a).

   NOTE: If the account owner died before the SECURE Act (i.e., death before 2020) and the original designated beneficiary taking life expectancy distributions also died prior to 2020, then the transition rules for the SECURE Act do not apply and the secondary beneficiary (taking what is left after the original beneficiary

also died) can continue to take RMDs based on the remainder of the original beneficiary's life expectancy and the new 10-year rule never applies to this beneficiary. §1.401(a)(9)-1(b)(3)(ii)(Example 2)

Author's Note: Choate's latest Update (September 2025, pages 91 - 93) has more examples of nuances of these transition rules.

2. *DB Under the SECURE Act:* If the account owner died after 2019 and the beneficiary is not an EDB, the 10-year rule applies right away. Upon the death of a beneficiary, the outer limit year does not change and the successor beneficiary takes the position of the prior beneficiary and must liquidate the account by the end of the original 10-year distribution period after the account owner's death.

3. *EDB Under the SECURE Act:* If the account owner died after 2019 and the beneficiary is an EDB using the life expectancy distribution rule, the SECURE Act provides in §401(a)(9)(H)(iii):

   Rules upon death of Eligible Designated Beneficiary.—If an eligible designed beneficiary dies before the portion of the employee's interest to which this subparagraph applies is entirely distributed, the exception under clause (ii) [the provisions allowing stretch distributions to EDBs] shall not apply to any beneficiary of such eligible beneficiary and the remainder of such portion shall be distributed within 10 years after the death of the such eligible designated beneficiary. [emphasis added]

   The regulations discuss two primary scenarios:

   • If the beneficiary is an EDB because he/she is the account owner's child who is a minor, the outer limit year is the year the child turns age 31 or ten years after the child's death, whichever year comes first. IRS Reg. §1.401(a)(9)-5(e)(4).

   • If the beneficiary is any other EDB, the outer limit year is the year that contains the tenth anniversary of the EDB's death IRS Reg. §1.401(a)(9)-5(e)(3).

* New

4. *Employer Plan May Control.* The final regulations contain many provisions which allow an employer plan to mandate that the 10-year rule apply to all accounts held in the employer plan. Some companies may impose this rule in an attempt to force families to remove the account from the employer's plan (perhaps to decrease administration costs). If the retirement account in question will be held in an employer plan indefinitely, then ensure that the employer does not impose this 10-year rule mandate (or other shorter distribution period). Accounts that are subject to an employer mandated 10-year rule that is not otherwise required by the IRS, should be rolled out of the employer plan and into an inherited IRA account.

Author's Note: It is this author's experience that it is easier to administer an inherited IRA account held at an investment company than to work with the plan administrators of an employer plan. This is especially true if the employer plan is a 403(b) account held at a government office. So, this author always encourages clients to roll retirement accounts out to one of the companies that have proven that they want these accounts and will give good serve to the beneficiaries. If the plan administrator resists rolling the account to an inherited IRA (i.e., for the benefit of a person or trust), offer to draft an attorney's opinion citing the appropriate authority and clearly stating that the family is relying on the attorney's opinion and not on the plan. You may even need to provide a "hold harmless" provision in that opinion letter. This author has used this process many times to obtain rollover treatment that the plan administrator initially resisted.

D. Separate Share Rule.

1. *Individual Beneficiaries.* The separate share rule for individual beneficiaries applies much as it did prior to the SECURE Act. If the account is split into separate shares by December 31 of the year after the year of the account owner's death, each beneficiary is able to administer the plan (i.e., calculate RMDs, etc.) and ignore the other beneficiaries of the account. IRS Reg. §1.401(a)(9)-8(a).

2. *Trust As Beneficiary.* If a trust is the beneficiary, then the type of trust, the category of the beneficiary, and the trust terms will determine how or if the separate share rule can be used. Generally, if a trust creates multiple subtrusts and if the primary funding trust (i.e., decedent's revocable trust) is named as the beneficiary on the retirement account, then all subtrusts are tested together (but see the new rule below). If an individual subtrust is named as the direct beneficiary on the retirement account's beneficiary designation, then that subtrust is tested individually. Examples of types of beneficiaries include:

   a. Applicable Multiple Beneficiary Trust (AMBT). The SECURE Act contains a special provision which allows a trust for disabled or chronically ill (D/CI) beneficiaries to use the separate share rule and treat that portion of the inherited IRA account under the EDB rules for these special beneficiaries. See more discussion on pages 44 - 46 of this outline.

   b. Minor Children of Account Owner. See the discussion on pages 36 - 40 of this outline for more information regarding a trust that has minor children who qualify as an EDB.

*New

   c. The final regulations, see IRS Reg. §1.401(a)(9)-8(a)(1)(iii), contained a nice surprise which allows a funding trust to create separate subtrusts which will be administered separately (each subtrust tested separately and able to use its own designated beneficiaries to determine RMDs, etc.) if:

• The primary funding trust requires separation into subtrusts and the trust determines the amount allocated to each subtrust (there can be no discretion given to the trustee on this point).

• The subtrusts are created immediately upon the account owner's death (the final regulations do allow for a vague amount of time for administrative delays in creating the subtrusts).

• The primary funding trust is promptly terminated after all assets are allocated to the subtrusts. So, if you are relying on this concept, ensure that all trust assets are allocated to one of the subtrusts and that the primary funding trust is terminated.

E. Roth IRA. Roth IRAs have two unique rules which make them very beneficial when used in the right circumstances (IRS Code §408A(d) and Choate Chapter 5):

1. Because the contributions are not deductible, qualifying distributions from a Roth IRA are not taxable. To be a qualifying distribution, the account owner must have had a Roth IRA account for at least five years (the "holding period") and the distribution must be made after a triggering event (either the account owner attaining age 59 1/2, or the account owner's death or disability).

2. Because there are no RMDs during the account owner's lifetime, upon the death of the owner of a Roth IRA, beneficiaries are treated as though the Roth IRA owner died before his/her RBD. IRS Reg. §1.408A-6, A-14(b). So, generally there are no RMD requirements for a designed beneficiary of an inherited Roth IRA account other than the new 10-year rule and the obligation to empty the account by December 31 of the year that contains the 10th anniversary of the death. If the beneficiary is an EDB taking a lifetime distribution treatment, then the RMD rules that apply to that situation will control annual distributions.

*New:

3. Many companies are also offering Roth Retirement accounts (i.e., Roth 401(k) or Roth 403(b) sometimes called a Designated Roth Account or "DRAC") for employees. Prior to 2024, for employees who had retired but kept their retirement account at the employer, these employer Roth accounts were subject to RMDs when the owner reached the RBD if the employee had both a Roth account and a traditional pre-tax account at the same employer. Beginning in 2024, RMDs are no longer required for a DRAC. See IRS Reg. §1.401(a)-5(b)(3), SECURE 2.0, s. 325 and SECURE 2.0 Proposed Reg. §§1.401(a)-5(g)(2)(iii).

4. 529 Plan (college savings plan) to Roth IRA. SECURE 2.0 contains a wonderful provision that allows left-over 529 plan contributions (i.e., amounts not used for college costs) to be rolled to the beneficiary's Roth IRA account. The amount contributed can't exceed the annual Roth IRA contribution limit or a $35,000 lifetime per beneficiary limit. Also, the 529 plan must have been in existence for at least 15 years and the amount rolled to the Roth IRA must have been in the account for at least 5 years (to prevent back-loading of a 529 to use this provision.

II. Miscellaneous Provisions.

A. Increased Age To Start RMDs. Most of the rules regarding administration of your own retirement account *during your lifetime* have not changed. The primary change relates to the Required Beginning Date (or RBD), the age for starting Required Minimum Distributions (RMDs). The SECURE Act raised the age from 70 ½ to 72. Then, SECURE 2.0 further raised the RBD to 73. The RBD is based on the year of the account owner's birth (April 1 of the year **after** the account owner attains the following age):

- Born before 7/1/49, age 70 ½;
- Born 7/1/49 - 12/31/1950, age 72;
- Born 1951 - 1959, age 73;
- Born 1960 or later, age 75.

Note: People born in 1959 were initially included in both the age 73 and 75 group. The IRS in the latest proposed regulations clarified that these people are in the age 73 group.

Note: The RBD is April 1 of the year after attaining the applicable age. This date is important to remember when considering whether an account owner died before or after the RBD (see many provisions in this outline). However, account owners who wait until that date to take their first RMD must take two RMDs in the same year (one for the year they attained the applicable age and one for the next year). Accordingly, most account holders start taking RMDs in the year they attain the applicable age, even if they haven't actually passed their RBD. Keep this in mind for account administration purposes and determining whether or not an account owner died before or after their RBD.

B. New Mortality Tables. Starting in 2022, IRS revised their mortality tables for calculating RMDs. The new tables show a longer life expectancy and result in smaller RMDs. These new tables are included in the Appendix to this outline. The following summarizes their effect:

1. For persons starting a lifetime distribution formula in 2022 or later, use the new tables for distributions in 2022 and later years.

2. For persons taking RMDs based based upon a life expectancy that was governed by the old tables, continue to use the old tables through the distributions in 2021. Then, for the 2022 and later distribution, reset the distribution period as though the account owner died when the new tables were in effect (i.e., go back to the beneficiary's age in the year after the year of of the death and start with a new life expectancy factor for the beneficiary's age in that first distribution year and then subtract one for each subsequent year).

C. Repeal Age Cap on IRA Contributions. The age cap for contributions to your own IRA account was eliminated. So, persons over 70 ½ with earned income (i.e., W-2 income from a job or self-employment subject to SE tax) can now contribute to their IRA accounts. This applies to contributions for 2020 and later tax years.

Author's Note: Employees who are eligible for an employer retirement account (i.e., 401(k) or 403(b) accounts) are able to continue to make retirement account contributions after age 70 ½. So, this SECURE Act change gave self-employed persons the same opportunity to continue to contribute to their retirement accounts as long as they have earned income.

D. Coordination Between QCD and IRA Contributions After Age 70 ½. A distribution from an IRA account which is given to a qualified charity is not included in taxable income if the distribution meets the definition of a Qualified Charitable Distribution (QCD) under IRS Code §408(d)(8) under the following rules:

- The account owner is over age 70 ½ at the time of the distribution;
- The distribution is given directly from the IRA account to the charity;
- The amount given to charity does not exceed $100,000 per year (this limit is now indexed for inflation with the 2026 limited adjusted to $108,000).
- The charity is a qualified charity (i.e. a tax-exempt organization under IRS Code §170 and the contribution would be fully deductible if given in cash);

Warning: transfers to a donor advised fund, a supporting organization to a public charity and a private foundation (other than a private operating foundation) do NOT qualify as a QCD!

Additional points to remember:

1. The amount distributed (and given to charity) does count toward the annual RMD. *Planning Tip:* Some clients mistakenly think that this QCD concept makes sense only to the extent of their RMD. This author routinely recommends that every client over age 70 ½ who gives substantial amounts to charity use the QCD concept for all large charitable gifts. This allows the client to use the pre-tax funds in the IRA account for charitable gifts and save their after-tax funds in their checking account.

2. After the 2017 Tax Cut & Jobs Act, most people will no longer itemize deductions and most will get no tax benefit from making charitable contributions. This QCD concept gives the same tax benefit as deducting a contribution without needing to itemize deductions.

3. Because the QCD is excluded from taxable income, the QCD is not part of the taxpayer's income for the purpose of determining what part of Social Security is taxable or other tax provisions which are dependant upon the taxpayer's adjusted gross income (i.e., medical expense deductions).

4. It ONLY makes sense to do the QCD from a traditional IRA account. Arguably, a person could make a QCD withdrawal from a Roth IRA account. But, because withdrawals from a Roth IRA are not taxable and because there are no RMD obligations from an account owner's own Roth IRA, it makes no sense to use a Roth IRA account for a QCD.

5. The traditional IRA account used for the QCD can even include an inherited IRA if the beneficiary is over age 70 ½ at the time of the QCD withdrawal. IRS Notice 2007-7, Sec. IX, Q&A 37, 2007-5 IRB 395.

6. Most companies holding an IRA will allow the account holder to create a checking account tied to the IRA account so that the account owner can send the QCD directly to the charity via this IRA check-writing concept. This makes the use of the QCD concept much easier. Remember to keep a list of the QCD gifts made and give that to your tax preparer at tax time to have these amounts excluded from your taxable income.

SECURE Act Change: For QCDs after 2019, the amount excluded from income under these provisions is "reduced (but not below zero) by an amount equal to the excess of—(i) the aggregate amount of deductions allowed to the taxpayer under IRS Code §219 [to a traditional IRA] for all taxable years ending on or after the date the taxpayer attains age 70 ½, over (ii) the aggregate amount of reductions under this sentence for all taxable years preceding the current taxable year." This author's attempted interpretation:

- The minimum age for making a QCD remains at 70 ½ and does not follow the RBD age which is adjusted up to age 73.

- The QCD rules remain unchanged unless the taxpayer has made deductible contributions to an IRA account after age 70 ½. If such deductible IRA contributions have been made, then future QCD distributions are not excluded from taxable income until they offset the cummulative amount of deductible IRA contributions made after age 70 ½.

- Note: Contributions to a SEP-IRA don't affect a QCD because those contributions are deducted under IRS Code §404(h), not §219.

E. Revert To Prior Kiddie Tax Rules. The 2017 Tax Cuts and Jobs Act (TCJA) changed the "Kiddie Tax" rule to tax a child's unearned income over $2,700 at tax brackets applicable to estates and trusts on Form 1041. This resulted in some children being tax on this unearned income at tax bracket that were higher than the tax brackets that applied to the parent(s)' return. The SECURE Act repealed this TCJA change and reverted to the prior rule. For children affected by the rule, unearned income over $2,700 will be taxed at the tax bracket that applies to the parent(s) tax return. This generally applies to children under age 18 and to children under age 24 who are full time students (college or other post-secondary schools). The Kiddie Tax rules don't apply if the child is married filing a joint return, if the child has no living parent or children over age 18 whose earned income is more than half of their support.

F. Attempt To Expand Eligibility To Employer Plans. More persons are now eligible for employer-based retirement accounts.

G. Annuity Payouts. Expanding (encouraging?) the use of annuities as a distribution tool for employer retirement account distributions during the account owner's lifetime. This is consistent with the SECURE Act's attempts to limit inherited IRA accounts. Employers

are given greater flexibility to offer a distribution option which will fully pay out the account during the lifetime of the employee and/or one designated beneficiary.

III. Application of these rules to various beneficiaries.

A. Surviving Spouse: The account owner's surviving spouse is an EDB. Most prior rules (pre-SECURE Act) regarding a surviving spouse remain unchanged.

1. *Rollover to spouse's own IRA.* Choate 3.2.

   a. This is the option that most surviving spouses should choose because this usually allows the surviving spouse the most flexible distribution options.

      Example: Jack (age 67) dies with a $1,000,000 in his 401(k) account which lists Betty (his surviving spouse, age 65) as the sole beneficiary. Betty rolls the entire balance into her own IRA account.

      • Betty can withdraw any amount at any time.
      • Distributions are taxable income but not subject to the 10% penalty because Betty is over age 59 ½.
      • No RMDs are required until Betty's RBD (age 73 if Betty reaches age 73 after December 31, 2022).
      • RMDs are based upon Betty's life expectancy (Table III - Uniform Life Expectancy table) because the account is treated like it always belonged to Betty.

   b. It is always safer to complete the rollover as a custodian-to-custodian transaction. If the account is distributed directly to the spouse, it may be possible to roll those distributions to the spouse's own IRA if the rollover is completed within 60 days. See Choate 3.2.03(A).

   c. If rollover treatment is intended, the spouse should be listed as the primary beneficiary on the retirement account. Normally, failure to name the spouse as beneficiary prevents rollover treatment. But, in IRS Private Letter Ruling (P.L.R.) 2014-12021 (Dec. 26, 2013), the IRS allowed a surviving husband who was the sole beneficiary and who was executor of the estate with unlimited authority over estate assets to liquidate the account through the estate and roll the distribution to his own IRA. See also P.L.R. 2014-37029 (June 5, 2014) where a similar result was reached where the surviving wife was allowed to roll her deceased husband's IRA into her own IRA after the IRA was paid to his estate which then assigned the IRA to the marital trust (for her benefit) and P.L.R. 2015-23019 (June 5, 2015) where the IRS allowed a retirement account paid to a marital trust to be rolled to the surviving spouse's IRA. In each situation, the IRS relied upon the fact that the surviving spouse had full control of the allocation and administration of the account paid to the estate and trust.

Practice Tip: If there is no named beneficiary, check the plan document for a default beneficiary designation. Many plans list the spouse as the default beneficiary.

d. If the account owner was past the Required Beginning Date ("RBD" or April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years) and was taking RMDs, then any part of the RMD that had not been taken prior to death must be taken by the surviving spouse and may not be rolled into the spouse's own IRA.

e. If the surviving spouse is past the RBD, the value of the rolled-over IRA is included in the calculation of the spouse's RMD for the year after the rollover (for year-end transfers that are still in process, the amount is part of the beneficiary's prior year-end balance if the rollever had been started before year end). Choate 1.2.06.

f. A surviving spouse may also elect to treat the deceased-spouse's IRA (not employer plan) as the spouse's own IRA. IRS Reg. §1.408-8(c). If this election is made, "the surviving spouse is considered the IRA owner for whose benefit the trust is maintained **for all purposes** [emphasis added] under the Internal Revenue Code (including section 72(t)) [the 10% penalty for withdrawals before age 59 1/2]. IRS Reg. 1.408-8(c)(3).

Author's Note: This election existed prior to SECURE 2.0 and may be different from the election under Secure 2.0 Proposed Reg. §1.401(a)(9)-5(g)(3) discussed below (pages18 - 20). This author is waiting for more clarification to determine if these elections are identical or just very similar. Because the new election under SECURE 2.0 does not impose the 10% penalty on a spouse using that election, it is possible the new (better) election overrules this prior election.

g. Clients may choose to not roll the account to the spouse's own IRA in situations where:

1) The spouse is under age 59 ½ and wants to avoid the 10% penalty for distributions before age 59 ½ (see discussion on pages 18 - 20 and Choate 3.2.01(D)).

2) The spouse may disclaim part of the account. If there is a chance that the surviving spouse may want to disclaim part of the retirement account, then delay rolling the part that may be disclaimed. Obviously, any portion of the account that is rolled to the surviving spouse's own IRA cannot be disclaimed. Also, remember that a qualified disclaimer must be completed within 9 months of the date of death. For an example of how this could work, see the example on pages 69 - 74 of a trust for the benefit of children (assume that the amount held for the children is disclaimed by the spouse into the trust which is listed as the contingent beneficiary of the retirement account) or bypassing the spouse (see pages 62-63).

3) During the process of administering the estate, there is controversy regarding which assets will be allocated to which person and the spouse may want part or all of the retirement account to be allocated to another person. Any part of the retirement account that is rolled into the spouse's own IRA cannot be transferred to another person without incurring income tax on the transferred amount. See Ozimkoski, TC Memo 2016-228 for a situation where the decedent's IRA was rolled to the spouse's IRA by mistake (by the investment advisor). Later, when the spouse distributed assets from the IRA to settle a dispute with the decedent's son (who challenged decedent's will that gave all assets to the spouse), the spouse had to recognize income on the entire amount distributed from the IRA and paid to the son. Plus, the spouse had to pay the 10% early withdrawal penalty because she was not yet age 59 ½. If the spouse had delayed rolling the IRA into her own account, she could have settled the dispute by assigning a share of the IRA account to the son. This would have avoided any income tax or penalty assessed against the spouse.

   Warning: If the account will not be rolled into the spouse's IRA, it is very important that the spouse promptly designate a new beneficiary on the account (in the event of the spouse's death). Choate 1.6.05. This option should be available for an IRA account which remains in the decedent's name; but, may not be allowed under employer plans (a review of the employer plan may be required to confirm the plan rules). If the surviving spouse dies before naming a new beneficiary, one of these results will likely occur:

   a) If the spouse dies within the statutory 120-hour survivorship provisions under Minnesota law (see Minn. Stat. §524.2-702(a) and elsewhere), the spouse is deemed to have not survived and the contingent beneficiary designation (if any) should control because the IRS code and the proposed regulations accept local law on this type of issue.

   b) If the spouse dies more than 120 hours after the account owner, then the spouse is entitled to the account and any secondary beneficiary designation created by the account owner may not have any legal effect. If there is a secondary beneficiary named on the account and the family wants to implement that secondary beneficiary, the spouse's estate can disclaim the account and the secondary beneficiary designation should then control the account.

   c) If there is no secondary beneficiary named by the account owner, check the plan document to determine whether the plan automatically creates a contingent beneficiary or if the default survivorship provisions of the plan allow the named contingent beneficiary to automatically own the account.

   d) If none of these options work, then it is likely that the estate will be the beneficiary. See discussion on page 7 and 30.

