WAUKESHA COUNTY ESTATE PLANNING COUNCIL

November 15, 2018

ACTEC IRA SURVEY BEST PRACTICES
IRA Beneficiaries and Passage of
IRA Assets at Death

Presented By:

John T. Bannen
Quarles & Brady LLP
411 East Wisconsin Avenue, Suite 2400
Milwaukee, WI 53202
414/277-5859 or john.bannen@quarles.com

ACTEC IRA SURVEY BEST PRACTICES:
IRA BENEFICIARIES AND PASSAGE OF IRA BENEFITS AT DEATH

November 15, 2018

A. Paying IRA Benefits to Revocable Trust.

1. It is quite common for planners to make IRA benefits payable to revocable trusts as a contingent beneficiary after naming spouse as primary beneficiary.

    a. This coordinates the distribution of assets with the various trusts.

    b. Though less common now, this course runs the benefits through the family trust, marital trust or outright to spouse formula.

2. There are administrative problems, however, with running the benefits through the revocable trust.

    a. You may want the benefits to ultimately be held by the family trust, or pass outright to the children, or perhaps to separate trusts for the children.

    b. Creating separate trusts for children is perhaps the most common approach because IRA benefits are usually paid to separate trusts to get better stretch out treatment when the assets ultimately go to the children. Such trusts usually include conduit language which will simplify the determination of the oldest measuring life.

    c. Trusts provide creditor protection, both inside and outside of bankruptcy.

3. The problem here is that most IRA sponsors insist on paying the benefits to the revocable trust, and not the trust that will ultimately distribute the assets.

    a. The trustee could take a distribution of the entire IRA balance, but doing so accelerates income.

    b. The revocable trust could continue going forward making distributions to the downstream trusts, but this is (i) complex, (ii) not authorized by the trust document, and (iii) unreasonably expensive.

    c. IRA sponsors will typically insist on paying inherited IRA account to revocable trust.

    d. You say – look, the revocable trust is just a conduit to (i) the kids, (ii) the kid's trust, or (iii) the family trust. Just pay it directly to the ultimate beneficiaries. Instead of A –> B –> C, just A –> C.

4. The response is "can't do it; our beneficiary designation says pay to revocable trust and that is what we are going to do."

5. You say trust has the right to assign its right to ultimate beneficiary.

6. They say (i) can't/won't do it, or (ii) that accelerates the income.

7. You say IRD passing as a result of death doesn't accelerate and any distributions trust-to-trust is tax-free. You cite Code 691 and Rev. Proc. 78-406, 1978 C.B. 157 and numerous PLRs.

8. They say fine, get a PLR; you say too expensive $25,000; they say they need a PLR.

9. By now you have spent $5,000 of legal time and you are stuck. At some point, the client might blame the estate planner, and if that is you, this is something we would like to avoid.

10. If you find yourself in this situation (not an optional position) the solution is to:

    a. Open inherited IRA in name of revocable trust. John Doe, deceased IRA f/b/o revocable trust. Have the funds transferred in a trustee-to-trustee transfer; funds should not be paid directly to the IRA beneficiary.

    b. IRA sponsor has paid to beneficiary, to revocable trust; can't be criticized or held liable.

    c. Open up separate additional inherited IRAs in name of ultimate beneficiary's (kids, kid's trusts) and do a trustee to trustee transfer. Tax free – Rev. Rul. 78-406.

    d. You as trustee have right to direct distributions (i) administrator is protected if they follow your directions, (ii) still have to convince them this is tax-free, but the Rev. Proc. says that trustee to trustee is not a taxable distribution.

11. IT IS SO MUCH SIMPLER TO SIMPLY NAME KIDS/KIDS TRUSTS DIRECTLY as contingent beneficiary after spouse, e.g.,

    a. I have an IRA, my spouse, Carol, has died. I have three children, I will have each of the children's GST trusts as beneficiary.

    b. Beneficiary: 1/3 – Ryan M. Bannen as trustee of Ryan M. Bannen Trust, u/a dated (date of revocable trust). Same for other two children.

    c. Inherited IRA Account: Open account John T. Bannen deceased, IRA f/b/o Ryan M. Bannen Trust, u/a dated date of revocable trust.