2. *Inherited IRA held FBO surviving spouse.* A surviving spouse who is the beneficiary of a retirement account may roll the account to an inherited IRA account.

a. *Examples:*

Example #1--Older Surviving Spouse: Jack (age 75) dies with $1,000,000 in his retirement account with his spouse Betty (age 85) as the sole beneficiary. Betty can roll Jack's account to an inherited IRA account and use the greater of her life expectancy (recalculated annually) or Jack's (ghost) life expectancy (reduced by one each year. IRS Reg. §1.401(a)(9)-5(d)(1)(ii). Because Jack was younger than Betty, Jack's remaining life expectancy is longer than Betty's. Because Jack's ghost life expectancy is not recalculated, if Betty lives long enough her recalculated life expectancy will eventually be longer than Jack's and she can automatically switch to use her own recalculated life expectancy. Despite §327 of SECURE 2.0, it appears that under this option Betty must use Table I (the bad mortality chart) to calculate RMDs. That may be clarified when the SECURE 2.0 regulations are finalized.

Example #2--Younger Surviving Spouse: Jack (age 56) dies with a $1,000,000 in his 401(k) account. Betty (his surviving spouse, age 50) needs distributions from the account to pay for living expenses for the family including college expenses for their children.

• If the assets in Jack's account are rolled into Betty's own IRA, then any distributions from Betty's IRA account prior to Betty attaining age 59 ½ are also subject to the 10% early withdrawal penalty. See Choate 3.2.08.

• Prior Advice (before SECURE 2.0): Determine how much Betty may need prior to attaining age 59 ½ (i.e., Betty decides that she wants access to $250,000 from the account during the next 10 years). She rolls this amount from the 401(k) into an inherited IRA titled "Jack (deceased), IRA fbo Betty". The remainder of the 401(k) account (the amount she will not need until after she is at least age 59 ½) is rolled directly into Betty's own IRA.

*New:

b. New Advice Under SECURE 2.0 §327 and Secure 2.0 Proposed Reg. §1.401(a)(9)-5(g)(3)--Spouse Election To Treat Retirement Account as Own Account for determining RMDs.

If the surviving spouse is the only beneficiary of the retirement account, the spouse can elect to treat the account as his/her own account for the purpose of determining RMDs. In many nuanced ways, this is different than rolling the account into the surviving spouse's own IRA and has substantial advantages.

Author's Note: Previously, a surviving spouse could choose to treat the deceased-spouse's IRA (but not employer plan) as his/her own. Those provisions are in IRS Reg. 1.408-8 which only relates to IRA accounts. This SECURE Act

2.0 change and the proposed SECURE 2.0 regulations appear to expand this concept to all retirement accounts including employer plans because they are in IRS Reg. 1.401(a)(9). This author is not certain whether these separate regulations are for the same election or if the new proposed regulations are for a slightly different election. Hopefully, that confusion will be clarified when the SECURE 2.0 regulations are finalized.

1) This election is automatic if the account owner died before the RBD. If the account owner dies on or after the RBD, the spouse may make the election or the plan may may make the election the default election.

2) Betty can take irregular distributions as needed from the account. Any distributions made (even before age 59 1/2) do NOT incur the 10% early withdrawal penalty. This favorable treatment is based on the fact the election is only for the purpose of determining RMDs and not for other purposes. Because it is still an inherited retirement account and because the §72(t) rules imposing a 10% penalty for early (before age 59 1/2) withdrawals do not apply to an inherited retirement account, no early withdrawal penalty can be imposed. See also the preamble paragraph F to Proposed SECURE 2.0 regulations page 58647. However, remember that all distributions are still taxable income.

3) If the surviving spouse is older than the account owner, RMDs are not required until the deceased-owner would have reached the RBD. IRS Code §401(a)(9)(B)(iv)(II).

4) Please note that if the surviving spouse is over age 59 1/2 but younger than the account owner and wants to delay RMDs until later (i.e., until his/her own later RBD), then it may be better to complete the rollover to his/her own IRA.

5) Once RMDs start, the spouse calculates RMDs **using the spouse's age on the good chart--Table III**. SECURE 2.0 Proposed Reg. §1.401(a)(9)-5(g)(3)(ii)(C). Alternatively, if the account owner died after the RBD, the spouse can use the longer of the spouse's own life expectancy or the deceased-owner's life expectancy on Table I (the bad chart). IRS Reg. §1.401(a)(9)-5(d)(3)(iv).

6) After the spouse's death, RMDs continue using the spouse's remaining life expectancy (not the original account owner's longer life expectancy if that is being used which is only available to the surviving spouse) but the new beneficiary must switch to the bad chart -- Table I. SECURE 2.0 Proposed Reg. §1.401(a)(9)-5(g)(3)(ii)(D). In addition, upon the spouse's death, the 10-year rule also applies so the entire account must be liquidated by the end of the year that contains the 10th anniversary of the spouse's death.

7) These new very favorable proposed regulations apply if the first year for RMDs for the surviving spouse is 2024 or later.

Author's Note: These proposed regulations are very favorable to the surviving spouse and should be considered in many situations. Perhaps the biggest disadvantage is that upon the surviving spouse's death, the successor beneficiary must continue to take RMDs and won't be treated as a new designated beneficiary. If the spouse only lives a short time, some of the advantages of using this election may be lost. Previously, a surviving spouse holding an inherited IRA account could (at any time) roll the account into his/her own IRA. It appears that this right still exists under this "treat the account as your own" regulation. [see Choate Update, page 41-42]

8) If Jack's employer is willing, Betty may leave part or all of Jack's 401(k) account in the employer plan. This might be especially helpful if the account holds closely-held stock (i.e., the company's own stock) which some investment companies do not want to hold.

9) Don't forget to look for opportunities for the use of a disclaimer. If the children are named as the contingent beneficiary on the account and the spouse can disclaim a portion of the account and let it pass to the children. Each child's share of any disclaimed amounts can be withdrawn and taxed on the child's tax returns. If the children are still young, don't forget to look at the "Kiddie Tax" rules when planning the amount to disclaim.

10) When the surviving spouse reaches the age that triggers RMDs (i.e., when the deceased account owner would have reached the RBD), then many of the advantages of using this election disappear. At that time (unless the deceased spouse is substantially younger than the surviving spouse and the spouse is using the decedent's ghost life expectancy), rolling the account into the surviving spouse's own IRA account is likely the best option.

    Note–Anti-Gaming Provision: If the spouse has held the account in an inherited IRA that does not require RMDs (i.e., spouse choses the 10-year rule for the IRA and avoids RMDs during years that would otherwise require RMDs), then IRS Reg. §1.402(c)-2(j)(4) prevents amounts that should have been taken as RMDs from being rolled over to the spouse's own IRA.

11) **Warning: New Contingent Beneficiary Needed.** If the spouse is using this rule, it is very important that the spouse name a beneficiary of this inherited IRA account. If the beneficiary dies without naming a new beneficiary, the account will be subject to probate administration and non-designated beneficiary status (i.e., the five-year rule if RMDs have not yet commenced).

Warning: See Choate's Update (September 2025, pages 34 - 36) for some unusual circumstances where a 10-year rule may be imposed on a surviving spouse.

B. Minor Child of Account Owner (EDB).

*New

1. The newly expanded definition of minor child contained in IRS Reg. §1.401(a)(9)-4(e)(1)(ii) has a cross-references to IRS Code §152(f)(1) and now includes:

   - The account owner's own children;
   - Adopted children;
   - Step-children;
   - Eligible foster children (if placed in the home by a government agency or by court decree.

   The definition does not include grandchildren or other minors whether or not related to the account owner.

2. The regulations create a uniform definition of minor as a child under age 21 to have a uniform rule for all states regardless of each state's individual definition of the term "minor". IRS Reg §1.401(a)(9)-4(e)(3).

3. If the minor child is named as the direct beneficiary of a retirement account, then control of the account may be problematic.

   a. Some investment companies will automatically allow the child's parent or guardian to control the account. If the company holding a retirement account won't readily recognize someone as the custodian of the account, you may be able to roll the account to a different company who will recognize a custodian's control of the account.

   b. Other investment companies use a beneficiary form that allows the account owner to name a custodian under the UTMA or UGMA to control the account.

   c. Some investment companies will not honor either of those options. In those situations, someone may need to petition the court for a protective order to get control of the account. This is a costly and inefficient process that puts the court in control of the process.

      Planning Tip: If there is any chance that a minor will be the beneficiary of a retirement account, you should consider who will control the account until the beneficiary attains an appropriate age. For small accounts, naming someone (a surviving parent or guardian) under the UTMA will allow an adult to control the account until age 21 when the beneficiary can assume control of the account. In the interim, distributions can be taken to support the beneficiary. For larger amounts, consider creating a trust to hold and administer these accounts.

4. Until the minor beneficiary attains the age of majority, the prior rules allowing a life expectancy distribution still apply. Accounts held for the benefit of a minor child should be administered as follows:

   a. Roll and maintain the child's share of the retirement account in an inherited IRA account via a custodian-to-custodian transfer. Do NOT transfer the IRA into the name of the beneficiary or otherwise liquidate the IRA account. Any amount that has been withdrawn from the decedent's retirement account, cannot be later rolled to an inherited IRA account.

   b. RMDs must begin by December 31 of the year after death (see warning below).

   c. RMDs must be made over the life expectancy of the designated beneficiary (Table I - Single Life Expectancy table). The distribution period is based upon the beneficiary's attained age on December 31 of the first distribution year (the year after the death). Choate 1.2.03 & 1.2.04.

   d. RMDs for each subsequent year are calculated by subtracting one from the initial distribution period. Choate 1.5.04.

      Example: Betty dies in July, 2025, with a $1,000,000 IRA which lists her son, Bill (age 10 in the year of death and age 11 in the first required distribution year), as the sole beneficiary. On Betty's birthday (October, 2025), she would have been 50. There is no RMD for 2025 because Betty had not reached her RBD (age 73). The account should be administered as follows:

      - Roll the account to an inherited IRA titled, "Betty (deceased), IRA fbo Bill".
      - Bill is age 11 (in first distribution year).
      - 2026 ADP 73.9 years (Appendix Table I - Single Life)
      - RMD for 2026 = $1,000,000 ÷ 73.9 = $13,532
      - RMD for 2027 = $1,026,468 ÷ 72.9 = $14,080 (4% APY in 2026)

      Warning: If the 2026 RMD is not taken, then Bill will likely not be able stretch the RMDs. Under the old rules, failure to start distributions by December 31 of the year after death meant that the beneficiary had to use the 5-year rule unless the IRA agreement or the employer's plan makes the life expectancy rule the default payout option. See Choate 1.5.07(A). IRS Reg 1.409(a)(9)-3 Q&A 4 makes the life expectancy rule the default rule if the plan is silent on this issue. IRS Reg. §1.401(a)(9)-3(c)(5)(iii) gives an EDB the option to use the 10-year rule if the account owner died before the RBD. Most clients with minor children will be under age 73. So, this option may be very helpful in these situations.

   e. Upon attaining the age of majority, the new 10-year rules begin to apply. §401(a)(9)(E)(iii). Continuing the example above, a ten-year liquidation period begins in 2036 when Bill reaches age 21.

• RMDs are required to continue during this 10-year period even though Betty had not passed her RBD because once RMDs start, the IRS wants RMDs to continue until the account is empty. Please note that RMDs were required under the life expectancy distribution rule until the beneficiary attained age 21. Please note that in IRS Reg. §1.401(a)(9)-4(f)(6)(i) Example 1, the IRS offers a similar set of facts involving life expectancy distributions for an EDB who is less than 10 years younger than the account owner. In that example, when the EDB died, the contingent beneficiaries were required to continue to take RMDs based on the deceased EDBs remaining life expectancy during the 10-year liquidation period that began at that EDBs death. It is likely that the IRS will impose a similar requirement that RMDs continue if the minor child loses EDB status by turning age 21.

• The account must be liquidated by December 31, 2046.

• If Bill dies during this 10-year distribution period, his contingent beneficiaries continue to take distributions for the remainder his 10-year distribution period with RMDs calculated using the remainder of Bill's life expectancy.

• If the beneficiary dies prior to attaining the age of majority, the contingent beneficiaries will start a new 10-year distribution period on the date of Bill's death.

Income Tax Tip. Please remember that an unmarried minor child who has at least one surviving parent is also subject to the "Kiddie Tax" rules which tax a child's unearned income (including retirement account distributions) at the tax brackets applicable to child's surviving parent. For children subject to these rules, the first $1,350 of unearned income is received income tax free. The next $1,350 of unearned income is taxed at 10% (federal). Additional unearned income is taxed at the surviving parent's tax bracket. This rule is likely to apply when the account owner is divorced and names their child as the beneficiary of a retirement account. The account owner can easily bypass the ex-spouse as beneficiary. But, that ex-spouse's tax bracket will affect the child's tax bracket for income from retirement account withdrawals.

Author's Note Re Trusts For Minors. For discussion of distributions to a trust for the benefit of a minor child, see the discussion below (multiple parts of this outline).

C. Disabled Beneficiary.

1. *Definition of Disabled.* There are now three possible routes to confirm a beneficiary's status as being "disabled" for the purpose of qualifying as an EDB:

*New

a. Social Security Determination. If the beneficiary has a certification from the Social Security Administration of disability status under 42 U.S.C. §1382c(a)(3), this is sufficient for qualification as an EDB. IRS Reg. §1.401(a)(9)-4(e)(4)(iv).

Author's Note: The preamble to the final regulations state that this Social Security determination should exist on the date of the account owner's death to use this determination as a safe-harbor.

Author's Note: The Minnesota Department of Human Services will routinely perform a SMRT certification that uses a similar definition of disability. In the preamble to the final regulations, the IRS specifically rejected a request that the IRS recognize a state court or agency certification of disability if that definition differs from the IRS definition. So, relying on a SMRT certification may or may not be acceptable to the IRS if the beneficiary's disability status is given scrutiny.

b. If the beneficiary is age 18 or over, and is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment that can be expected to result in death or to be of long-continued and indefinite duration. IRS Reg. §1.401(a)(9)-4(e)(4)(ii). This definition mirrors IRS Code §72(m)(7) defining "disabled" for other tax purposes.

Author's Note: This author sees substantial ambiguity in using this definition if the beneficiary has a job specifically designed to allow a disabled person to work in an adapted job. Beneficiary's with this status should be encouraged to obtain a disability determination from the Social Security Administration. However, as noted above, the Social Security Administration's determination needs to be in place on the date of the account owner's death for certainty that this safe harbor will be acceptable. Only experience will help us know whether an aggressive IRS agent will attempt to enforce such a requirement strictly or if there will be any grace in the administration of these rules.

Author's Note: This definition could be troublesome for persons whose disability status is intermitent (i.e., a person with a mental illness who is sometimes able to work but whose mental illness sometimes prevents a person from working) or who recovers from the disability and no longer meets that definition. Hopefully, the IRS will give us more guidance on these issues in the future. In the interim, it is this author's opinion that relying on an intermitent disability status is not likely to be effective for EDB status.

c. If the beneficiary is under age 18 and has a medically determinable physical or mental impairment that results in marked and severe functional limitations and that can be expected to result in death or to be of long-continued and indefinite duration. IRS Reg. §1.401(a)(9)-4(e)(4)(iii).

2. *Disability Status Must Exist At Death.* The beneficiary's disability status must exist at the time of the account owner's death.

Author's Note: The Preamble to the proposed regulations specifically stated that a minor child who became disabled (while still a minor) after the death did not qualify as disabled. That specific provision was not included in the preamble to the final

regulations. However, it is likely implicitly incorporated in the final regulations and we should expect that concept to be enforced.

3. *Documentation Required.* Documentation of the disability status must be given to the plan administrator by October 31 of the year after the account owner's death. Please ensure that the documentation clearly states that the disability existed on the date of the account owner's death.

    a. For account owners who died before 2024, the final regulations contain a transition rule which allows the documentation to be sent to the plan administrator by October 31, 2025 if that date is later. So, every attorney should review their files for the existence of disabled beneficiaries and ensure that the appropriate document is sent to the plan administrator. This is a substantive requirement to establish EDB status. Failure to meet the documentation requirement will likely result in loss of EDB status.

    b. For Chronically Ill beneficiaries (see below), the certification must be signed by a physician, a registered professional nurse or a licensed social worker. It is unclear what qualifications are needed to certify disability status. But, we can expect the IRS to require a similar level of professional certification to given an opinion of disability status.

4. Some persons who may not meet this definition of being disabled, may meet the definition of being "Chronically Ill" (see below).

5. A disabled beneficiary is an EDB and the life expectancy distribution method is allowed.

6. If the disabled beneficiary is the named beneficiary (allowing the beneficiary to access the account) or if any retirement account assets are paid directly to the disabled beneficiary, then the inherited retirement account could create problems with the disabled person's eligibility for government benefits.

7. If the disabled person is named as the direct beneficiary of a retirement account and the account owner dies, then the prior practice of assigning the inherited account to a 1st person special needs trust (SpecNT) should still work for disabled beneficiaries under age 65. However, remember that such trusts are subject to the estate recovery rules which will require that upon the death of the disabled beneficiary, any remaining trust assets must be paid to the state to the extent of benefits received by the disabled beneficiary.

8. At this time, it appears that the best option for disabled beneficiaries is to continue the prior practice of either creating a 3rd person supplemental needs trust (SupNT) or a "pure discretion" trust which has no other beneficiaries during the disbled person's entire lifetime and name the trust the beneficiary of an inherited retirement account. Attorneys who are not experienced in drafting these trusts are advised to work with an

experienced elder law attorney who understands the nuances of these options and can provide better guidance.

9. If the retirement account is paid to a trust for the benefit of a disabled person, see the discussion below regarding Applicable Multi Beneficiary Trusts as the beneficiary on pages 44 - 46. SECURE 2.0 changed the rules regarding contingent beneficiaries for these trusts and now an AMBT may list a charity as a contingent beneficiary of the trust.

10. Upon the death of the disabled person, a new 10-year distribution period starts for any contingent beneficiaries. It appears that the proposed regulations will require that the successor beneficiary(ies) must continue to take RMDs based on the disabled beneficiary's remaining life expectancy during this 10-year distribution period.

11. Various lobbying groups are lobbying the IRS and Congress to make the following changes to the law and the proposed regulations relating to disabled persons:

    a. Collateral Benefits. To qualify as an Applicable Multi Beneficiary Trust (see page 44), only the disabled person may be a beneficiary of the trust. Many of these trusts allow collateral benefits to other persons (i.e., a travel companion, etc.) for the benefit of the disabled person. The rules regarding retirement account distributions should be expanded to specifically allow these payments.

       Author's Note: Absent further guidance, this author would argue that payments to travel partners (etc.) are substantively necessary for the disabled person to travel and should be treated as solely for the disabled person's benefit. But, that is just this author's opinion. Perhaps having the trust pay the travel providers directly for these companion expenses will be effective. Please consult with an attorney who has expertise in these issues for more guidance.

    b. Assignment to First Person Speical Needs Trust. If the disabled person is the direct beneficiary of a retirement account, PLR 2006-20025 (and several later PLRs) allowed the inherited retirement account to be transferred directly to a first person special needs trust (frequently referred to as a (d)(4)(A) trust). This right probably still exists even though it is not expressly included in the law or regulations. It would be helpful if the concept was formally recognized in either the law or the final regulations.

    c. Retroactive Social Security Administration Determination. A strict reading of the final regulations would indicate that to use the Social Security Administration's determination of disability status as a safe harbor, that determination needs to be in place at the time of the account owner's death. It would be very helpful if the IRS would recognize and allow a Social Security determination which is received after death (i.e., before the Beneficiary Finalization Date) if the determination confirms that the disability existed on the date of death. In the interim, this author suggests getting the Social Security Administration’s certification in advance.

D. Chronically Ill.

1. *Definition.* A beneficiary is "chronically ill" if he/she meets the definition contained in §7702B(c)(2). This is the definition that has been used for qualification for long-term care benefits under a LTC insurance contract and for deduction of certain medical expenses as an itemized deduction.

2. *Chronically Ill Status Must Exist At Death.* The chronically ill status must exist on the date of the account owner's death. Thus, a beneficiary who becomes chronically ill after the date of death does not become an EDB.

3. *Documentation Requirement.* This condition must be certified in writing and the certification must show that the period of inability is an indefinite one which is reasonably expected to be lengthy in nature. IRS Reg §1.401(a)(9)-4(e)(7).

   a. The documentation must be signed by a physician, a registered professional nurse or a licensed social worker. See the Appendix for an example of a chronically ill certification that this author has used for many years which is an attempt to follow this definition.

      Note: Even though §7702B(c)(2) contains both the "2 of 6 ADLs" test and the "Severe Cognitive Impairment" test (see Test B in the sample certification form in the Appendix), the final regulations only focus on the 2 of 6 ADLs part of the definition of chronically ill. Choate finds this omission "inexplicable". This author agrees. In my experience, most people who meet the 2 of 6 ADLs test, also meet the Severe Cognitive Impairment test. For beneficiaries who only meet the Severe Cognitive Impairment and not the 2 of 6 ADLs test, there is at least some uncertainty on this issue that will hopefully be clarified (perhaps in the final SECURE 2.0 regulations).

   b. The documentation must be given to the plan administrator of the account by October 31 of the year after the account owner's death. For account owners who died before 2024, the transition rule in the final regulations allows the documentation to be given by October 31, 2025.

4. Troublesome issues exist for a person who meets these rules and then recovers so that the person may not be chronically ill at a later date. Who makes that determination? Who polices the decision?

   Example: Bill has a stroke shortly before inheriting a retirement account. On the date of the account owner's death, Bill clearly meets the definition of being chronically ill because he needs substantial assistance when dressing and bathing. At that time, the condition as indefinite and likely to be long-term. However, Bill takes his physical therapy seriously and recovers so he no longer meets the definition of being chronically ill. But, there may not be a precise date when the chronically ill status stopped.

5. A chronically ill beneficiary is an EDB and the life expectancy distribution method is allowed.

6. If the chronically ill person lacks capacity to effectively control the account, then an attorney-in-fact or a conservator should be able to control the distributions through that authority status.

   Practice Tip: Be aware that some companies are insisting that the principal sign their own custom power of attorney form and are resisting reliance on other POA forms, including a statutory short form. If you know that the accounts will be held at a specific investment company, consider having the principal also sign that company's custom POA form.

7. If the retirement account is paid to a trust, see the discussion below regarding Applicable Multi Beneficiary Trusts as the beneficiary on page 44 - 46.

8. Upon the death of the chronically ill person, a new 10-year distribution period starts for any contingent beneficiaries. It implicitly appears that the regulations will require that the successor beneficiary(ies) must continue to take RMDs based on the disabled beneficiary's remaining life expectancy during this 10-year distribution period.

D. Beneficiary who is less than 10 years younger than account owner.

1. *Who Qualifies?* This category of EDB appears to be designed to work well if the intended beneficiary is:
   - Sibling
   - Life partner (but not a spouse)
   - Unrelated friend

* New:

2. The regulations use the actual date of birth for the account owner and the beneficiary to determine whether the beneficiary is not more than ten years younger. IRS. Reg. §1.401(a)(9)-4(e)(6).

3. These beneficiaries are able to continue to use the prior life expectancy method. Unlike the account owner's minor child, these persons will never lose their EDB status.

4. To use their own life expectancy, the beneficiary must roll the share into a separate inherited IRA account and begin taking RMDs by December 31 of the year after death as provided under the prior rules.

5. Please note the following life expectancies contained in IRS Table I, Single Life Expectancy:

   - Age 40: 45.7 years (2.2% of the account balance in first year)
   - Age 50: 36.2 years (2.8%)
   - Age 60: 27.1 years (3.7%)

- Age 70: 18.8 years (5.3%)
- Age 80: 11.2 years (8.9%)
- Age 90: 5.7 years (17.5%)

6. Upon the death of this beneficiary, the account will be subject to a new 10-year distribution period starting at the death of the EDB. IRS Reg. §1.401(a)(9)-5(e)(3).

   Author's Note: The proposed regulations had a provision in Prop. Reg. §1.401(a)(9)-5(e)(5) that if the EDB is older than the account owner, then the account must be liquidated before the expiration of the EDB's own life expectancy if that is shorter than 10 years from the date of the EDB's death. For account owners who have passed their RBD and had to start taking RMDs, this provision in the proposed regulations appeared to create a distribution formula where RMDs are calculated based on the remainder of the account owner's remaining life expectancy because that is a longer distribution period—see Prop. Reg. §1.401(a)(9)-5(d)(1)(ii). But the account would need to fully liquidated when the beneficiary's life expectancy would have expired (even when the beneficiary's life expectancy is not used to calculate RMDs). This provision does not appear to be in the final regulations so apparently the IRS abandoned this concept for this somewhat unlikely fact pattern.

F. Non-Spouse Individual Beneficiary who is not an EDB—the new 10-year rule.

1. Children (or other individuals) over age 21 (the new uniform age of majority) who don't fit any other EDB category will have one option—the new 10-year rule.

2. Roll each beneficiary's share of the account into a new inherited IRA account (example: Jack (deceased) IRA fbo Bob) through a custodian-to-custodian transfer. Remember that rollover to the beneficiary's own IRA is not allowed. Only a spouse can roll a retirement account to the beneficiary's own IRA. Please note the difference between rolling a deceased person's retirement account to an "inherited IRA" account (which will continue to be allowed) versus rolling the account to the non-spouse beneficiary's own IRA (which is not allowed).

3. The beneficiary's share of all retirement accounts must be liquidated within 10 years of the account owner's death. The proposed regulations confirm that the actual deadline is December 31 of the year that contains the 10th anniversary of the date of death.

* New:

WARNING: The final regulations require RMDs during this 10-year period if the account owner died after the Required Beginning Date ("RBD" or April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years). RMDs are calculated using the beneficiary's age in the first distribution year (the year after death) using Table I (the "bad" chart). Despite the need for RMDs (which will be modest for most beneficiaries), the beneficiary will have substantial opportunities to time distributions to any of these ten years (potentially allocating income onto 11 different tax returns) and to coordinate with the beneficiary's other income.

Examples:

Example #1--Near Retirement Age: Bob (age 61) inherits a retirement account from his father. He intends to retire from his high-income job in five years (at age 66). Bob takes only his minimal RMD withdrawals during the first five years while still employed. Bob takes larger withdrawals from his inherited IRA account during years six through ten and recognizes income on the amounts withdrawn in those years. This allows Bob to recognize the income after his retirement when he will likely be in a lower tax bracket.

Example #2--Pay For College: Bill (age 21) inherits a retirement account from his father. Bill is enrolled in college on the date of his father's death. Bill chooses to use his share of the inherited retirement account to pay for college (or graduate school) expenses when he has no other taxable income. If both of Bill's parents have died, then the Kiddie Tax rules do not apply. Bill can use withdrawals from his inherited IRA account in an almost tax-efficient process.

4. Upon the death of the beneficiary, the new beneficiary will continue the administration based on the remainder of the 10-year period from the original account owner's death. All inherited IRA accounts should name a new beneficiary to receive any remaining assets in the event of the beneficiary's death.

5. This author has frequently drafted trusts designed to control access to an inheritance for young (i.e., under age 40) or financially irresponsible beneficiaries. Congress has made administration of a retirement account very difficult for trusts that are designed to administer an inherited retirement account past age 31 (see pages 32 - 44) because this is the group that will be most severely affected by the SECURE Act.

G. Decedent's estate or non-qualifying trust as beneficiary.

1. *These rules appear to be unchanged.* For most clients, this is the worst category. An estate can NEVER be a designated beneficiary. It does not matter if the estate transfers the retirement account to a person (who *could* have been a designated beneficiary) or a trust (that *could* have qualified as a DBT).

Warning: If there is no named beneficiary, the retirement account is by definition an estate asset. Similarly, if the beneficiary designation names “my estate” as the beneficiary, there can never be a designated beneficiary.

Practice Tip--Check for Default Beneficiary. If the retirement account names "my estate" as the beneficiary, it appears that nothing can be done to fix this categorization. However, if the retirement account does not have a named beneficiary, then check the account's master plan (available from the plan administrator upon request). The plan may have a default beneficiary that may include a surviving spouse and/or the account owner's descendants. In this event, administer the account based on that default beneficiary status.

Practice Tip--Assignment Of Account To Beneficiary. If a retirement account is payable (i.e., not yet withdrawn from the retirement account) to an estate or trust, it may be possible for the fiduciary to assign shares of the account to the residual beneficiaries. This will allow each beneficiary to independently roll his/her share of the retirement account to an inherited IRA account and take distributions independently from the estate or trust. Please remember that this assignment does NOT change the distribution period or any of the rules regarding RMDs. Some investment companies will process an assignment almost routinely. Other investment companies will first require an attorney's opinion letter advising them that the assignment is allowed under state and federal law. Some investment companies still refuse to cooperate with this reasonable and completely legal assignment.

2. *Death Before RBD--5 Year Rule.* If the account owner dies before the Required Beginning Date ("RBD" or April 1 of the year after attaining age 73 (this age was 70 ½ and then 72 in prior years), the 5-year rule still applies and the entire account must be liquidated by December 31 of the year that contains the fifth anniversary of the account owner's death. No RMDs are required during these five years because the account owner had not yet reached the RBD for mandated lifetime distributions by the account owner. IRS Code §401(a)(9)(B)(ii).

3. *Death After RBD--Ghost Life Expectancy.* If the account owner dies after his/her RBD, the non-designated beneficiary must continue to take RMDs annually based upon the remainder of the account owner's life expectancy but is required to shift from Table III, Uniform Lifetime Table (the good RMD chart) to Table I, Single Life Expectancy Table (the bad RMD chart) which uses a substantially shorter life expectancy.

   For the year of death, use the account owner's age (on the birthday in the year of death) and the Uniform Lifetime Table III because this is the decedent-owner's own distribution.

   For subsequent years, calculate the RMDs based upon the account owner's age in the year of death and then subtract one for each subsequent year (i.e., if the account owner was or would be 85 in the year of death, then use age 86 to calculate the RMD for the first year after death). Please note that the ghost life expectancy for an account owner who was past the RBD but under age 82 is longer than ten years. So, beneficiaries using this ghost life expectancy actually have a longer distribution period than designated beneficiaries who are required to follow the 10-year rule.

   Author's Note: Many commentators (including this author) expected the IRS to issue regulations which would limit those beneficiaries to the 10-year period that applies to designated beneficiaries to prevent allowing these non-designated beneficiaries to be treated better than most designated beneficiaries. To the best of this author's awareness, this treatment is confirmed in the final regulations. So, it appears that (at least for now) some beneficiaries will benefit from this aberration in the regulations.

Author's Note Regarding Trusts: If an account owner with a "ghost" life expectancy (i.e., past the RBD but under age 82) dies leaving a retirement account to a trust and if the trust qualifies as a Designated Beneficiary Trust (DBT see pages 32 - 44), the trust is subject to the 10-year rule. If the trust fails that test, the trust can use the longer ghost life expectancy. Does this create an incentive for a clever trustee to ensure that the trust is not a DBT (i.e., by not giving the proper documentation to the account administrator)?

4. **Warning--***Rollovers To Inherited IRA Account May be Limited.* The rules that require an employer to allow rollover from an employer retirement account to an inherited IRA account only apply to designated beneficiaries. See Choate, Life & Death Planning 4.2.04. Some employers may allow rollover to an inherited IRA even if the beneficiary is not a designated beneficiary. However, other employers may not be cooperative. A private employer holding a 401(k) account payable to an estate may insist on making a lump-sum distribution of the entire account to the estate and they may insist that the distribution be made in a very short time (as little as 90 days from the date of death). That would make the entire account immediately taxable. Similarly, some companies holding IRA accounts payable to an estate will allow the estate to assign shares of the IRA to individual beneficiaries. But, again, other investment companies holding those IRA accounts will not be as cooperative. This author has occasionally had to find the cooperative investment companies and roll the IRA from one company to another to efficiently administer the account.

IV. Paying a Retirement Account to a trust.

A. **Definitions.** In IRS Reg. §1.401(a)(9)-4(f)(1), the IRS defined some terms which have been commonly used but which were not formally recognized in prior law or regulations, including:

1. *"See-Through" Trust.* If a trust is the beneficiary of a retirement account, then beneficiaries of the trust will be deemed the beneficiaries of the retirement account if the trust meets these four tests (on the surface, this simply incorporates the prior rules):

   - The trust is valid under state law.

   - Certain documents are given to the plan administrator by October 31 of the year following the year of the death.
     - It is safest and easiest to meet this rule by giving the account administrator a copy of the trust.
     - If you don't want to give a full copy of the trust, the rule can be met by giving the account administrator a full list of all current and contingent beneficiaries with "a description of the conditions on their entitlement sufficinet to establish which of those beneficiareis are treated as beneficiaries" of the trust.
     - This author prefers to do both and to get a signed receipt or confirmation email.

- The trust is irrevocable or will, by it terms, become irrevocable upon the death of the account owner.

- The beneficiaries of the trust are all identifiable (see analysis in the following pages).

2. *"Designated Beneficiary Trust" (DBT).* The regulations implicitly (but not expressly) create this as a new subcategory of see-through trusts. Please remember that only an individual (i.e., a living human being) can be a designated beneficiary. If the trust qualifies as a see-through trust **and if all of the trust beneficiaries that must be counted are individuals (see below)**, then the retirement account has a designated beneficiary and those individuals beneficiaries are treated as though the individuals are the beneficiary of the retirement account. DBT status is necessary to use the ten-year rule for designated beneficiaries and the life-expectancy withdrawal rules for EDBs.

   Author's Note Re Estate Expenses: The preamble to the proposed regulations (issued in February 2022) contained a warning that if trust assets could be used to pay expenses of the decedent's estate, that ability to allocate retirement account withdrawals to estate expenses would mean that the estate was a potential beneficiary and the trust would fail the DBT test. The preamble blessed the idea of using a savings clause (see the author's attempt at a savings clause on page 50) to prevent this problem.

   Author's Note: If an account owner with a "ghost life expectancy" that is more than 10 years (i.e., owner is past the RBD but under age 82 at death) dies leaving a retirement account to a trust, if the trust qualifies as a Designated Beneficiary Trust (DBT), the trust is subject to the 10-year rule. If the trust fails that test, the trust can use the longer ghost life expectancy. Does this create an incentive for a clever trustee to ensure that the trust is not a DBT (i.e., by not giving the proper documentation to the account administrator)?

3. *"Conduit Trust".* The terms of the trust require that all withdrawals from a retirement account must be paid directly to, or for the benefit of, the specified trust beneficiaries. IRS Reg. §1.401(a)(9)-4(f)(1)(ii)(A).

   Sample Language: Any and all amounts withdrawn from a Retirement Accounts shall, upon receipt by the trustee, be promptly paid directly to, or for the sole benefit of, [trust conduit beneficiary].

   Author's Note Re Trust Expenses: Choate's interpretation is that a conduit trust may use withdrawals from a retirement account to pay direct trust expenses (i.e., tax preparation, attorney fees, trustee fees, costs of creating or administering an inherited IRA, etc.) because these are deemed to be expenses for the benefit of the trust beneficiary. What is clearly prohibited is paying decedent's debts or expenses relating to administration of the decedent's estate (etc.).

*New

By contrast, a trust that merely gives the beneficiary the right to demand that all retirement account withdrawals be paid out does **not** qualify as a conduit trust (the IRS specifically rejected that position in the preamble to the final regulations).

Author's Note: Similarly, a trust that requires that all "income" be paid to the beneficiary is not a conduit trust. A conduit trust must specifically require that every withdrawal from a qualified retirement account must be redistributed to or for the benefit of an individual beneficiary and may not be retained by the trust.

Author's Note Re Timing of Distributions: The regulations are not specific regarding the timing of the re-distribution of retirement account withdrawals to the beneficiaries. However, best practices would dictate that these amounts be paid directly to or for the sole benefit of the beneficiary promptly after receipt of the retirement account withdrawal by the trustee. You might be tempted to argue that a distribution to the beneficiary that is made prior to the receipt of the retirement account withdrawal could retroactively be considered to be from the retirement account withdrawal if the total distributions to the beneficiary in the year are at least as much as the retirement account withdrawal. This author recommends that the trustee of a conduit trust be able to trace all retirement account withdrawals to distributions made to the beneficiary after receipt of the withdrawal. In addition, it is safest to make the distribution promptly to allow better tracing between the retirement account withdrawal and the distribution to the beneficiary. In all events, the distribution should happen during the same year (calendar or fiscal year if the trust is using a fiscal year for its income tax return).

4. *"Accumulation" Trust.* Any see-through trust that is not a conduit trust (i.e., if there is any trust authority to accumulate and not immediately distribute amounts withdrawn from a retirement account).

B. Which beneficiaries can be ignored in testing a trust to determine if it is a DBT?
A trust is tested to see if it has the right beneficiaries to qualify as a see-through trust and to determine which beneficiaries must be counted to calculate RMDs. There are two key dates for these tests: the date of death and the Beneficiary Finalization Date ("BFD" which is September 30 of the year after the death. If the trust has beneficiaries who will either cause the trust to lose see-through status or will result in a shorter distribution period, it may be possible to eliminate the unwanted beneficiaries before the BFD. IRS Reg. §1.401(a)(9)-4(c)(2) lists which beneficiaries can be eliminated.

1. *Pre-Deceased.* Any beneficiary who died prior to the account owner. IRS Reg. §1.401(a)(9)-4(c)(2)(I).

2. *Deemed Pre-Deceased.* Any beneficiary who is deemed to have died prior to the account owner pursuant to:

• State law survivorship provisions (i.e., Minnesota's 120 hour survivorship rule) see IRS Reg. §1.401(a)(9)-4(c)(2)(ii);

Drafting Note: All trusts should include either its own survivorship clause or a cross-reference to the applicable state law survivorship provision.

• A qualified disclaimer that meets the requirements of IRS Code §2815 (see IRS Reg. §1.401(a)(9)-4(c)(2)(ii));

- The beneficiary must disclaim "the entire interest to which the beneficiary is entitled". The requirement that the beneficiary disclaim the beneficiary's "entire" interest makes sense in this context because if only part of the retirement account interest is disclaimed, then the beneficiary (that you are attempting to eliminate) still owns the right to part of the retirement account and remains a beneficiary of the retirement account paid to the trust.

- The use of a disclaimer is also clarified to confirm that the disclaimer must fully meet the rules for a qualified disclaimer and must be completed within 9 months of the date of death (this is almost always before the BFD).

Warning: A beneficiary who is alive on the date of death but who dies prior to the Beneficiary Finalization Date (BFD, September 30 of the year after death) must still be considered in the analysis unless that beneficiary's interest is terminated by one of the other tactics to allow the trust to disregard that beneficiary (i.e., qualified disclaimer, payment of full share, etc.). IRS Reg. §1.401(a)(9)-4(c)(3)(vi) Example 6.

3. *Not Yet Born.* Any beneficiary who is not yet born at the time the trust is being tested. The authority for ignoring this group is based on the implication contained in the regulations when an IRS example makes an account owner's descendants the beneficiaries of a trust and the IRS ignores descendants who are not yet born. See examples IRS Reg. §1.401(a)(9)-4(f)(6)(iv) & (v), Examples 4 & 5.

4. *Paid Out Before BFD.* The beneficiary's entire interest in the retirement account is paid to such beneficiary prior to the Beneficiary Finalization Date (BFD or September 30 of the year after the year of death). This provision can be used if a charity is a first tier beneficiary. If the charity receives its full share of a retirement account by the BFD, the charity is ignored. See IRS Reg. §1.401(a)(9)-4(c)(2)(iii) and -4(c)(3)(iv) Example 4.

* New:

5. *Beneficiary Removed.* A beneficiary who is removed by a modification of the trust terms (i.e., by court reformation or by decanting to a different trust) if the beneficiary is removed by the Beneficiary Finalization Date (BFD, September 30 of the year after the account owner's death). IRS Reg. §1.401(a)(9)-4(f)(5)(iii).

Author's Note: Please note that prior law (pre-SECURE Act regulations) did not allow post-death reformation of a trust to meet the see-through trust rules (now call DBT rules). The prior justification for that law was that if the trust was changed after the date of death, it really wasn't irrevocable on the date of death. The IRS has now relaxed that concept and given us the ability to fix some poorly

drafted trusts. This is a substantial improvement over the prior law. Over time we will get a better understanding of which trusts can be fixed and which may be beyond repair and what process must be used to reform a trust.

Author's Note Re NJSA. This author believes that the Minnesota law (see Minn. Stat. §501C.0111 or ND.C.C. §59-09-11) allowing for a Non-Judicial Settlement Agreement *should* be sufficient to allow a trust to be reformed without needing a Court to approve the reform if the provisions of that law is followed carefully (i.e., including having all of the right people signing the agreement). But, to the best of my understanding that position has not yet been tested.

If the trust reformation or the decanting to a new trust happens after the BFD, then the trust must be re-tested to ensure that it still meets the rules (and potentially to change the RMD calculations based on the new beneficiaries).

6. *Disabled or Chronically Ill.* Qualified beneficiaries under Applicable Multi-Beneficiary trusts (see pages 44 - 46 below).

7. *Potential Appointees under a Power Of Appointment.* If a beneficiary has the power to appoint retirement account assets to another person or entity, that new potential beneficiary may need to be considered when testing a trust to see if it meets the Designated Beneficiary Trust (DBT) rules. IRS Reg. §1.401(a)(9)-4(f)(5)(ii).

   - Additional potential beneficiaries (named in a power of appointment) do not need to be included in the analysis until the beneficiary actually exercises the power of appointment. Upon exercise of the power of appointment, all persons (or entities) who are appointed, must be included in testing the trust.

   - If the beneficiary irrevocably limits the power of appointment by the BFD (Sept. 30 of the year after the account owner's death), to only allow individuals to be the recipients of the power of appointment, that limitation is given retroactive effect to the date of death.

   - If the beneficiary exercises the power of appointment after the BFD, then the trust must be re-tested to see if the trust still qualifies as a see-through trust or DBT (i.e., if a charity is appointed, then the trust will fail the test).

   Author's Note: This author does not routinely include a power of appointment in trust terms. For those attorneys who do include a power of appointment in trust terms, extreme caution should be used to avoid the risk that the trust could fail the see-through trust or DBT test if the beneficiary inadvertently signs a poorly-drafted power of appointment that does not address this issue.

C. Which beneficiaries must be counted in analyzing a trust to qualify as a DBT? In the trust analysis, the most complex test relates to identifying the proper beneficiaries who must be considered in the analysis. To qualify as a "Designated Beneficiary Trust", the trust must only have individuals as beneficiaries who must be considered or counted

(see pages 34 - 36 for a list of beneficiaries who can be ignored in this analysis). The regulations actually make this analysis slightly simpler (when compared to the Pre-SECURE Act law). They do this by creating a two-tier test to determine which beneficiaries count. See IRS Reg. §1.401(a)(9)-4(f). Please note that the designations of these tiers is based on Natalie Choate's creation of these terms in an attempt to understand the proposed regulations which do not explicitly name these tier designations.

1. *First Tier Beneficiaries.* This includes, "Any beneficiary who could receive amounts in the trust representing the employee's interest in the plan that are neither contingent upon, nor delayed until, after the death of another trust beneficiary…" IRS Reg. §1.401(a)(9)-4(f)(3)(i)(A). **In other words, all current beneficiaries (anyone who could receive a distribution from the trust) are first tier beneficiaries and must be included in the analysis.**

   Warning: This group also includes persons who could become a current beneficiary upon an event other than the death of a first tier beneficiary (i.e., if the trust expands the group of current beneficiaries upon another event like the remarriage of a surviving spouse or upon a young beneficiary attaining a certain age).

2. *Second Tier Beneficiaries.* These are the beneficiaries who will receive the retirement account withdrawals that are not distributed to the first tier beneficiaries (in an accumulation trust).

   a. Conduit trusts will always pass this test and will not need to include any second tier beneficiaries in the analysis because all retirement account withdrawals must be promptly distributed to the first tier beneficiaries so there are no retained retirement account withdrawals to taint the trust. IRS Reg. §1.401(a)(9)-4(f)(6)(i) Example 1(B). [See also the definitions in IRS Reg. §1.401(a)(9)-4(f)(3)(i)(B) & (1)(ii)(A) to fully understand the example.]

   b. Accumulation trusts will need to analyze who will receive retained retirement account assets upon the death of a first tier beneficiary(ies). Assume that all contingent beneficiaries of an accumultion trust must be counted unless they meet one of the following examples:

      1) *Death of Contingent Beneficiary.* If the contingent beneficiary will only receive retained retirement account assets upon the death of another secondary (i.e., a second tier) beneficiary.

         Example: Jack dies leaving his retirement account to an accumulation trust that has only one current beneficiary--Betty, his surviving spouse. Until Betty's death, no other person is a beneficiary of the trust entitled to current distributions. Upon Betty's death, Jack's children (or some other individuals) are the contingent beneficiaries who also survive Jack. A charity is listed as the residual beneficiary only if neither Betty nor any of Jack's children are surviving. Betty is the only first tier beneficiary. As long as at least one child

survives the account owner, the children are the only contingent (second tier) beneficiaries and the charity will only receive accumulated retirement account assets upon the death of all of the contingent beneficiaries. So, the charity can be ignored in the analysis. Because only individuals are counted beneficiaries, the trust has only designated beneficiaries. IRS Reg. §1.401(a)(9)-4(f)(6)(ii) Example 2.

Warning: *Author's Note Regarding Outright Distribution to Second Tier Beneficiaries.* Choate stresses the point (see page 66 - 69 of her September 2025 Update) that **this rule only works if the contingent beneficiaries receive their share of the remaining assets outright** (and not in a continued trust for their benefit). That analysis is apparently based on Choate's strict interpretation of the new regulations and examples. This author questions whether that strict interpretation is really intended by the IRS. What reasonable purpose is served by not applying this concept to young beneficiaries who are listed as contingent beneficiaries and if their share continues to be held in trust? Hopefully, this issue will be clarified in future regulations or in PLRs. But for now, we need to trust Choate's interpretation.

Author's Note: In Choate's preliminary analysis of the proposed regulations, these secondary contingent beneficiaries were previously referred to as "third tier" beneficiaries (who could be ignored). My prior outlines used that term. Choate has apparently changed how she describes these remote beneficiaries. I have followed her lead.

Author's Note: Please remember that because this is an accumulation trust, Betty is not the only beneficiary for determining RMDs. The children must be considered for that purpose and the trust is not able to take advantage of the special rules when the surviving spouse is the only trust beneficiary who must be considered in calculating RMDs. Also please note that you don't wait to see if there are any retained withdrawals from retirement accounts. If it is possible for the trustee to retain withdrawals, then for the purpose of this test, you must assume that the trust will have retained retirement account withdrawals and secondary beneficiaries must be included in this analysis.

Warning: Be very careful about including conditions that may terminate a beneficiary's right to distributions of retirement account withdrawals other than the death of the beneficiary. Termination of a beneficiary's rights to retirement account assets for reasons other than the beneficiary's death will almost certainly create another group that is now considered a 2nd tier beneficiary who must be included in testing the trust.

> *Example:* Jack leaves his retirement account to a trust. The primary beneficiary is Betty, Jack's surviving spouse. However, Betty's rights to trust distributions (or at least retirement account distributions) terminates if Betty remarries (or meets another condition like entrance into a long-term care facility). That condition makes the contingent beneficiaries first

tier beneficiaries because their right to trust distributions is not dependant upon the death of the first tier beneficiary. A trust provision with this type of conditional termination will prevent the trust from using the special distribution rules that only apply if the surviving spouse is the only current trust beneficiary and may cause many other unintended consequences. Such terms need careful analysis to ensure that the trust properly meets the new law and regulations.

2) *Age 31 rule.* Contingent beneficiaries of an accumulation trust can be ignored if the contingent beneficiary only inherits retirement account assets upon the death of a first tier beneficiary (a person under age 31) and the trust requires distribution of all retirement account withdrawals to the first tier beneficiaries by age 31 (or 10 years from the death of the last minor beneficiary). IRS Reg. §1.401(a)(9)-4(f)(3)(ii)(B).

What you need to remember about this age 31 rule:

(a) It is only needed if you have to protect the trust from considering contingent beneficiaries when testing the trust. If the trust has contingent beneficiaries who do not cause problems (i.e., young individuals who won't affect the RMD calculations), you may not need to include this concept.

(b) This regulation applies to all young beneficiaries (i.e., for using the ten-year rule) and is not limited to the account owner's own children (for EDB status).

(c) If the young beneficiary is the account owner's minor child, it allows EDB status (and stretch withdrawals) to be used even if the trust is not a conduit trust if the trust requires full distribution to the young beneficiaries upon attaining age 31. Until age 31, the trust can accumulate retirement account withdrawals. Choate summarizes, "In other words, it doesn't have to be a conduit trust for ages zero through 30…it only has to effectively "become" a conduit trust at age 31."

(d) The regulation is written assuming that there is only one beneficiary of the trust. If there are multiple trust beneficiaries and you need to rely on this provision to protect the trust, it is not clear which beneficiary triggers the age 31 distribution requirement. Please note that other provisions in the final regulations clearly state that the terms don't apply until the youngest beneficiary attains age 31--this paragraph is silent on that issue.

(e) **Warning:** By the specific wording of the regulation, this rule only applies to young primary (first tier) beneficiaries. If the young beneficiary is a 2nd tier (contingent) beneficiary, than other inclusion or exclusion rules will control the analysis. See IRS Reg. §1.401(a)(9)-4(f)(3)(ii)(B).

Author's Note: Limiting this rule only to situations were the young beneficiaries are current beneficiaries (after the account owner's death) makes no sense to this author. If the logic behind this issue is valid, it should apply whether the young beneficiaries are current or contingent beneficiaries. But, because we can only rely on this rule if the young beneficiaries are first-tier beneficiaries, if the trust makes the surviving spouse the first-tier beneficiary and the children contingent beneficiaries, then this rule does not protect the trust. This is another possible reason to draft trusts with these fact patterns as a conduit trust.

Author's Note: This author recommends that accumulation trusts with young beneficiaries all require that each beneficiary be paid his/her share of the retirement accounts during the year when they attain age 31. Sample language could include something like:

> *"Savings Clause. Not withstanding any trust provision to the contrary, each beneficiary's share of any retirement accounts paid to this trust (including the beneficiary's share of retained withdrawals from retirement accounts) must be paid to the beneficiary prior to the end of the year when the beneficiary attains age 31 or to the beneficiary's estate by December 31 of the year after the beneficiary's death if sooner.*

Author's Note Re Tracing Assets: It is not clear how the IRS intends to trace retirement account distributions to ensure that they have actually been distributed to the beneficiaries by age 31. Specifically, once a retirement account withdrawal has been comingled with other assets, how will the IRS know which assets were distributed. If/when this author has a trust that is being administered under these provisions, we will recommend that all retirement account withdrawals be paid to a separate bank (or investment) account that only receives distributions from inherited retirement accounts. Then, it will be easier to trace withdrawals from the retirement account and distributions to the beneficiaries. This will be helpful annually to ensure that withdrawals to conduit trusts were properly paid to the beneficiaries and to trace any retained withdrawals to pay those to the beneficiaries before they attain age 31.

* New

3) *Trust with Minor Child of Account Owner.* There is a special EDB rule for a trust with at least one minor child of the account owner as an EDB. Generally, if the trust includes any beneficiary who is not an EDB, the trust will be treated as though it had no EDBs. IRS Reg. §1.401(a)(9)-4(e)(2)(i) However, under the final regulations, if the trust has at least one beneficiary who is the minor child of the account owner, the trust will be treated as though it has an EDB as long as at least one of beneficiaries is decedent's minor child. So, EDB status continues until decedent's youngest such minor child attains age 21 or all of the minor children have died. IRS Reg. §1.401(a)(9)-4(e)(2)(ii). See my example on pages 42 - 44.

*New

Author's Note: Under the 2022 proposed regulations, EDB status was lost after the oldest minor child EDB attained age 21. Under those circumstances, this author recommended drafting separate trusts to hold each minor child's share of the retirement account(s). Under these new final regulations, there is less need for separate trusts for each beneficiary.

* New

4) *Applicable Multi-Beneficiary Trust.* The final regulations contain a similar provision that provides that if the trust qualifies as an AMBT (with at least one disabled or chronically ill beneficiary), the disabled or chronically ill trust beneficiaries will be treated as an EDB "even if one or more of the other trust beneficiaries are not EDBs". IRS Reg. §1.401(a)(9)-4(e)(2)(iii). If this paragraph is read alone, this would appear to allow EDB status if there is any trust beneficiary who is disabled or chronically ill. However, this paragraph also contains a cross-reference to IRS Reg. §1.401(a)(9)-4(g) which requires that all other beneficiaries be designated beneficiaries and that no beneficiary other than a disabled or chronically ill beneficiary has any right to the retirement plan until the death of all of the disabled or chronically ill beneficiaries. IRS Reg. §1.401(a)(9)-4(g)(1)(iii). It is this author's opinion that the paragraph in IRS Reg. §1.401(a)(9)-4(e)(2)(iii) is included to protect a valid AMBT from including contingent beneficiaries in the analysis of testing the trust to see if it qualifies as a see-through designated beneficiary trust (see outline pages 44 - 46).

* New

D. New Separate Share Rule For Trusts. The final regulations in IRS Reg. §1.401(a)(9)-8(a)(1)(iii) contain a provision which will be very helpful in testing a trust. Each subtrust is tested separately and able to use its own designated beneficiaries to determine RMDs, etc. if:

1. The primary funding trust requires separation into subtrusts and the trust determines the amount allocated to each subtrust (there can be no discretion given to the trustee on this point).

2. The subtrusts are created immediately upon the account owner's death (the final regulations do allow for a vague amount of time for administrative delays in creating the subtrusts).

3. The primary funding trust is terminated after assets are allocated to the subtrusts.

Author's Note: To use this nice new concept, it is important that the primary funding trust (the trust that is the beneficiary of the retirement account and which split the account to separate sub-trusts) must be promptly terminated. So, a trust that creates a separate subtrust for some beneficiaries but continues to hold assets for other beneficiaries likely won't qualify unless all assets are distributed to subtrusts. All trusts relying on this concept should ensure that all trust assets are allocated to a subtrust and that the primary funding trust is terminated promptly.

E. Whose age is used to calculate RMDs?

1. If there is more than one designated beneficiary, the final regulations state that the oldest designated beneficiary's age is used to determine the divisor for RMDs. IRS Reg. §1.401(a)(9)-5(f)(1). This would apparently apply to calculate RMDs if:

   • The account owner died after the RBD and RMDs are needed during the 10-year distribution period.

   • The account had at least one EDB and RMDs are required using the life expectancy ("stretch") distribution rules.

   Author's Note: Because the SECURE Act and the regulations eliminate the life expectancy ("stretch") distribution rules for all beneficiaries other than EDBs, it is apparently no longer necessary to include as many potential contingent beneficiaries (to determine the oldest beneficiary who must be counted) in determining the denominator used to calculate RMDs for these trusts. So, the final regulations actually make this part of the analysis slightly easier than existed in the law prior to the SECURE Act. See the two tier test on pages 36 - 41. In this author's opinion, because the SECURE Act mandates faster withdrawals from retirement accounts and because all withdrawals are fully taxed, there is no reasonable public policy justification for limiting who can receive accumulated (i.e., after-tax) withdrawals. But, the IRS does not solicit my opinions on this or any other topic.

F. How is the 10-year Outer Limit Calculated?

1. Trusts subject to the 10-year rule must liquidate all qualified retirement accounts by December 31 of the tenth year after the start of a 10-year distribution period. For trusts without an EDB that are not allowed to use the life-time ("stretch") distribution rules, this will be 10 years after the account owner's death.

*new

2. If the trust is using the life expectancy method of calculating RMDs because at least one of the beneficiaries is the account owner's minor child (EDB), then the account must be liquidated by the 10th anniversary of the earliest of the youngest EDB attaining age 21 or the death of all of the minor EBDs. IRS Reg. §1.401(a)(9)-5(f)(2)(ii).

   Example: Jack dies in 2026 at age 50 (before his RBD) with $1,000,000 in his 401(k) account. Jack leaves his entire account to a trust for the benefit of his four children, ages 25 (from his first marriage), 16, 13 and 8 (from his second marriage). The 25 year old child is not an EDB. The other three children are EDBs.

   • Because at least one of Jack's children is an EDB, the trust is administered as though it has an EDB.

- The trust is allowed to use the life expectancy distribution method. RMDs must begin by December 31 of 2027 (the year after death).

- The first RMD is calculated based on the age of the oldest designated beneficiary who must be counted (the age 25 child who is age 26 in the first distribution year and has a life expectancy of 59.2 years). The first RMD will be calculated as the 12-31-26 balance divided by 59.2 or approximately $16,900. The 2027 RMD is based on a denominator of 58.2 years (reducing the life expectancy by one each year).

- The Outer Limit Year is based on the youngest EDB--here the 8 year old child. IRS Reg. §1.401(a)(9)-5(f)(2)(ii)(B). That EDB turns 21 in 2039. The retirement account must be completely liquidated into the trust no later than December 31 of 2049 when that youngest beneficiary attains age 31.

Author's Note: If the trustee only withdraws the RMDs, then the 2049 withdrawal will be very large. So, a trustee in these circumstances will likely want to spread retirement account withdrawals somewhat evenly over the 23 year term.

- In the statistically unlikely event that ALL minor EDBs die sooner, the trust must be liquidated by the end of the calendar year which includes the 10th anniversary of the last minor EDB to die.

- If the trust is drafted as a conduit trust, then all retirement account withdrawals must be distributed to or for the benefit of the beneficiaries.

- If the trust is drafted as an accumulation trust:

    - Retirement account withdrawals that are distributed to beneficiaries get the benefit of the DNI (distribution) deduction and the beneficiary is taxed on the amount distributed (see discussion of this topic on pages 51 - 55).

    - Retained withdrawals are taxed at the trust's highly compressed tax brackets (i.e., 37% federal tax plus state tax on retained income exceeding approximately $16,000--almost half of these retained withdrawals are paid in income tax to the government).

    - **Warning:** Carefully consider who will be the contingent beneficiary if all of the children die. If the trust has an older contingent beneficiary, that person's age is used to calculate RMDs. If the contingent beneficiaries (upon the death of all of the account owner's children) is of a similar age to the children (i.e., nieces and nephews), then this only slightly affects the distribution period based on the age of the oldest contingent beneficiary who must be considered. But, if the trust lists older persons (i.e., heirs-at-law), then the oldest such beneficiary's age is used to calculate RMDs for the children. So, remember to chose a young "wipe-out" beneficiary.

- If a charity is the primary contingent beneficiary, ensure that the trust has provisions that require that all such retained withdrawals must be distributed to the beneficiaries prior to their attaining age 31 to meet the terms of IRS Reg. §1.401(a)(9)-4(f)(3)(ii)(B). See discussion on pages 37 - 40. Or, switch to a conduit trust which doesn't need to worry about contingent beneficiaries when testing the trust.

- The trust may continue pursuant to the trust terms and administer assets other than the retirement account(s) and the net after-tax amount of the retirement accounts that were liquidated.

Author's Note: If your client wants to spread trust distributions over longer periods of time (beyond age 31) and if the trust holds both retirement accounts and non-qualified investments, then draft and administer the trust to distribute all of the retirement accounts during the early years (prior to all beneficiaries attaining age 31) and save distributions from the other assets until after the retirement accounts are exhausted. This may also have the advantage of distributing the taxable retirement accounts while the children are in lower tax brackets and saving the non-taxable distributions of other trust principal until later when the child's tax bracket may (likely will) be higher. If you are guiding the trustee administering a trust with these terms, you should also discuss investment strategies to limit the amount of taxable income (i.e., interest, dividends, rents, etc.) that is accumulated in the trust from the non-qualified investments. See discussions below regarding trust income taxes and the DNI deduction on pages 51 - 55.

G. RMD Penalties under §4974. If the trustee fails to take the full RMD and incurs a penalty, the penalty is incurred by the trust and not the individual beneficiaries of the trust. IRS Reg. §1.401(a)(9)-8(a)(1)(iii).

H. **Applicable Multi-Beneficiary Trusts ("AMBT"** - Regarding Disabled or Chronically Ill Beneficiaries). The SECURE Act contains two special rules that only help beneficiaries who are disabled or chronically ill. A trust for the benefit of these beneficiaries will meet the see-through trust rules for an EDB if the trust fits one of two categories:

1. If the multi-beneficiary trust requires that the share for a disabled or chronically ill beneficiary be "immediately" divided into separate shares, then the share for these two categories of EDBs can use the life expectancy distribution method even if the other beneficiaries cannot. See §401(a)(9)(H)(iv) & (v).

   Author's Note: The final regulations expanded this new separate share concept to other trusts (not only those for AMBTs for disabled or chronically ill beneficiaries) in IRS Reg. §1.401(a)(9)-8(a)(1)(iii). This new separate share rule specifically overrules the prior rules that prevented using the separate share rule when calculating RMDs for all trust beneficiaries. See discussion on page 41.

2. If, during the entire lifetime of the disabled or chronically ill beneficiaries, such beneficiaries are the only permissible beneficiaries of their share(s) of the trust, then other potential beneficiaries (including contingent beneficiaries) can be ignored for the purpose of calculating RMDs and using the lifetime distribution formula. This overrules prior law and allows a trust for these EDBs to rely on the beneficiary's EDB status and use the lifetime stretch provisions for the EDB even if other individuals (who are not EDBs) are the contingent beneficiary and would otherwise disqualify the trust from using the lifetime distribution rules. IRS Reg. §1.401(a)(9)-4(g)(1).

   a. RMDs will be calculated based on the age of the oldest of these EDBs.

   b. SECURE 2.0 also allows a qualified charity to be listed as a contingent beneficiary of these AMBTs (ignoring the charity as a disqualifying contingent beneficiary and treating the charity as though it is a designated beneficiary in this AMBT context only). IRS Code §401(a)(9)(H)(v).

      Author's Note: The definition of a qualified charity is the same as the rules for a Qualified Charitable Distribution (QCD) from an IRA (i.e., all "50% charities" but excluding donor advised funds). Drafters should confirm that the named charities meet this definition. Please also remember that if a trust other than an AMBT has a charity as a second-tier (contingent) beneficiary of an accumulation trust, the trust is not allowed to use EBD status.

   c. If there is more than one disabled or chronically ill beneficiary, the trust may terminate the interest of one of these special beneficiaries as long as no beneficiary other than a disabled or chronically ill beneficiary receives any distributions from the retirement account until all such disabled or chronically ill beneficiaries have died. IRS Reg. §1.401(a)(9)-4(g)(2).

Author's Note—Don't Exclude Disabled Beneficiaries from Retirement Accounts. This author has the opportunity to consult with many estate planning attorneys regarding estate planning with retirement accounts. Many attorneys routinely avoid allocating retirement accounts to the disabled beneficiaries because of concerns relating to the complexity of this issue. Instead they allocate all retirement accounts to the non-disabled beneficiaries (who are likely in a higher tax bracket) and only allocate other (non-retirement) assets to the trusts for their disabled beneficiaries. Although I understand this risk-avoidance position, this is not a tax-efficient strategy. These final regulations make it much easier to allocate retirement accounts to disability trusts.

Author's Note--Create a Separate Trust for AMBT: This author strongly recommends creating a separate, stand-alone trust for these disabled and chronically ill beneficiaries. It is easier to ensure that the trust meets this test if the trust terms are not embedded into another trust. The trust can probably be drafted as either a supplemental needs trust or a "pure discretion" trust. I further strongly recommend that the separate trust be named as the direct beneficiary of the intended portion of the retirement account. However, if the retirement account is paid to a main funding trust

which clearly requires immediate separation of these applicable shares to the stand-alone trust for the disabled or chronically ill beneficiary, this should meet the test for an AMBT.

Author's Note—Use an Accumulation Trust: The general consensus among disability trust experts is that these trusts should be drafted as an accumulation trust because a conduit trust that mandated prompt payment to or for the benefit of the disabled beneficiary could be interpreted to make the disabled beneficiary ineligible for government benefits. Don't forget that if the trust qualifies as a Qualified Disability Trust (see instructions for 1041 returns) that the trust gets these nice tax benefits:

- Any amounts distributed for the sole benefit of the disabled beneficiary should qualify for the distribution deduction (see explanation of DNI on pages 51 - 55) and the income flows through to the disabled beneficiary who is likely in a low or zero tax bracket.

- The trust is entitled to a $5,100 exemption and this amount of retained income incurs zero federal or state income tax. Over the lifetime of an accumulation trust, this will allow the trustee to retain $5,100 per year of retained withdrawals from a retirement account as a tax-free accumulation.

Warning: Minnesota SupNT Shut Down Clause: Many supplemental trusts drafted by Minnesota attorneys provide that the trust will terminate (and the assets will be paid to contingent beneficiaries) if the government determines that the existence of the trust makes the disabled beneficiary ineligible for government benefits or if the disabled beneficiary is over age 64 and becomes a patient or resident in a state institution or nursing facility for six months or more and there is no reasonable expectation that the disabled person will ever be discharged from that facility and that the existence of the trust makes the disabled beneficiary ineligible for government benefits. These provisions are an attempt to respond to Minn. Stat. 501C.1205, Subd. 2 (e). Normally such trusts pay any remaining assets to other beneficiaries at that time. It appears that such terms would likely violate the EDB test because retirement account assets could be paid to a contingent beneficiary prior to the death of the disabled or chronically ill beneficiaries. A possible solution that this author strongly endorses is to modify this trust provision to provide that the paragraphs that allow the trust to be terminated prior to the disabled beneficiary's death do <u>not</u> apply to retirement accounts administered by the trust. Under these circumstances, the supplemental needs trust could distribute all other assets to contingent beneficiaries as though the disabled person had died and continue to use the inherited retirement account assets to pay for the disabled person's care until those retirement accounts are exhausted.

I. SUMMARY OF RULES REGARDING PAYMENT OF RETIREMENT ACCOUNTS TO A TRUST:

How to follow these rules and attempt to ensure that a trust meets the see-through trust and DBT rules:

1. *Don't Pay To A Trust Unless Necessary.* When appropriate, create beneficiary designations that pay retirement accounts to the beneficiaries directly rather than through the trust. But, such direct beneficiary designations may not be in the beneficiary's best interests. Remember that protecting the beneficiary may be more important than making the drafting process easier. Also, this author recommends that you include retirement account provisions that meet these rules in ALL trusts just in case a retirement account is paid to the trust even if you didn't intend for this to happen.

2. *Conduit Is Frequently Better.* Use conduit trust terms (not accumulation trust terms) when those terms will meet the client's goals. Calculate likely payout scenarios (like used in the examples in this outline) showing the likely size of retirement accounts at various ages and the amounts that will likely be paid to the trust and to the beneficiaries each year. Many client benefit from seeing actual anticipated payout scenarios (even if they are estimates) during the planning process. The regulations create many scenarios where accumulation trusts work better than they did prior to the SECURE Act. However, there a still many situations (i.e., better RMD rules when the spouse is the sole current beneficiary and trusts with a charity as a contingent beneficiary) where it is much better to use a conduit trust.

3. *Charities as Contingent Beneficiaries:* It is crucial to ensure that only individuals must be counted in the testing the trust. If you draft an accumulation trust, then you must carefully consider whether a charity must be included in testing the trust. If a charity is listed as a contingent beneficiary, you must ensure that the charity cannot be considered a second tier beneficiary. This is not a problem for a conduit trust because such trusts do not have to consider second tier beneficiaries. If the trust is an accumulation trust, ensure that only individuals are the second tier beneficiaries and the charity cannot receive any retained retirement account distributions from a first or second tier individual beneficiary's share of the trust unless all first tier and second tier beneficiaries have died. If the charity is the contingent beneficiary of an accumulation trust and can receive undistributed retirement account withdrawals, the trust will fail the "DBT" trust test.

   For accumulation trusts, to be extra cautious about this potential gift to charities issue, consider adding a "last person standing" rule that requires immediate distribution of all remaining retirement accounts (and prior retained withdrawals) if at any time there is only one remaining individual who is a first or second tier beneficiary. This *should* solve any potential problems. But, it also completely eliminates the goal of having a charity inherit any remaining retirement account assets if the intended individual beneficiaries all die. This author is hoping for more clarity on some of these nuances in future years (either through revised regulations or PLRs).

4. *Young Beneficiaries.* Remember that there are three different rules that apply to young beneficiaries:

   a) IRS Reg. §1.401(a)(9)-4(e)(2)(ii) says that if there are multiple designated beneficiaries and at least one of the designated beneficiaries is the account owner's minor child (EDB), then the trust gets to use EDB distribution rules to calculate RMDs (i.e., life expectancy rules). This protects a trust's ability to use EBD status (i.e., lifetime distributions) as long as one of the beneficiaries is the account owner's minor child.

   b) IRS Reg. §1.401(a)(9)-4(f)(3)(ii)(B) says an accumulation trust can ignore contingent beneficiaries if the trust withdraws and then distributes all retained retirement account withdrawals by the time the young primary beneficiaries reach age 31. This rule protects a trust that has a contingent beneficiary that is less than optimal (i.e., an older person whose age would shorten the life expectancy or a charity that would cause the trust to fail the DBT rules).

   c) IRS Reg. §1.401(a)(9)-5(f)(2)(ii)(B) says that if there are multiple designated beneficiaries and at least one of the designated beneficiaries is the account owner's minor child (EDB), then the 10 year "outer limit" ends (and the retirement account must be paid to the trust) by December 31 of year that is the 10th anniversary of the year when there are no more EDBs (all have died or turned 21). This delays the start of the 10-year rule and allows the trust to delay final liquidation of the retirement accounts until the youngest beneficiary is age 31.

5. *Step Distributions.* If the trust is making step distributions (i.e., a certain percentage of the trust assets at specific ages or time intervals), carefully consider how inherited retirement accounts should fit into that distribution formula.

   • If an accumulation trust uses a step distribution formula that extends beyond age 31, determine if you need to **require** that retained retirement account withdrawals be distributed to the beneficiary by age 31.

   • Can the trust administrator use retirement account withdrawals to fund distributions prior to age 31 to help ensure that the retirement accounts are liquidated and paid out to the beneficiaries prior to that age. This will allow the trustee to save other assets for later distributions. This will likely be a more tax-efficient process because many (most?) beneficiaries are in higher tax brackets as they get older and more established in their careers.

   • Consider how those account withdrawals will be handled and the tax consequences to the trust and the beneficiary. If the retirement accounts are large, carefully consider whether to use conduit or accumulation trust language (conduit terms are less likely to cause the trust to fail the DBT test but accumulation terms may be more flexible).

6. *Draft Separate Trusts.* If there are multiple trust beneficiaries who are in different categories (i.e., some are EBDs and others are not) or have very different

circumstances, consider creating separate trusts and list each separate trust as the direct beneficiary of a portion of the retirement account. If you don't want to create separate trusts, then creating separate subtrusts may work if the retirement account beneficiary designation specifically referrences the subtrust. The new provisions in the final regulations may decrease circumstances when separate trusts are needed. However, depending on your client's goals, there may be times when it will be easier to administer separate trusts than to attempt to incorporate beneficiaries with different needs into one trust.

7. *Creative Trust Termination Terms.* Carefully consider creative terms to terminate a beneficiary's rights to retirement account assets paid through a trust. Specifically, it is safest to only terminate rights to retirement account assets upon the death of the beneficiary. For example, in a second-marriage situation, some clients want to change a surviving spouse's rights to trust distributions if the surviving spouse remarries. Other clients want to decrease or terminate a beneficiary's rights to distributions for bad decisions (i.e., excessive gambling, drug addiction, etc.). Such terms will likely dramatically affect how a retirement account is adminstered by the trust and may disqualify the trust as a see-through trust or DBT if extra beneficiaries need to be considered because of these trust terms that could terminate a beneficiary's rights to distributions from the trust.

   If your client wants creative terms to limit or terminate distributions to a beneficiary, consider drafting a separate trust to handle the retirement accounts that doesn't include those creative termination provisions. Ensure that the terms of the trust that will administer retirement accounts follow the SECURE Act and regulations. Allow your client to be creative with the terms of the other trust that will handle all assets other than retirement accounts.

8. *Allow Withdrawals In Excess of RMD.* Most trusts should include a provision which allows the trustee to withdraw amounts in excess of the RMDs. This is especially important for trusts where beneficiaries will lose EDB status (i.e., trusts for the owner's minor children). If only RMDs are allowed to be withdrawn from the retirment account, then it is very likely that trusts subject to the 10-year rule will have small (or no) retirement account withdrawals in years 1 - 9 and a huge required withdrawal in year 10. That is likely not good tax planning. This author usually gives the trustee authority to take larger withdrawals and our trusts ususally suggest that the trustee amortize the retirement account over the expected term of the retirement account withdrawals. However, this concept may not apply to a trust for a surviving spouse of a second marriage. In that situation, to prevent the surviving spouse from promptly emptying the trust, distributions may be limited to on the RMD (or the actual trust income if that is more than the RMD).

9. *Payment of Trust Expenses.* Remember that the trust can pay direct trust expenses from retirement account withdrawals but all other payments must be made only to individuals.

10. *Administrative provisions*. This author strongly recommends having a separate section of administration provisions which include, but are not limited to, the following:

• An obligation to withdraw all RMDs.

• A clear statement that either makes the trust a conduit trust or specifically allows accumulations from retirement account withdrawals.

• If a surviving spouse will be the sole current beneficiary, provisions which will qualify the retirement account for QTIP purposes (i.e., the right to account income if it exceeds the RMDs, the right to convert assets to make them productive of income, the right to make a QTIP election, etc.).

• Specifically include all withdrawals from a retirement account in DNI for trust distribution and income tax purposes.

• Allowing the right to assign shares of the trust (including retirement accounts) either to various subtrusts or directly to trust beneficiaries.

• Authority to transfer retirement accounts to an inherited IRA account by custodian-to-custodian transfers.

• Authority to move retirement accounts from one investment company to another.

• Permission for 3rd parties to rely upon decisions of the trustee in trust administration matters.

• A savings clause like the following [edited to meet the circumstances of your trust]:

Savings Clause. Not withstanding any provision to the contrary, after the Beneficiary Finalization Date and during their remaining lifetimes, my spouse and/or my descendants [or other individual beneficiaries] shall be the only beneficiaries of Retirement Account assets payable to this trust. All trust expenses, taxes and payments to other persons or organizations shall be paid with other trust assets and no part of such expenses, taxes or payments shall be made from these Retirement Account assets. It is my intention that my spouse, and/or my descendants [or other individual beneficiaries] qualify as my "designated beneficiary" for the purpose of all distribution rules established by the Internal Revenue Service and that this trust qualify as a "see-through" [or "conduit trust" or "Designated Beneficiary Trust" where appropriate] as those terms are defined by law or commonly recognized. Any provision of this trust agreement which is inconsistent with this status or which could be interpreted as inconsistent with this status, shall be void and unenforceable or shall be interpreted so as to be consistent with all applicable legal requirements. If the IRS code, regulations, rulings or cases interpreting the law establish additional requirements (not covered by these trust provisions), I automatically incorporate such provisions

into the terms of this trust. The trustee also has the authority to decant retirement accounts payable to this trust to another trust that meets all applicable IRS rules. However, the trustee may not amend this trust in any way or decant retirement account assets from this trust to any other trust if such action would jeopardize the trust's status as a"Designated Beneficiary Trust" [or "conduit"] trust.

Author's note: Please remember that this is a paragraph that the author has crafted in an attempt to solve potential problems. It is not an IRS approved paragraph that can be relied upon to make your trusts bullet-proof. In addition, the prohibition on using retirement account assets to pay trust expenses may be more broad than necessary.

V. Fiduciary Income Tax Rules--Deduction of Distributable Net Income (DNI).

This is perhaps the most important and least understood part of a 1041 (estate or trust) income tax return. The following is an over-simplified attempt to help you understand this crucial concept. There are nuances that need to be addressed by the tax preparer that will be ignored in this outline because a full discussion of all nuances is beyond the scope of this outline and this is an attempt to clarify and not confuse attorneys.

A. First, DNI must be calculated.

1. All taxable income (i.e., interest, dividends, rents, retirement account withdrawals, etc.) and tax-exempt income (i.e., municipal bond interest) income is included in the calculation.

   Author's Note Re Capital Gains: The default rule is that capital gains are not part of DNI for an on-going trust. Under some circumstances, a trustee can elect to allocate some or all capital gains to DNI if the trust instrument allows that election. However, a discussion of those rules is beyond the scope of this outline.

2. Deductible expenses are subtracted (i.e., state and local taxes up to SALT limit, PR fees, trustee fees, attorney fees, etc.).

3. The net number is the total amount of income that can be taxed to the beneficiaries if sufficient distributions are made.

B. Second, accounting income is calculated.

1. Accounting income will usually be similar to DNI. However, sometimes (see note on page 54 regarding distributions from retirement accounts), some taxable income may not included in "accounting income".

2. Generally, normal administration expenses of a complex trust are allocated one-half to income (for the purpose of determining the amount of income to distribute) and one-half to principal (to use against retained income taxed to the trust, if any). So, for most trusts, accounting income will be higher than DNI by the amount of these deductions that are allocated to trust principal.

3. Please note that if a trust simplistically says, "all trust income shall be paid to [beneficiary]", the trust's accounting income (and not DNI) will be used to determine the amount of income to distribute to the beneficiary.

4. There are other nuances of when the differences between accounting income and DNI affect the amount paid to beneficiaries which are beyond the scope of this outline.

C. **Third, Determine Distribution Deduction.** The amount that is either actually distributed or is "required to be distributed" that qualifies for the income distribution deduction. This is the amount of DNI that flows out from the trust to the beneficiaries on a K-1.

1. If the trust is a Simple Trust (all income is required to be distributed, no principal is distributed and there are no charitable beneficiaries), then the full amount of DNI is deemed to have been distributed and taxed to the beneficiary even if no distributions were actually made to the beneficiary(ies).

   WARNING: If actual distributions are less than the amount required to be distributed, this is essentially a contribution from the income beneficiary to the trust. If the trust was created for estate tax protection purposes (i.e., a standard credit shelter trust) and if the income beneficiary (i.e., surviving spouse), does not take the income distributions that are required to be made, then there is a risk that part of the credit shelter trust (i.e., the undistributed income that was improperly retained by the trust) will be included in the income beneficiary's estate for estate tax purposes because this was an asset that the beneficiary was entitled to receive but chose to not receive (i.e., an indirect and unallowed contribution to the trust). When this author helps administer a simple trust, we attempt to ensure that all income is routinely distributed (we prefer electronic distributions which automatically sweep all income directly to the income beneficiary's checking account monthly or quarterly) to the beneficiary to avoid this risk. A simple chart showing the amount of income required to be distributed (this number is usually shown on the trust income tax return) and the amounts actually distributed can be a very helpful trust administration tool to avoid this problem.

2. If the trust is a Complex Trust (i.e., any trust that doesn't meet the definition of a "Simple Trust"—see above), then only the amount actually distributed to the income beneficiary(ies) is included on the K-1 and taxed to the beneficiary(ies).

3. Fixed amount pecuniary gifts (i.e., of a set amount of money–for example $10,000 to my nephew) do NOT qualify for the income distribution deduction and do NOT carry DNI to the beneficiary.

4. Specific gifts (i.e., giving a parcel of real estate to one beneficiary) generally do not carry DNI to that beneficiary unless the income is directly tied to that asset (i.e., net rent received during estate administration will follow a specific gift of that rental property).

5. Distributions of in-kind assets made to residual beneficiaries do carry DNI out to the beneficiary (i.e., the trust distributes the stocks, real estate or other assets to the residual beneficiaries). Thus, if one residual beneficiary receives distributions of cash and another receives in-kind distributions, both distributions will carry DNI to the beneficiary.

6. Distributions made "for the sole benefit" of a beneficiary are considered made to the beneficiary (i.e., paying a beneficiary's rent or debts). So, the beneficiary may receive a K-1 for the appropriate share of the DNI even if the beneficiary did not directly receive any cash distributions.

7. Gifts to charity from trust principal are never deductible on a 1041 return. For example, a gift of a set amount (i.e., $10,000 to my church) is not deductible on the trust income tax return. If a charity is entitled to a percentage of the residual estate (i.e., a will gives "10% of all assets available for distribution to my church"), then 10% of the income is claimed as a charitable deduction and this amount is excluded from the DNI calculations.

   Planning Hint: This author is a huge advocate of making gifts to charity directly from qualified retirement accounts. This allows the estate or trust to use pre-tax assets to fund charitable gifts and after-tax assets to fund the inheritance allocated to individuals.

8. *65 Day Rule.* Normally, only distributions made during the tax year count as part of the income distribution deduction rule. However, because many estates or trusts do not know the precise amount of DNI or accounting income until after the end of the tax year, the IRS code allows a distribution which is made within 65 days of the end of the tax year to be included in the amount considered distributed to the beneficiaries in the prior year. This rule can be very helpful to an estate or a complex trust that has substantial retained income (that would be taxed at very high tax brackets) to make an additional distribution and have that income flow through and be taxed to the beneficiaries. The election is made by checking the box 6, page 3 of the 1041 return and then treating the distributions made during the first 65 days of the next tax year as though they were made during the current tax year.

   Administration Hint: Get the tax information to the tax preparer early in the tax season. This will allow the preparer to draft the tax return to see if an additional 65-day distribution is appropriate.

9. *Timing Issues:* Distribute Income After Receipt. If the distribution to the beneficiary is made before the income is received, then arguably the distribution was made from principal and not from income. For most distributions, they should not be a problem. But, if the taxable income comes from a withdrawal from a retirement account, this author recommends that the distribution be made to the beneficiary after the retirement account withdrawal. This may be especially important for a conduit trust

where you will want to be able to trace the distribution directly to the amount withdrawn from the retirement account.

10. *Note Regarding Trust "Accounting Income" and "Taxable Income":* Under the trust accounting rules, only trust "income" is included in Distributable Net Income (DNI) for the purposes of determining the distribution deduction to the beneficiaries. A distinction needs to be made between "accounting income" for the purpose of the distribution deduction and "taxable income" for income tax reporting. All distributions from the retirement account will be taxable income that must be reported on the 1041 return (unless the account is a Roth account or it is a traditional IRA account which contains non-deductible contributions). However, it is likely that a withdrawal from a retirement account will include both accounting income (i.e., dividends, interest, etc. earned that year) and principal from the retirement account (i.e., contributions and income earned in prior years). If the trust document only requires the trustee to distribute "income", that likely only means accounting income. Absent special language, the principal portion of retirement account withdrawals may be principal and may not qualify for the distribution deduction. This situation may exist in a second marriage where the trust only allows distributions of the trust income and carefully protects the trust principal for the benefit of the decedent's descendants. In that situation, the principal portion of the retirement account withdrawal may not qualify for the distribution deduction and may be trapped on the 1041 return as retained income (and taxed at the trust's highly-compressed tax brackets). This analysis appears to be confirmed by IRS Reg. §1.401(a)(9)-4(f)(6)(ii), Example 2 which makes a distinction between trust accounting income and taxable distribution from a retirement account for the purpose of determining that the trust in question is an accumulation trust because the trust only requires that "all income" be paid to the surviving spouse and does not require that principal that is included in the retirement account withdrawal be paid to the spouse.

    Drafting Hint: This author favors adding specific terms (like the sample language below) into the trust document that create conduit trust status for most clients and which specifically allocate all retirement account withdrawals to DNI. This *arguably* makes the entire retirement account withdrawal eligible for the distribution deduction and reduces the risk of having some taxable income trapped on the 1041 return.

    > *Inclusion In Distributable Net Income. All distributions to a beneficiary from withdrawals from a Retirement Account shall be classified as distributions of trust accounting income which are included in Distributable Net Income (DNI) for the purpose of calculating the income distribution deduction of the trust to ensure that the income tax due on these distributions is paid by the individual beneficiaries and is not an obligation on the trust principal.*

D. **Retained Income.** The entity (estate or trust) is taxed on any income not distributed to the beneficiaries. This includes:

- DNI less the distribution deduction;

• Capital gains that are not distributed. Remember that the default rule is that capital gains are considered principal (and taxed to the trust) and not income (eligible to be distributed to the beneficiaries) unless the trust authorizes characterization of capital gains as distributable income and sufficient distributions are made to flow those capital gains out to the beneficiaries or it the trust is filing its "final" return (when capital gains and losses flow out to beneficiaries). A proper discussion of those rules is beyond the scope of this outline.

E. Trust Tax Brackets. Estates and trusts are taxed at highly compressed tax brackets which reach very high rates at very low levels of retained income. The 2025 tax brackets for a 1041 return are:

Taxable Income	Tax Bracket
0 – 3,150	10%
3,150 – 11,450	315 + 24% of amount over 3,150
11,450 – 15,650	2,307 + 35% of amount over 11,450
15,650 or more	3,777 + 37% of amount over 15,650

F. Hypothetical Situations:

Case #1. Credit Shelter Trust For Surviving Spouse (see 1041 example #1 in Appendix).

Jack (age 75) dies leaving a second-marriage surviving spouse, Betty (age 73). Jack leaves descendants who will receive the remainder of the trust assets upon Betty's death. To help protect a portion of the trust assets for Jack's descendants, the trust limits distributions to Betty and creates a credit shelter trust for Betty's benefit with the following terms:

• Betty gets the annual RMDs from the IRA via conduit provisions. Betty is the only current beneficiary, qualifies as an EDB and the life expectancy factor is recalculated annually. The trust provisions expressly provide that all distributions from the inherited IRA are part of DNI. RMDs for the year after death are calculated based on Betty's age (74 in the first distribution year).
• Betty receives an annual unitrust distribution of 3% of the other assets.

Jack leaves the following assets to his credit shelter trust:

• IRA	1,000,000
• Mutual Fund	500,000

The trust receives the following income:

• RMD from IRA	64,100
• From mutual fund:	
○ Qualified Dividends	25,000
○ Capital gain dividends	5,000

The trust incurs the following deductible expenses:

- Attorney fees for trust administration 3,000
- Tax preparation fees 750

DNI is calculated as (note that the capital gain dividends are not part of DNI):

- RMD from IRA 64,100
- Qualified Dividends 25,000
- Less deductible expenses <3,750>

85,350

Betty receives the following distributions:

- RMD from IRA 64,100
- 3% unitrust distribution 15,000 (3% of $500,000 mutual fund)

79,100

Betty's K-1 shows the following income which is reported on her personal return (as allowed by the rules for a 1041, all of the deductible expenses are allocated against the IRA income):

- Ordinary income from IRA 60,350
- Qualified dividends 18,750

79,100

The trust is taxed on:

- Undistributed qualified dividends 6,250
- Capital gains 5,000
- Less exemption amount <100>

11,150

The trust's tax liability on retained income is:

- Federal income tax 1,253
- MN income tax 597

1,850

Case #2. Estate With IRA - Not Closed Promptly (see 1041 example #2 in Appendix).

Jack died on 10-1-2021 with the the assets noted below including $200,000 in an IRA account that lacks a beneficiary designation so it is collected by the estate. There is a dispute between the two children so probate administration is not completed within 12 months. Because of the dispute between the beneficiaries, you advise the PR to not make any distributions pending resolution of the dispute. Accordingly, the first 1041 return (for the first year of estate administration) shows all of the income (including the IRA which was liquidated) but does not show any distribution deduction so no income flows out to the beneficiaries and all is taxed to the estate.

Estate Assets:	Value	Income/expense	
home	300,000	<1,200>	real estate taxes prior to sale
		<20,000>	RE commission & closing costs
3M stock	500,000	1,500	dividend income
		<4,000>	capital loss on sale
bank	400,000	500	interest income
IRA	**200,000**	**200,000**	**all taxed upon liquidation**
Administration expenses:		<3,000>	attorney fees and court costs
		<2,000>	PR fee
		<600>	tax preparation fee

Net Taxable Income (after deductions): 191,600

Estate Income Tax Due:

Federal	**68,955**
Minnesota	**14,922**
	83,877

Effective tax bracket: **43.7%**

Case #3. Pecuniary Gifts From IRA (see 1041 example #3 in Appendix):

Jack dies in 2021 and leaves his $2,000,000 IRA account to his trust (this is the only asset paid to the trust). Jack is survived by Betty (his 2nd marriage spouse) and his three children from his first marriage. The trust contains the following distribution provisions:

- $400,000 to each of my three children to be distributed promptly after my death;

- The entire balance to be held for the benefit of Betty with Betty receiving all income and principal under a HEMS formula for the rest of her life.

As attorney for the trustee, you direct the trustee to follow the terms of the trust. The trustee withdraws $1,200,000 from the IRA and promptly pays that amount to the children ($400,000 to each child).

- The trust must report $1,200,000 of taxable income.

- Because the distributions to the three children are a pecuniary gift, **the distributions to the children do not carry DNI out from the trust.** So, the entire amount of taxable income is trapped in the trust and is taxed on the trust's 2021 income tax return (filed in April 2022).

- In April 2022, the trust withdraws the money needed to pay the tax on the 2021 trust income tax return (Form 1041) from the IRA account withdrawals. This generates income in 2022 with no offsetting deduction for the federal income tax due (the trust is allowed to deduct up to $10,000 of state income taxes). Then, the trust must withdraw the rest of the IRA account to pay the tax due on the trust's 2022 & 2023 returns.

IRA at death	2,000,000
Less distributed to children	<1,200,000>
IRA left to support Betty:	800,000

Less tax on 2021 return (on $1,200,000 of IRA withdrawal):

Federal:	442,281	
Minnesota:	114,309	
Total:	**< 556,590 >**	

Account balance after paying 2021 income taxes: 243,410

Again, because the only source of assets to pay the 2021 income taxes due on the trust's income tax returns is the retirement account, each successive withdrawal creates a cascading series of taxes due.

Account balance after paying 2021 income taxes: 243,410

Less tax on 2022 return
(on $556,590 of IRA withdrawal to pay tax on 2021 returns):

Federal:	200,464	
Minnesota:	50,812	
Total:	**< 251,276 >**	

Short-fall including 2022 income taxes due: <7,866>

Less tax on 2023 return (on $243,410 of IRA withdrawal which emptied the account):

Federal:	84,469	
Minnesota:	19,681	
Total:	**< 104,150 >**	

Short-fall including 2023 income taxes due: <112,016>

SUMMARY:

- Don't rely solely on the tax preparer to do the tax planning for your estates and trusts.
- Learn and understand the rules, especially the rules relating to DNI and the distribution deduction.

- During the year, focus on estimating the likely taxable income and determine whether the distributions are appropriate to flow income out to the beneficiaries.
- Get the tax information to the tax preparer early in the tax preparation season.
- Be especially careful if retirement accounts are liquidated into an estate or trust.
- Don't draft a trust with fixed amount pecuniary gifts if the trust will be funded substantially with distributions from a retirement account.

VI. What happens now & planning options.

A. Reduce Balance in Retirement Account At Death. Some clients will choose to decrease the amount that remains in their retirement accounts at their death.

1. If a large retirement account will need to be liquidated quickly after the owner's death, it is possible that the post-death distributions will be taxed at a higher tax bracket than existed for the account owner during the years when the retirement account contributions were made. So, some clients will rethink the amount they want to contribute annually to their retirement accounts. Query: Could this have the unintended consequence of decreasing long-term savings and thus make some clients less likely to be financially secure and independent?

2. Some clients who are in retirement will choose to withdraw more from their retirement accounts to deplete the accounts during their lifetime. These clients will choose to use taxable distributions from their retirement accounts for living expenses rather than taking distributions from their after-tax investment accounts.

3. Clients who have substantial medical expenses (i.e., any client needing long-term care in a nursing home) should be encouraged to use withdrawals from their retirement accounts as a primary source for the funds to pay for that care. The cost of the medical expenses will at least partially offset the income recognized on the retirement account withdrawals.

4. Clients over age 70 ½ who give substantial amounts to charity should be encouraged to use the Qualified Charitable Distribution (QCD) concept discussed on pages 13 - 14 for their charitable contributions. This will make gifts to charities more tax-efficient and reduce the amount held in retirement accounts at death.

   Planning Tip: This author asks all estate planning clients to bring a copy of their most recent income tax return. Even if you do not do tax planning or preparation, even a cursory review of a client's tax return can yield valuable information regarding your client. For example, check to see how much your client gives to charity (check Sch. A, line 11 if they itemize deductions on their federal return or line 11 on Form M1M of their Minnesota return for subtractions for gifts to charity if they don't itemize deductions). If your clients who are over age 70 1/2 give substantial amounts to charity, ask if they use the QCD concept. If not, then add this to your recommendations to add more value to your consultation.

5. Some clients will choose to do annual Roth IRA conversions to shift their retirement accounts from a pre-tax account to a Roth IRA. A carful consideration of the clients' current tax bracket and the likely tax bracket for anyone who inherits their traditional retirement accounts may help justify Roth conversions. Plus, a Roth IRA is one of the very best assets to inherit. Clients can spread the tax on pre-tax retirement accounts over many extra years by paying the tax themselves.

   Example: Betty is age 62. She is unmarried and recently retired. She owns a traditional IRA account that holds $3,000,000 of assets. Each year, Betty does a Roth conversion which withdraws $100,000 from the IRA and transfers $65,000 from her traditional IRA account to her Roth IRA account and uses $35,000 from her IRA to pay the income tax on these transactions (depending on her other income and deductions, the total tax on $100,000 of taxable income will be approximately $35,000). The net result is that $65,000 has been converted to a Roth IRA and the taxes on that amount have been paid in full. That amount can grow tax-free for the rest of her life and will be easier to use as an inheritance because withdrawals won't create taxable income for the beneficiaries. If the client has sufficient cash outside of her IRA, the tax on the Roth conversion amount can also be paid with that cash (of course). Betty does this for the ten years between her retirement and the year she turns 73 and has to start taking RMDs of approximately $100,000 per year from her retirement accounts (depending on her investment results in the interim).

   As an added bonus, if Betty also has a taxable estate for Minnesota estate tax purposes, the amount of income tax paid on these Roth conversions will be out of her estate and her estate will save at least 13% of the taxes paid during her lifetime (in this example, 10 years of Roth conversions will save over $45,000 of Minnesota estate taxes on the $35,000 of income taxes paid).

6. For clients who will keep assets in trust after their death (i.e., for the benefit of an irresponsible child who can't be trusted to use an inheritance prudently), please remember that it is much easier to administer assets that are not held in a qualified retirement account. These clients should be encouraged to use one or more of the ideas discussed above to substantially reduce the size of their qualified retirement accounts prior to their death.

7. On a related note, the Tax Cuts & Jobs Act (the new income tax rules effective from 2018 – 2025 and extended by the 2025 legislation) created the new §199A QBI deduction. Taxpayers who are taxed on Qualified Business Income (QBI) receive a new deduction for 20% of the business profits. However, contributions to a Simplified Employee Pension (SEP) or simple IRA account decrease QBI and decrease the QBI deduction. Because of the interplay between these rules, self-employed persons eligible for the QBI deduction essentially deduct only 80% of these retirement account contributions. But, when the taxpayer retires and starts to take distributions from the SEP account, all distributions will be fully taxable as ordinary income. If the taxpayer is in the same tax bracket during retirement, the net tax benefit from these retirement account contributions is reduced. So, taxpayers in these circumstances may want to reconsider the amount to contribute to their SEP (or

other similar) accounts or may want to maximize their allowable traditional IRA contributions prior to contributing to a SEP account because contributions to a traditional IRA do not affect the QBI deduction.

Example:

Jack is self-employed with the following circumstances:

Profit from business (QBI):	100,000
QBI deduction (20% of QBI)	<20,000>
Profit subject to income tax	80,000

If Jack contributes $10,000 to his SEP account, then:

Profit from business	100,000
Less SEP contribution	<10,000>
QBI	90,000
QBI deduction (20% of QBI)	<18,000>
Profit subject to income tax	72,000

Result: only $8,000 of the $10,000 SEP contribution reduces his taxable income.

B. Individuals Named As Direct Beneficiary. For clients who have named individual beneficiaries on their retirement accounts, it is likely that no changes are needed. Their current plan will still work reasonably well.

1. If the individual named is the surviving spouse, then the pre-SECURE Act rules still apply for the surviving spouse. Most spouses will roll the account into his/her own IRA account.

2. If the individual is a non-spouse EDB other than a minor child (i.e., a friend or sibling who is not more than 10 years younger than the account owner, a mentally competent beneficiary who is disabled or chronically ill but still able to handle his/her own inherited account, etc.), this plan may work fine because the SECURE Act still allows these beneficiaries to use the life expectancy distribution concept.

3. If the individual named as beneficiary is the minor child of the account owner and if the amount inherited is modest (i.e., an amount that will be reasonably used while a minor or in the 10 years after reaching age 21), then this may still work reasonably well. Ensure that the beneficiary designation form allows a custodian (i.e., under the UTMA until age 21) to control the account until the beneficiary reaches an appropriate age.

4. If the individual named as beneficiary is the adult child of the account owner (or other person who is not an EDB), the beneficiary can still administer the account as an inherited IRA account and defer income tax on the inherited assets until withdrawn from the account. Under the regulations, RMDs must be taken if the account owner

had passed the RBD. The biggest change is that the beneficiaries will not be able to use the life expectancy method and will be required to liquidate their share of any inherited IRA within 10 years. So, each beneficiary will get the good and bad consequences of making good and bad decisions.

5. Assignment Of Account To Beneficiary. If a retirement account is payable (i.e., not yet withdrawn from the retirement account) to an estate or trust, it may be possible for the fiduciary to assign shares of the account to the residual beneficiaries. This will allow each beneficiary to independently roll his/her share of the retirement account to an inherited IRA account and take distributions independently from the estate or trust. Please remember that this assignment does NOT change the distribution period or any of the rules regarding RMDs. Some investment companies will process an assignment almost routinely. Other investment companies will first require an attorney's opinion letter advising them that the assignment is allowed under state and federal law.

6. *Planning Tip–Bypass Spouse:* Consider bypassing the surviving spouse for part or all of the retirement account assets. If all retirement accounts are given to the surviving spouse with the remainder to their children after the second spouse's death, then all of the retirement accounts will be subject to the new 10-year rule started at the 2nd spouse's death. If the surviving spouse has sufficient income and assets to live comfortably, consider having some retirement accounts bypass the surviving spouse and pass directly to the children at the first parent's death.

   Example: Jack and Betty are both age 80. They have one child, Bob (age 55 and financially successful and responsible). They own the following assets:

Jack's IRA	1,000,000
Betty's IRA	1,000,000
Home	400,000
Non-qualified savings and investments	600,000

   Both spouses have good pensions and Social Security benefits and they are confident that the surviving spouse will have sufficient income and assets to meet all foreseeable costs. They decide to list their son, Bob, as the primary beneficiary of each IRA account. At each parent's death, Bob will start a 10-year distribution period for that parent's IRA.

   Note: Depending on their dates of death, this will help stagger the distributions and give Bob a longer distribution period. They could also accomplish the same goal by listing Bob as the contingent beneficiary and having the surviving spouse disclaim part or all of the account to Bob. However, using a disclaimer as a primary planning tool depends upon the surviving spouse's agreement (after the death) to complete the disclaimer and requires that no intervening event (like a premature rollover to the surviving spouse's IRA) prevents the use of the disclaimer.

Note: Many clients hesitate to bypass their surviving spouse because they don't want to risk having their surviving spouse run out of money in the event the spouse needs long-term care or other emergencies arise. This author has frequently helped alleviate this concern by modelling likely payouts like the following.

Example: Continuing the example above, assume that Jack dies and leaves his IRA to Bill. Shortly after Jack's death, Betty needs long-term care services. She will still have the following income and assets:

Betty's Assets:		
Betty's IRA		1,000,000
Home (which will be sold if Betty needs LTC)		400,000
Non-qualified savings and investments		600,000
		2,000,000
Betty's Annual Income and LTC costs:		
Betty's pension	24,000	
Betty's Social Security	30,000	
RMD on Betty's IRA	50,000	
Income on N/Q investments (@ 3%)	18,000	
Income on home sale proceeds (@ 3%)	12,000	
	134,000	
Less LTC costs		<120,000>
Excess of income over LTC costs		14,000

C. Trust As Beneficiary. If a trust will be the beneficiary of a retirement account, the trust must be carefully crafted to meet both the pre-SECURE rules and contain a distribution formula that works well under The SECURE Act. The following is an attempt to give multiple examples of how to apply the new SECURE Act rules to trusts with the following beneficiaries:

1. **Conduit Trust for Surviving Spouse:**

a) If the trust is required to distribute all account withdrawals annually to the surviving spouse and if the spouse is the sole beneficiary of the trust during the spouse's lifetime, then the trust should work as intended during the spouse's lifetime because the spouse is an EDB. Such a trust should also give the spouse the right to withdraw income earned on the trust assets if that income is larger than the RMDs and/or any other amounts distributed (a QTIP trust concept). See IRS Reg. §1.401(a)(9)-4(f)(6)(ii), Example 2. If the trust is intended as a credit shelter trust (or "A/B Trust" or "Bypass Trust" depending on the phrase you want to use), this is the model that usually works best.

Example: Jack (age 67) dies with a $1,000,000 in his 401(k) account. Jack leaves a surviving spouse (2nd marriage), Betty (age 65) and 3 children from his prior

marriage. Because this is a second marriage, Jack wants to help support Betty but doesn't want to give Betty outright control of the entire account. Jack makes his trust the beneficiary of the retirement account under the following terms:

• The trust is drafted as a conduit trust with Betty as the sole current beneficiary during her lifetime. Betty qualifies as an EDB and the trust can stretch distributions over Betty's life expectancy.

• No RMDs are required until the year Jack would have reached age 73. The trust may and probably should allow optional distributions prior to this date for Betty's support.

• If Jack intends that the trust be used to support Betty, then the trustee should not be limited to only withdrawing and distribution the RMDs. The trust should be drafted to require that Betty receive the larger of the RMD or the actual income earned each year or a unitrust percentage (i.e., 4%). So, even if no RMDs are required, Betty will at least receive the income earned on the account. Assuming the trust receives normal investment results, the balance in the account should remain relatively stable or only decrease slightly for the first years of the trust (until Betty is substantially older and RMDs begin to exhaust the IRA).

Drafting Hint: This author routinely includes a "uni-trust" distribution formula which pays a set amount (i.e., 3%, 4% or 5%) each year for the spouse's support. Those uni-trust provisions may apply only to the non-retirment account assets (with retirement accounts subject to clean conduit trust provisions) or may be carefully crafted to incorporate retirement account and non-retirement account assets. A carefully crafted combination of distributions based upon the greater of the RMDs, the trust income and/or a uni-trust formula may work well for this situation (i.e., conduit trust distributions of all RMDs (or IRA income, if greater) plus additional distribution from non-retirement investment accounts that total the desired unitrust percentage for total distributions).

*New

• Surviving spouses have the right to treat an inherited IRA as their own IRA. IRS Reg. §**1.408**-8(c)(1)(ii) [the prior election that only applied to IRAs] prevented the trustee (and/or the spouse) from using the election to treat the IRA owner's IRA as the spouse's IRA if the IRA is paid to a trust for the spouse's benefit. However, the new SECURE 2.0 Proposed Regulations §**1.401(a)(9)**-5(g)(3)(ii)(C), which have a similar election that apparently applies to both IRAs and employer plans do not expressly contain that same prohibition on a retirement plan paid to a trust. Choate (in her Choate Update, September 2025, page 37) believes that this new election is available to a retirement account paid to a trust and should be usable for a conduit trust for the sole benefit of the surviving spouse. This interpretation may need to be clarified in the SECURE 2.0 final regulations. Choate makes the further point that if the spouse decides to <u>not</u> make this election (or affirmatively elects that this election not apply), that the RMDs will be larger and the spouse will effectively increase the amount that will be paid to her from this type of trust.

Author's Note: When Betty turns 73 (8 years after Jack's death), her life expectancy will be 26.4 years and the RMD will be approximately 3.8% of the prior year-end account balance. This revision to the rules substantially length the distribution period. That makes it more likely that the account will last for Betty's entire lifetime and that there will be assets left in the account at Betty's death for Jack's children to inherit. However, it also means that if only RMDs are being distributed, the distributions for Betty's annual support from these funds will be lower.

- Because Betty (as surviving spouse) is the sole current beneficiary and it is a conduit trust, the trust gets two wonderful benefits (see Choate 1.6.03(D) & 6.4.06(A) and IRS Reg. §1.401(a)(9)-5(d)(3)(iv)):

    - RMDs are calculated based on the Uniform Lifetime mortality table I (the good table); and,

    - Betty's life expectancy is recalculated each year.

    But, see IRS Reg. §1.401(a)(9)-4(f)(6)(ii) Example 2 for an example of a trust that was not allowed to use those good RMD rules because the trust did not qualify as a conduit trust.

- Upon Betty's death, Jack's children will be the successor beneficiaries of the residue of the IRA account. They will then begin a 10-year distribution period for each share of the inherited IRA account.

- **Warning:** Do NOT add provisions that terminate the surviving spouse's rights to distributions of retirement account withdrawals if the surviving spouse remarries (or for other reasons). Such provisions will likely disqualify the trust as a DBT for a spouse EDB and will prevent the trust from using the good RMD rules for surviving spouses.

- This trust should work relatively well to meet Jack's goals. If the trust hold assets other than the retirement account, while the retirement account exists, distributions to Betty should come primarily from the retirement assets and the other assets should be retained (and hopefully allowed to grow to support Betty during later years when RMDs are smaller because the IRA is shrinking).

Sample Conduit Language: Retirement Benefits Payable To Trusts. From and after the date of my death, all withdrawals from a retirement account to this trust must be paid or applied for the sole benefit of my spouse in the same calendar year that the withdrawal was made from the retirement account. If a trust takes a withdrawal from a Retirement Plan and my spouse dies before the withdrawal is distributed to my spouse, any undistributed amounts of the retirement account withdrawal must be distributed to my spouse's estate in the same calendar year that the withdrawal was made from the Retirement Plan. No withdrawal from a

Retirement Plan may be accumulated by a trust during my spouse's lifetime for the benefit of any other individual or otherwise.

Drafting Hint: Anytime the surviving spouse is the sole beneficiary of a trust collecting a retirement accout, this author recommends including a paragraph which ensures that the surviving spouse has a right to all income earned by the retirement account if that income is greater than the RMD. You may choose to make this concept only apply to the Marital Trust or to all retirement accounts paid to the trust (including retirement accounts allocated to a credit shelter trust). This is helpful for income distribution purposes and essential if there is a possibility that the trustee will want to elect QTIP treatment for part or all of this share.

> *Sample Language: Retirement Benefits Payable to [Marital] Trust. In addition to any other income required to be distributed to my spouse from the [Marital] Trust, the Trustee shall make distribution elections in a manner which will ensure that annual distributions from the Retirement Plan to the [Marital] Trust will not be less than the net income earned by the Retirement Plan if the net income exceeds the amount required to be distributed from the Retirement Plan under section 401(a)(9) of the Internal Revenue Code, and the Trustee shall allocate the amounts so received to income for distribution to my spouse during the calendar year. The Trustee shall have the power to make an election to treat the interest of the [Marital] Trust in each Retirement Plan as qualified terminable interest property (QTIP) under section 2056(b)(7) of the Internal Revenue Code.*

Author's Note Regarding Drafting Wills &Trusts language. This author heavily relies on the model trust language which is routinely published by Minnesota CLE in their publication, Drafting Wills and Trusts. However, this author also routinely edits those model provisions to better fit the clients' unique circumstances. This author recommends that every attorney find a reliable source for model language for the foundation of all wills and trusts and to carefully edit and modify that language to fit the unique features of each client's circumstances.

Author's Note Regarding Allocation of Retirement Account to Fund Credit Shelter Trust: If the trust is being created as an estate tax planning tool (i.e., a credit shelter trust), this author recommends **allocating assets other than qualified retirement accounts to the credit shelter trust** because those assets can be administered in a more tax-efficient manner. Using a qualified retirement account to fund a credit shelter trust with conduit language will result in all retirement account withdrawals being paid out to the surviving spouse and will thus substantially deplete the assets held in the credit shelter trust over time. If the surviving spouse lives to near that spouse's anticipated life expectancy, most or all of the account will have been paid to the spouse and few or no assets will remain to be sheltered from estate taxes. Allocating taxable assets like a qualified retirement account to the credit shelter trust should only be done if there are no other assets readily available to meet this goal. This author has routinely used a

qualified retirement account to fund the credit shelter trust when the clients were in a second marriage and no other assets were available to use to fund the credit shelter trust. In such situations, trust terms routinely require that only the RMDs can be withdrawn from the inherited IRA account and paid to the surviving spouse. This formula may be the only reasonable way to provide a steady source of income to the surviving spouse while protecting some (even if a dwindling amount) of assets for the benefit of the decedent's children.

Author's Note Regarding Trust "Accounting Income": Please see the discussion of this issue on pages 51 - 55 of this outline.

2. **Accumulation Trust for Surviving Spouse:**

a. If the trust allows retirement account withdrawals to be either accumulated or distributed to other beneficiaries who are not EDBs, the trust won't qualify to use a life expectancy stretch formula because the account withdrawals are not solely for the spouse and other EDBs. These trusts will be subject to the new 10-year rule.

Example: Jack (age 67) dies with a $1,000,000 in his 401(k) account. Jack leaves a surviving spouse, Betty (age 65) and 3 adult children from his prior marriage. Because this is a second marriage, Jack doesn't want to give Betty outright control of the entire account. Jack makes his trust the beneficiary of the retirement account under the following terms:

- The trust is drafted as an accumulation trust with Betty as the primary beneficiary but also allows the trustee to accumulate retirement account withdrawals or make distributions for the benefit of Jack's children. Because the trust is allowed to make distributions to beneficiaries who are not EDBs, the trust cannot stretch distributions over Betty's life expectancy.

- The same result would exist if the trust only said that "all trust income must be distributed to my spouse" because that is not a conduit trust (which must specifically state that all retirement account withdrawals must be distributed). See IRS Reg. §1.401(a)(9)-4(f)(6)(v), Example 5.

- The trust is subject to the new 10-year rule. Each year the trustee withdraws $100,000 (or more based on expected income earned on the account) from the retirement account to spread the account distributions over 10 years.

- The trustee distributes most (or all) of the account withdrawals to the individual beneficiaries (Betty and/or Jack's children). Each beneficiary is taxed on the amount received.

- To the extent that the trustee retains retirement account withdrawals, the retained amounts are taxed at the highly compressed 1041 tax brackets.

• The retirement account is completely liquidated in 10 years. Jack's goal of creating an account that will provide income to Betty for her entire life and give the principal balance to his children is not possible with these trust terms.

Warning Re Charities As Contingent Beneficiary: In every accumulation trust, remember that the contingent beneficiaries who must be counted (to test the trust for Designated Trust status) must all be individuals. A charity may not be named as a contingent beneficiary unless it only receives retained retirement account withdrawals if all first and second tier beneficiaries have died. See discussion on pages 36 - 41). In this example, the trust will need to name grandchildren (or other individuals) to receive retained retirement account withdrawals upon the death of Betty and Jack's children.

• In this scenario the surviving spouse is not the sole beneficiary. So, it can't qualify for QTIP status and it is not necessary to include a paragraph which ensures that the surviving spouse has a right to all income earned by the retirement account if the annual income is greater than the RMD.

• Also, remember that only giving the surviving spouse the right to all trust income does not result in conduit trust status. A conduit trust must require that all retirement account withdrawals be distributed to the beneficiary.

Author's Note: It is this author's opinion that this type of plan will not work well for most clients if the primary asset funding the trust is a retirement account unless the client is confident that the surviving spouse will live less than 10 years and the trustee is capable of making fair decisions regarding what portion of the account to withdraw each year and who should receive the distributions from the trust.

Author's Notes Regarding Roth IRAs: If, prior to Jack's death, he had systematically converted part of his IRA account into a Roth IRA account, that part of the trust assets can be administered very efficiently in this type of plan. Specifically, the Roth IRA can be rolled into an inherited Roth IRA account. Under The SECURE Act rules, that account is subject to the new 10-year rule. It can be kept in the inherited Roth IRA account and continue to grow tax-free for 10 years (the account must be liquidated by Dec. 31 of the year that includes the 10th anniversary of the account holder's death). The trustee can monitor the income earned in the account and pay those amounts to the surviving spouse from other assets. In ten years, the inherited Roth IRA can be liquidated and invested as an after-tax account. This variation on the facts noted above can work very well to meet Jack's goals.

In addition, an inherited Roth IRA is treated as though the account owner died before the Required Beginning Date (because there are no RMD obligations during the owner's lifetime), so the provisions of the new proposed regulations which might require RMDs during the 10-year period should not apply to an inherited Roth IRA account.

Author's Note Regarding Tax Planning. Attorneys who do not do tax planning or consultations may think that this type of discussion should only be attempted by the client's tax preparer. However, many (most?) tax preparers are so busy during tax season that they don't have time to have this type of discussion. In addition, the tax preparer may be completely unaware of the size of the client's retirement accounts because that information is usually not needed to prepare the income tax returns. Finally, this type of analysis may be completely beyond the expertice of the tax preparer (even many CPAs). As the estate planning attorney, you may be the ONLY professional who will discuss these issues with your client. Raising these issues is a way to add extra value to your estate planning consultations.

3. Conduit Trust for Minor Beneficiaries:

a. Since conduit trusts still work well while the beneficiary(ies) is a minor, this option may still work reasonably well until the child attains the age of majority (age 21 under the final regulations).

b. This would allow the trustee to take RMDs based on the beneficiary's life expectancy while the beneficiary(ies) is a minor and use those account withdrawals to support the beneficiary. RMDs are calculated based on the age of the oldest beneficiary. Please note that the life expectancy of a 10 year old beneficiary is 74.9 years (new mortality tables for 2022 and later). So, the RMD is only 1.335% of the account balance ($13,335 on a $1,000,000 inherited IRA account).

c. The trust should allow the trustee discretion to take larger retirement account withdrawals if needed for the beneficiary's support. This will also allow the trustee to loosely amortize the retirement account withdrawals throughout the distribution period.

*new

d. When the youngest minor EDB attains age 21, the 10-year rule will be triggered. Because RMDs are required to get the life-expectancy payouts, RMDs must continue during this 10-year period. Additional account withdrawals (more than the RMD) can also be taken to support the beneficiary(ies) for education or other expenses. Because the trust has conduit provisions, all such distributions must be distributed to the individual beneficiary or used for their benefit. So, it is easier for the trust to qualify as a DBT.

e. Because this is a conduit trust and because the retirement accounts must be fully liquidated when the youngest minor EDB reaches age 31, all retirement accounts must be liquidated and distributed by that date. If your clients want to hold money in trust longer (i.e., until the beneficiary is older), the trustee may continue to hold the non-retirment account assets. Alternatively, you will need to switch to an accumulation trust model (see options immediately below).

f. This author recommends that all trusts contain provisions authorizing distributions to a UTMA account on behalf of the beneficiary and/or making

payments to others for the sole benefit of the beneficiary. This allows the trustee to control the use of the distributions without giving the money directly to the minor beneficiary. The final regulations specifically bless this concept including allowing payments to a custodial account) to be treated as payments to the child. IRS Reg. §1.401(a)(9)-4(f)(3)(iv). Accordingly, the trustee can make big distributions to a UTMA account and allow the child's guardian to use that account to support the child.

g. If your client is comfortable allowing the retirement account(s) to be completely liquidated and distributed to the child by the time the child attains age 31, this plan may continue to work reasonably well. This is especially true because most clients with minor children do not have large balances in their retirement accounts.

Example: Betty (unmarried) dies leaving two minor children (ages 11 & 8) and $200,000 in her 401(k) account. The beneficiary on the account is a trust which requires the trustee to promptly create separate shares of all trust assets for each beneficiary. The trustee is required to withdraw all RMDs and is allowed to take extra withdrawals from retirement accounts for the children's benefit. All such withdrawals must be redistributed to or for the sole benefit of the child who is the beneficiary of the separate share receiving the account withdrawal.

• While the children are minors, the trustee withdraws the RMD (approximately $1,400 per child, per year) and additional amounts as needed for the children's support. If this account is the primary source of support for the minor children, the trustee will likely withdraw more than the RMD to properly provide for the children's support.

• When the youngest child attains the age 21, the new 10-year rule begins. The trustee continues to take RMDs and other distributions as needed for the children's support during this 10-year period.

• If the child is subject to the Kiddie Tax rules (i.e., because the child has a surviving parent, etc.), up to $2,700 per child can be received each year at very modest tax brackets. Larger amounts of unearned income (including retirement account distributions) are taxed at the tax bracket that applies to the surviving parent (if any).

• Each child's share of the account ($100,000) can be spread over twenty three years. This plan will work relatively well for this family.

Author's Note: If the retirement account is substantially larger (i.e., each child's share is $1,000,000), a conduit trust could still work reasonably well to spread the distributions over the allowable period. Prior to the SECURE Act, a trust with these circumstances was allowed a substantially longer distribution period. So, these trusts do not work nearly as well under the new SECURE Act rules.

Sample Conduit Language: Retirement Benefits Payable To Trusts. From and after the date of my death, all distributions from a Retirement Plan to a trust administered under this instrument for the benefit of an individual beneficiary (the "primary beneficiary") must be paid to or applied for the sole benefit of the primary beneficiary in the same calendar year that the distribution was made from the Retirement Plan. If a trust takes a withdrawal from a Retirement Plan and the primary beneficiary's death occurs before the withdrawal is paid to the primary beneficiary, any undistributed amounts of the retirement account withdrawal must be distributed to the primary beneficiary's estate in the same calendar year that the withdrawal was made from the Retirement Plan. No withdrawal from a Retirement Plan may be accumulated by a trust during the primary beneficiary's lifetime for the benefit of any other individual or otherwise.

4. Accumulation Trust For Minor and/or Adult Beneficiaries:

a. When the SECURE Act was passed, most commentators believed that an accumulation trust for minors would never be able stretch distributions over the minor's life expectancy if the trustee has the discretion to hold those account distributions for persons who are not EDBs. In the final regulations, the IRS gave us a gift by creating an exception to that concept in IRS Reg. §1.401(a)(9)-4(e)(2)(ii) which allows a trust to administer a retirement account under the minor child EDB rules even if other beneficiaries are not EDBs. See discussions on pages 36 - 41.

*New

b. If the trust is calculating RMDs based on the life expectancy of the account owner's children (EDBs), then the account must be liquidated by the 10th anniversary of the earliest of the youngest EDBs attaining age 21 or the death of all minor children (i.e., when there is no longer a minor child of the account owner who is under age 21). IRS Reg. §1.401(a)(9)-5(f)(2)(ii)(B).

Example: Jack dies in 2025 before his RBD with $1,000,000 in his 401(k) account. Jack leaves his entire account to a trust for the benefit of his four children, ages 25 (from his first marriage), 16, 13 and 8 (from his second marriage). The 25 year old child is not an EDB. The other three children are EDBs.

- Because at least one of Jack's children is an EDB, the trust is administered as though it has an EDB.

- The trust is allowed to use the life expectancy distribution method.

- RMDs must begin by December 31 of 2026 (the year after death).

- The first RMD is calculated based on the age of the oldest designated beneficiary (the age 25 child who is age 26 in the first distribution year and has a life expectancy of 59.2 years). The first RMD which must be taken in 2026 will

be calculated as the 12-31-25 balance divided by 59.2 or approximately $16,900. The 2027 RMD is based on a denominator of 58.2 years (subtracting one). But, remember the warning below relating to contingent beneficiaries. If the trust names an older person as the contingent beneficiary, then this older person becomes the measuring life for calculating RMDs.

*New

- The Outer Limit Year is based on the youngest EDB--here the 8 year old child. That EDB turns 21 in 2038. The account must be completely liquidated into the trust no later than December 31 of 2048. If the trustee only withdraws the RMDs, then the 2048 withdrawal will be very large. So, a trustee in these circumstances will likely want to spread retirement account withdrawals somewhat evenly over the 23 year term.

- Retained account withdrawals are taxed at the trust's highly compressed tax brackets (i.e., in 2025, the federal tax bracket on retained income over $15,650 is 37% (plus state tax)--almost half of these retained withdrawals are paid in income tax to the government). However, with four individual beneficiaries to support, it should be possible to find a legitimate support purpose for almost all account withdrawals.

Warning Re Contingent Beneficiary: In every accumulation trust, remember that the contingent beneficiaries who must be counted (to test the trust for Designated Trust status) must all be individuals. This trust may fail if a charity is named as a remote contingent beneficiary. See discussion on pages 36 - 41). In addition, an older person listed as contingent beneficiary changes the RMD calculation. In this example, the trust can name grandchildren (or other young individuals) to receive retained retirement account withdrawals upon the death of all of Jack's children. But, there needs to be an individual named as the final "wipe out" or "last person standing" beneficiary (at least for the retirement accounts).

Author's Note: Many attorneys like to create a pot trust where all trust assets are held in a common pot and distributions are made for the benefit of any of the individual beneficiaries at the trustee's discretion. This allows the trustee to use discretion to determine which of the beneficiaries in the pool needs the most benefits. Most of these trusts are designed to split into separate shares at an appropriate time (i.e., when the youngest current beneficiary attains a certain age). It appears that this provision in the final regulations is specifically designed to favor this type of spray trust. If creating a spray trust with accumulation trust terms, ensure that all retirement account withdrawals are distributed to individual beneficiaries before the final liquidation date when the youngest beneficiary attains age 31. See IRS Reg. §1.401(a)(9)-4(f)(3)(ii)(B).

By contrast, this author prefers to use separate shares for the children (regardless of whether the separate share rule applies for tax purposes of testing the trust) to help ensure that each beneficiary gets an equal share of the inheritance. The difference between these two approaches requires a balancing between flexibility (allowing the

trustee to shift assets) versus certainty or "fairness" (each beneficiary gets the same initial amount and those assets are spent only for that beneficiary's benefit). Drafting a pot trust has the risk of "rewarding" beneficiaries who make bad decisions and create circumstances where they "need" more trust assets to fix their bad circumstances.

5. Conduit Trust For Adult Children. Depending on the trust terms, these trusts should continue to work well.

a. If the trust only allows withdrawal of RMDs, then if the account owner died before the RBD and was not yet subject to RMDs, then there are no RMDs until the end of the 10th year after the death. Arguably, if the trustee has no discretion to take account withdrawals until year 10 and the trustee must liquidate the entire account and distribute it all to the beneficiaries in year 10. That is likely not your clients' intention. Such trusts should be reviewed and amended promptly to allow extra or discretionary distributions in years 1 - 9.

b. If the trust also allows additional retirement account withdrawals (above the RMDs) and if your client is content to have all retirement account withdrawals promptly distributed to or for the benefit of the beneficiaries within ten years of the account owner's death, then these trusts may still work reasonably well (but with a shorter than anticipated liquidation of the retirement accounts than existed prior to the SECURE Act).

c. For these trusts, please remember that the trust can be drafted so that only the retirement account withdrawals must be promptly distributed to the beneficiaries. The trust can allow the trustee to continue to accumulate other income and assets for the beneficiary's long-term benefit. If trust assets will be held longer, use retirement accounts to fund the distributions to beneficiaries in the first 10 years and save the other assets for distributions later.

Example: Betty (unmarried, age 55) dies leaving two adult children (ages 25 & 30) and $200,000 in her 401(k) account. The entire account is paid to a conduit trust. The trustee is required to withdraw all RMDs and is allowed to take extra withdrawals from retirement accounts for the children's benefit. All such withdrawals must be redistributed to or for the benefit of the children.

• Since neither beneficiary is an EDB, the new 10-year rule begins immediately. The trustee takes withdrawals as needed for the beneficiaries' support during this 10-year period.

• The amount withdrawn and redistributed to the beneficiary will be taxable income to the beneficiary and taxed at the beneficiary's own tax bracket. Beneficiaries who are successful and have substantial other income, will pay a high rate of income tax on these distributions. While beneficiaries who are in a lower tax bracket will pay substantially less income tax on these retirement account distributions.

• Each child's share of the account ($100,000) can be spread over 10 years and for most beneficiaries the tax burden will not be unreasonable. This plan will work relatively well.

Drafting Tip: If the retirement account is substantially larger (i.e., each child's share is $1,000,000 or more), a conduit trust could still work reasonably well to spread the distributions over the allowable period. However, because these beneficiaries are not EDBs and cannot use the life expectancy method for determining distributions, conduit provisions are no longer as necessary to ensure the optimal distribution period. For these beneficiaries, a properly drafted accumulation trust (with proper drafting regarding successor beneficiaries to ensure that the trust qualifies as a DBT) could also work well and may give the trustee more flexibility including the ability to retain a portion of the retirement account distributions in the trust. These nuances will take careful consideration of the specific client's circumstances and may involve custom drafting to fit those circumstances.

6. **Trust for Irresponsible (or Imprudent) Adult Children.** The SECURE Act is not friendly to trusts for irresponsible beneficiaries (i.e., anyone not likely to handle the distributions prudently) who are not EDBs.

   a. Example: Jack owns a $1,000,000 401(k) account. He is diagnosed with a terminal condition and will die soon. His only beneficiary is his son, Bill (age 40), with serious addiction issues (i.e., illegal drugs, alcohol, gambling, irresponsible spending, or other issues that do not create disabled or chronically ill status). You tell Jack that he has the following options:

      1) List Bill as the direct beneficiary of the account. If he does this, Bill may not make prudent decisions with the inherited assets. In extreme cases, access to this account may even be dangerous to Bill if the funds give Bill more access to a harmful lifestyle (i.e., illegal drugs, etc.).

      2) For employer-based plans, the new annuity rules (see page 14) may allow the employee to choose an annuity distribution option for the employee and one beneficiary. This may be an option to allow Jack to create a life-time distribution formula for himself and Bill. However, that annuity provision will likely only apply to employer plans (and not to IRA accounts) and we will likely need to wait for the IRS to rule on this application of the law. Plus, those options are dependant upon the employer having an annuity option available as part of the employer's plan and Jack trusting the company that will administer the annuity.

      3) Name Jack's trust as beneficiary. Because Jack doesn't want to give Bill prompt access to retirement account withdrawals, the trust should be drafted as an accumulation trust. The trustee can have discretion to use the funds reasonably. The retirement account must be liquidated within 10 years.

Retirement account withdrawals that are distributed to Bill or used for his sole benefit (i.e., housing, addiction treatment, etc.) are taxed to Bill. Amounts withdrawn from the retirement account and retained by the trust are subject to income taxes at outrageous rates (i.e., federal tax bracket of 37% on net retained distributions over $16,650 in 2025). With the addition of state income taxes, almost half of these retained retirement account withdrawals will be consumed by income taxes.

4) This author believes that it may be possible for Jack to use the grantor trust rules to create a trust with Bill (the irresponsible son) treated as the grantor. This trust can have a person other than Bill act as trustee and control access to the funds. If the trust meets the grantor trust rules, then the trust is a "tax-disregard" entity and payment of taxable income to the trust is the same as payment to the beneficiary. This would allow Bill's trust to receive withdrawals from the retirement account, retain part or all of the amount withdrawn in the trust and have all of the income taxed on Bill's personal tax return.

   This concept is the currently recognized basis for the tax treatment for Irrevocable Life Insurance Trusts (ILIT) with Crummey withdrawal rights. This author believes that the tax rules that apply to those trusts should be applicable to this context. Under IRS Code §678, if the beneficiary is given a right to withdraw income from the trust the payment of the income to the trust is deemed payment of the income to the individual and grantor trust status is established for that income. However, if the individual actually exercises that withdrawal right, then the purpose of the trust is lost. So, the circumstances need to be crafted and administered cleverly to obtain the best result (see continued example below). See also Rev. Rul. 2002-20 involved payments from a charitable remainder unitrust (CRUT) to a 1st person SpecNT for the benefit of a disabled beneficiary. Because the SpecNT was taxed as a grantor trust, the IRS ruling treats the payments from the CRUT to the SpecNT as though the payments were made directly to the disabled beneficiary.

   Example: Continuing the facts in the example above, Jack creates two trusts: the first trust is Jack's normal revocable trust that is named as the beneficiary of the retirement account. Jack's trustee is given authority to control the retirement account by either:

   • paying retirement account withdrawals directly to Bill (or to pay expenses for Bill's sole benefit which is deemed a payment to Bill for tax purposes),

   • retaining those distributions in Jack's trust for Bill's future benefit (resulting in high income taxes for these retained account withdrawals), or

   • paying them to Bill's grantor trust (which is the second trust that Jack creates).

Bill's trust can achieve grantor trust status (with Bill treated as the grantor) if Bill is given a right to withdraw income paid to his trust. That withdrawal right can be limited and can lapses if not exercised within a reasonable time (i.e., 30 days) of written notice to Bill. However, to avoid potential gift tax consequences under §2514 from the lapsed withdrawal right, Bill should affirmatively release his withdrawal right (that release should be in writing and may cover future withdrawal events unless and until later revoked). Periodically, the trustee of Jack's trust makes withdrawals from the inherited IRA account and pays those withdrawals to Bill's grantor trust. The trustee gives Bill written notice of his withdrawal right. Bill is informed that he has these options:

- Option A: If Bill agrees to allow his withdrawal right to lapse, then the trustee will continue to pay the retirement account withdrawals to Bill's trust and those withdrawals will be taxed on Bill's tax return at Bill's tax bracket. The trustee will ensure that the tax due on these distributions to Bill's trust will be paid from the trust assets. The after-tax amounts retained in Bill's trust will be held for Bill's benefit and distributed pursuant to the terms that Jack created in Bill's trust.

- Option B: If Bill exercises his withdrawal right, then the trustee will stop sending retirement account distributions to Bill's grantor trust. In this event, all future withdrawals from the inherited IRA account will be held in Jack's trust and taxed at the substantially higher tax brackets that apply to a 1041 return. In this event, taxes will consume a much larger part of the retirement account withdrawals.

If Bill is wise, he will agree to follow Option A. As an incentive (Bill's additional "carrot"), if Bill cooperates, he will get a reasonable spending allowance in direct distributions from Jack's trust. If Bill cooperates and allows the trustee to distribute most or all of Jack's retirement account to Bill's grantor trust over the 10-year distribution period, there will be more net after-tax assets held in Bill's grantor trust for Bill's long-term benefit. This carrot & stick approach might be sufficient to convince Bill to not exercise his withdrawal rights.

Please also remember that the DBT (Jack's primary trust) will need to have an appropriate contingent individual beneficiary as a wipeout beneficiary to qualify as a DBT.

Warning: To the best of this author's knowledge, the IRS has never specifically blessed this concept in this context. However, this concept may be a solution that can help families with adult beneficiaries who are not able to prudently handle their own inheritance. More research, expertise and creativity will be needed to refine this or other ideas that may be helpful in these circumstances. This author expects other attorneys to craft many clever ways to creatively achieve similar results.

Warning: Choate in her latest Choate Update (Septemer 2025, page 109) discusses the concept of paying retirement accounts to a grantor trust in general. It is her opinion that most variations of naming a grantor trust as the beneficiary are likely not to work if the goal is to treat the beneficiary's grantor trust as the designated beneficiary of the retirement account (or as a see-through trust with the individual as the designated beneficiary). However, this example is a variation of that concept because this is an attempt to treat the distribution from a DBT to the beneficiary's grantor trust as though it was paid to the beneficiary directly. It is this author's opinion that this plan *should/may* work. But, that is only this author's opinion.

Planning Opportunity. This author believes that there is room for creative alternatives that are similar to this idea. We recently completed an estate plan where a young (early 30's) beneficiary is likely to inherit over $2,000,000 from his parents' retirement accounts. The parents are very concerned that with this windfall, the son would likely stop working live on the inherited assets for at least 10 years. We crafted an accumulation trust that allows the trustee to either pay the account withdrawals to the son or accumulate them. We crafted guidance to the future trustee to encourage the son to invest (and not spend) most of the after-tax proceeds from retirement account withdrawals. If son does this, he will be rewarded with generous trust distributions (the "carrot"). If son does not save most of the retirement account withdrawals that are paid to him, the trustee will accumulate them and let them be taxed to the trust at the trust's compressed tax brackets (this is "the stick"). The goal is to have oversight by the trustee to encourage the son to make better financial decisions and use his inheritance wisely.

7. **Non-Qualifying (Old) Trust:** This author was recently asked to analyze an interesting set of facts with the following challenging facts. Jack (age 75, which is after his RBD) died leaving $2,500,000 in his IRA account which listed his old (1992) trust as the sole beneficiary. The trust (an early version of a credit shelter trust) allowed distributions to his spouse and children. The trust did not qualify as a see-through trust (it was drafted before any of the relevant rules existed for distributions of retirement accounts to a trust so the attorney had no reason to draft it to meet those rules). Jack was survived by his spouse, Betty (age 74) and four adult children.

   The family had conflicting goals:

   • Betty (of course) preferred to have control of Jack's IRA account (a very normal reaction for anyone who recently lost a spouse).

   • Betty's other assets totalled approximately $2,000,000, so the family wanted to take advantage of the potential Minnesota estate tax savings of allocating the retirement account to Jack's trust to use part of his Minnesota estate tax exclusion amount.

But, the 1992 trust did not qualify as a DBT and would have to liquidate the inherited IRA rather quickly.

Betty had substantial income and wanted to take advantage of the longer distribution period which would exist if Betty was able to roll Jack's IRA into her own IRA account.

Solution:

- We determined that the default beneficiary on the investment company's master plan made the surviving spouse the default beneficiary. So, Betty, as trustee of the 1992 trust, disclaimed $1,000,000 of the IRA account. When the trustee of the 1992 trust filed the disclaimer, the disclaimed amount reverted to the plan's default beneficiary—Betty, as surviving spouse. This allowed Betty to roll this disclaimed amount ($1,000,000) to her own IRA account and take advantage of the longer distribution period. With normal spending and annual exclusion gifting to her children, Betty will likely be able to keep her estate below the $3,000,000 Minnesota estate tax exclusion amount for her remaining assets after her death.

- The remainder of the account, $1,500,000, which was not disclaimed was allocated to the 1992 trust. Because the trust was not a see-through trust and because Jack died after his RBD, the trust was treated as a non-designated beneficiary. As such, the $1,500,000 allocated to the trust was allowed to use the remainder of Jack's ghost life expectancy under the IRA mortality Table I (the "bad" chart). Jack's remaining life expectancy was 14.1 years. The trustee (Betty) is able to take RMDs based on that ghost life expectancy and allocate the funds either to Betty or to the children or retain them in the trust (remember that approximately $15,000 per year can be retained and taxed on the 1041 return at almost reasonable tax brackets) over the next 13.1 years. Because the remainder of the account is allocated to Jack's credit shelter trust, this amount avoids the 13% Minnesota estate tax that would have been imposed on these assets if Betty had rolled the entire account to her own IRA.

8. **Final Trust Example--Hybrid (Mix & Match) Plan:** Jack (age 85) dies in 2025 leaving behind his spouse, Betty (age 80) and three adult children. This is a long-term second marriage (15 years--they were married the year Jack retired and rolled his 401(k) account into his IRA) and Betty has a daughter of her own from her prior marriage. Jack and Betty own the following assets:

Home	400,000
Betty's brokerage account (not retirement)	500,000
Jack's brokerage account (not retirement)	600,000
Jack's traditional IRA	2,000,000
Jack's Roth IRA	300,000
Jack's life insurance	1,000,000
Total	4,800,000

Prior to his death, you helped Jack and Betty create the following estate plan:

a. *Jack and Betty create a joint, revocable trust that owns their home:* *400,000*

During their joint lifetime, the trust remains a revocable, grantor trust. Upon the death of either spouse, the entire trust becomes irrevocable. Because the home was purchased and maintained during their 15 years of marriage with relatively equal contributions from both spouses, the trust provides that the surviving spouse can live in the home indefinitely but must pay all costs associated with ownership and use of the home. Upon the surviving spouse's death or permanently moving out of the home, the home is to be sold and the sale proceeds divided with one-half given to each side of the family (i.e., to the surviving spouse if sold before that spouse's death and one-half given to the descendants, per stirpes, of any deceased spouse).

Drafting Hint: Any model join trust forms for a joint revocable trust should form a good foundation for this type of trust. However, custom drafting will be necessary to carefully craft provisions that meet the required goals of allowing the surviving spouse to have full use of the home, requring the surviving spouse to pay all normal costs of home ownership (if that is desired) and protecting the rights of the descendants of the deceased spouse.

b. *Betty's credit shelter trust holds the following assets:*

Betty's brokerage account (not retirement)	500,000

This account holds Betty's non-marital assets which she brought into the marriage. Betty's trust contains provisions that require that the trust pay the income to Jack for his lifetime (if he survives Betty) and the entire residue to Betty's daughter upon the death of both Jack and Betty.

Trust Administration Note: Although Jack has the right to the income from this account, he is confident that he will have plenty of income and assets to live very comfortably and fully intends to disclaim all rights to this trust upon Betty's death. That would allow the entirety of this trust to be distributed promptly to Betty's daughter shortly after Betty's death.

c. *Jack's credit shelter trust holds the following assets:*

Jack's brokerage account (not retirement)	600,000
Jack's Roth IRA (beneficiary to trust)	300,000
Jack's life insurance (beneficiary to trust)	1,000,000
	1,900,000

This trust has standard provisions requiring that trust income be paid to Betty each year. This author prefers to use a uni-trust distribution formula which gives Betty

a set percentage (3, 4 or 5%) of the trust assets annually. Other attorneys prefer to use a HEMS distribution formula of trust income and principal at the trustee's discretion if the trustee reasonably determines that Betty's other income and assets are insufficient to meet her reasonable financial needs. Jack's Roth IRA works well in this trust because it can continue to be held in an inherited Roth IRA account and grow tax-free for ten years after Jack's death. Then, it can be liquidated and invested with the other non-retirement assets.

Drafting Note: Many attorneys like to draft a credit shelter trust with "disclaimer" provisions which automatically give all assets in the decedent's trust to the surviving spouse unless the spouse disclaims them into the credit shelter trust. This author does not favor that drafting concept in a second marriage where the surviving spouse may not be inclined to be generous to the decedent's children. Instead, if the intended plan wants certainty that the right assets will be allocated to the right trust share, do not rely upon the survivor to exercise a disclaimer to accomplish the intended asset allocations to the right shares.

d. Jack's traditional IRA is split and given to the following trusts:

1) 40% to a conduit trust for Betty as sole beneficiary 800,000

• This trust is drafted as a conduit trust with directions to withdraw only the RMDs which must be paid promptly to Betty. This trust should qualify as a DBT with Betty qualifying as an EDB. Betty is age 81 in 2026 (the first trust distribution year) and her life expectancy is used to calculate RMDs.

• RMDs are calculated based on Betty's life expectancy. This author believes that Betty should be able to make the election contained in the SECURE Act 2.0 proposed regulations (of 10.5 years. Because Betty is the sole trust beneficiary, her life expectancy is recalculated annual (i.e., 2027: 9.9 years, 2028: 9.3 years, etc.). Although the balance of this trust share will likely decrease substantially, a combination of the re-calculated life expectancy and reasonable investment results will likely create a substantial income stream for most or all of Betty's life.

• Jack is confident that this income stream, along with income from his credit shelter trust, Betty's Social Security benefits (Betty's takes over Jack's $3,000 per month SS benefit) and the income and principal of Betty's own trust, will be sufficient to meet all of Betty's reasonable financial needs.

• Upon Betty's death, the remainder of this trust is paid to Jack's children (because this IRA was all a non-marital asset accumulated prior to Jack's marriage to Betty).

Drafting Note: Any good credit trust model forms should form a good foundation for this type of trust. However, custom drafting will be necessary to carefully craft provisions that meet the required goals and terms desired.

Drafting Note: See my comments on pages 63 - 67 regarding a conduit trust for the benefit of a surviving spouse.

2) 60% to an accumulation trust FBO Betty and Jack's children 1,200,000

• Because this is an accumulation trust, it is subject to the new 10-year rule and must be completely liquidated by December 31, 2035. If Betty lives more than ten years, this asset will have been exhausted before her death.

• RMDs must be taken each year based upon the age of the oldest trust beneficiary--Betty (age 81 in 2026, the first distribution year). The initial RMD is $114,300. Because Betty is not the sole trust beneficiary, the life expectancy denominator is not recalculated annually so future RMDs are calculated by subtracting one from the denominator each year (i.e., 2027: 9.5, 2028: 8.5, etc.). Because Betty's life expectancy is near the 10 year distribution period, the RMDs will almost perfectly amortize the account liquidation over the 10-year period.

• Because Jack is confident that Betty's financial needs will be met with other assets, the trustee is directed to distribute all IRA withdrawals annually directly to Jack's children unless the trustee determines that Betty has or is likely to have unmet financial needs. In that event, the trustee may either retain IRA withdrawals (these will be taxed to the trust as the compressed 1041 tax brackets) or may make distributions directly to Betty.

• Upon Betty's death, the remainder of this trust is paid to Jack's children (because this IRA was a non-marital asset accumulated prior to Jack's marriage to Betty).

• This trust will be used to pay the majority of Jack's IRA to his children in a reasonable manner and allow extra financial protection for Betty in the event of an unforeseen financial crisis during the first ten years after Jack's death.

SUMMARY: This plan is an attempt to illustrate that sometimes creativity is needed to meet multiple conflicting goals, including:

a. Ensuring that the primary non-marital assets are given to that spouse's descendants and not to the descendant(s) of the surviving spouse.

b. Reducing estate taxes due at the surviving spouse's death. If Betty dies first, Jack's estate still has a substantial Minnesota estate tax exposure. If Jack dies first and if he estate elects QTIP treatment for the portion of the IRA given to the conduit trust, Jack's estate has only a modest Minnesota estate tax exposure which could be solved by using a QTIP election on a portion of his brokerage account (assuming that the trust is crafted correctly to allow that QTIP election).

c. Ensuring that whichever spouse survives, there are substantial assets available for the financial support of the surviving spouse.

D. Gifts to Charities. For clients with charitable intent, at least these good options remain:

1. **Qualified Charitable Distribution (QCD).** For clients over age 70 ½ with a traditional IRA, during the account owner's lifetime, this author recommends that all substantial charitable contributions be made using the QCD concept discussed on pages 13 - 14 of this outline.

2. **Direct Distribution To Charity.** Clients who own retirement accounts and want to give post-death gifts to charity should be encouraged to make those charitable gifts directly from their retirement accounts. Making gifts to charities from a retirement account is a very tax-efficient way to help the charity because the charity does not pay income tax on these retirement account distributions and it preserves other after-tax assets to give to individual beneficiaries. Specific charities can be named as the direct beneficiary on the retirement account.

   Warning: A pecuniary gift (i.e., a gift of a set amount like $10,000) in a will or trust does NOT carry DNI out to the charitable beneficiary or qualify for a charitable deduction. Such a gift leaves the taxable assets to individuals to inherit and gives after-tax assets to the charity. Remember that IRS Reg. §1.652(b)-2(b) prevents a will or trust from allocating specific types of income (i.e., ordinary income from retirement accounts, etc.) to a charitable beneficiary unless the allocation has "economic effect independent of the tax consequences". So, if your client intends to make charitable gifts at death (especially a pecuniary gift of a set amount) and if the trust (or probate estate) will receive any distributions from a retirement account, this author strongly recommend making those gifts to charity directly from the retirement account.

3. Donor Advised Fund (DAF). This is a wonderful option for a charitably minded client who wants to make donations to charity upon the retirement account owner's death. Choate 7.5.03.

• The DAF can be listed as the direct beneficiary for part or all of the retirement account.

• The DAF can be scheduled to distribute the gift to the charity(ies) in a lump sum or over several years with little or no administrative cost.

• The decedent may create a list of the specific qualified charities which will receive the distributions. It is relatively easy for the client to later amend that charity list to add or delete specific charities and/or to change the amount given to specific charities.

• Alternatively, the DAF may allow a family member or friend to "advise" the fund regarding which charities should receive distributions by naming that person as the

successor donor advisor. Although the fund is not legally required to follow this advice, a reputable fund will likely follow this advice as long as the advisor designates a qualified charitable organization. This allows the individual (i.e., an adult child) to receive the intangible benefits of being able to direct charitable gifts for an indefinite period of time.

• Please remember that although a DAF may not receive a Qualified Charitable Distribution (QCD) from an IRA account, a DAF is a wonderful tool to use as a post-death beneficiary of any retirement account.

4. **Charitable Remainder Trust (CRT).** For clients who want to give a person an income right before the gift to the charity, a charitable remainder trust may be a very good option. Such a trust would allow the account owner to give an individual beneficiary a lifetime income and give any remaining assets to the chosen charity(ies) after the death of the income beneficiary. This author has used this concept effectively to help clients with the appropriate charitable goals.

   Example: Jack (age 85) dies leaving a surviving spouse, Betty (age 80). Jack owns an IRA account worth $1,000,000. Jack is very committed to his favorite charity (he helped found the charity and served on the Board of Directors for years). Jack wants to ensure that Betty has enough income to live comfortably. This is Betty's second marriage and Betty has a child (not Jack's child). If Betty is the direct beneficiary of Jack's IRA, Betty will likely list her son as the beneficiary on the account and Jack's favorite charity will likely get nothing from the account.

   • Jack creates a Charitable Remainder Trust (CRT) and names the trust as the beneficiary of his IRA.
   • After Jack's death, the CRT promptly liquidates the IRA account. The liquidation of the IRA by the CRT does not create immediate taxable income because of the charitable nature of the CRT. Because there is no tax due, the CRT invests the entire balance in appropriate long-term investments. Because the IRA is liquidated, there is no need to take RMDs in future years.
   • The trust makes annual income distributions to Betty. Those distributions can be structured as:

      ○ Charitable Remainder Annuity Trust (CRAT): a specific amount (i.e., $50,000 per year) regardless of the trust balance, or,

      ○ Charitable Remainder Unitrust (CRUT): a specific percentage of the trust balance between 5% and 50% per year.

   • Because of the "worst-in, first-out" rule, all income distributions made from the CRT to Betty (up to the cummulative total of $1,000,000) will be ordinary income.

• Upon Betty's death, all remaining trust assets ($1,000,000 plus investment returns minus the distributions to Betty) are paid to the charity.

• If Betty is the only non-charitable beneficiary, then the entire IRA given to the CRT escapes estate tax because Jack's estate gets a marital deduction (for the income rights given to Betty) and a charitable deduction (for the remainder interest given to charity) against estate taxes.

• A CRT may not work effectively for a younger beneficiary (under 30?) because of the complex rules requiring that a sufficient amount of assets remain available for the charity upon the death of the individual beneficiary.

Final Thoughts:

Natalie Choate is arguably the nation's foremost expert on retirement account distributions. The citations to "Choate" in this outline are to her seminal book, Life and Death Planning for Retirement Benefits, 8th Edition (2019). In light of the SECURE Act, this author is hoping (praying???) that she publishes a 9th Edition. Her website still hints that a new edition may be published but shows no scheduled date for any such release.

Choate's website, https://ataxplan.com/secure-act-update/ has a link to her SECURE Act and CARES Act Update (her latest Update was released in September 2025). This author used that resource extensively in drafting this outline. If you have questions not addressed by this outline, please check this Update.

All advisors are recommended to read all of the regulations published by the IRS on these topics. However, be warned that the authors of the regulations have a writing style that may be rather difficult to follow.

Because these changes are so dramatic, every professional needs to diligently monitor all available resources for further explanations and insights into these new rules and for updates to the information currently available. Among the best authors, consider reviewing information published by Ed Slott and Robert Keebler. In addition, many investment companies have created summaries of these rules that may be helpful.

In addition, this author is very aware that different people learn differently. This outline is the author's best attempt to explain the law as clearly as possible. However, every author has their own writing style. It is very likely that some (perhaps many) advisors will learn better (or at least differently) by reading Choate's Update and other resources.

Finally, this outline is still a work in progress. Every author has their own interpretation of the nuances of some of these rules. If you believe that any information in this outline is inaccurate or incomplete or if you read any other resource that reaches different conclusions or makes different recommendations or if you want to discuss any of the information in this outline, please contact me at:

Bryan Jamison
Jamison & Jamison, P.A.
Shoreview, MN 55126
651-482-9330
Bryan@JamisonLaw.net