12. If you must run through revocable trust due to formula, anticipate the two step process I have described.

    a. Inherited IRA revocable trust.

    b. Transfer to inherited IRA for ultimate trust.

    c. Expect to have to write a letter and cite Rev. Proc. 78-406 to get tax-free transfer.

    d. Convince the IRA administrator that you do not need a PLR; offer an "opinion letter" saying that this is how you interpret the law to obtain the desired result.

13. If the IRA administrator is still pig-headed and reluctant, open inherited IRA in name of the trust, transfer funds to revocable trust account.

    a. Then open IRA exactly in some name friendly IRA sponsor, Fidelity/Baird.

    b. Transfer.

14. I have some sympathy for the IRA sponsor.

    a. They are taking the additional risk that your assignment is correct.

    b. They don't have a contract with the revocable trust who is the beneficiary, setting up a legal frame work to make the distribution. Indemnities and releases are not in force.

15. BEST PRACTICE: If IRA benefits will just be passing through the revocable trust to an outright distribution or another trust, NAME THAT BENEFICIARY DIRECTLY. Don't run the benefits through the revocable trust.

16. You will need to address possible GST issues: exempt or non-exempt trusts. If there are both, non-GST is best if RMDs go to non-skip persons.

B. Beneficiary Designations.

1. Beneficiary forms have little boxes.

2. If what you want to do doesn't fit into the boxes, attach addendum. Lawyers love addendums.

3. IRA administrators hate addendums.

4. IRA administrators are directed custodians or directed trustees.

    a. They want no discretion.

b. They don't want to interpret anything.

c. They don't want to consider any external or extrinsic facts, except maybe that a beneficiary has died and then they will want a death certificate for that.

d. They want to be told what to do (i) clearly, (ii) without exercising any discretion, (iii) without taking into account any facts, (iv) they don't want a series of "if this, then that," decision trees, (v) they want to be directed to pay 1/3 to Tom, 1/3 to Dick, and 1/3 to Harry.

e. They (i) want it simple, (ii) want to be told EXACTLY what to do, so (iii) nobody can complain or sue.

5. When Dan Wentworth of Fidelity meet with the ACTEC Employee Benefits Committee, he came in his asbestos suit, ready to be burned and he was; but he made several good points:

    a. He said "Look! We charge $75 per year to be IRA custodian."

    b. "For that fee, you don't get the services of a trustee."

    c. He said "If you have lots of complicated conditions and formulas, put those in the trust and let the trustee worry about them, DON'T make the $75 per year IRA plan administrator to be a trustee."

    d. This I thought was valid.

6. While all IRA sponsors accept addendums to their beneficiary forms, those which are most easily accepted share the following characteristics:

    a. Provide a concise statement of the dispositive scheme

    b. To the extent possible, the names, social security numbers and dates of birth of known beneficiaries (don't worry about trust beneficiaries of a continuing trust; must identify oldest beneficiary in other paperwork)

    c. Provisions which do not require knowledge or confirmation of extraneous facts, persons or values

    d. If extraneous facts, persons or values are needed, then identify the person who will provide them (e.g., trustee of revocable trust) and state that the IRA administrator can rely on the information so provided

    e. Acknowledge that the IRA sponsor is acting as a directed agent or custodian and does not exercise discretion

f. Acknowledge that the IRA sponsor does not give tax advice and the beneficiaries have their own tax counsel who are responsible for the tax consequences of the proposed dispositive scheme

g. If the sponsor has a specific protocol for directing the IRA sponsor with respect to distributions, coordinate the beneficiary designation with this protocol (largely trial and error since it is usually impossible to talk to anyone regarding something out of the ordinary)

h. The most common problem is a provision to give a fixed percentage of client's total estate (trust assets, IRA benefits, etc.) to a charity; consider directing the IRA administrator to give an amount designated by the trustee of the revocable trust to charity and the rest to children's trusts or other beneficiaries

C. Per Stirpes Beneficiary Designations.

1. If you are not doing GST planning and you name the children directly, you would typically like the shares to go to the issue of a deceased child. Some clients (maybe most clients) may not return to you for a review of their plan if a child dies; it would be nice to accommodate client's wishes without the need for a second visit. NOTE: this is one reason to name the child's trust as the beneficiary.

2. Some forms anticipate this desire and have a box to check to accomplish per stirpes beneficiary designations, but only 4 of the 13 surveyed do this. There is a trend in this direction among IRA administrators.

3. If there is no per stirpes box, providers vary in terms of what their form provides; many say that the proceeds of the deceased beneficiary would pass to the surviving beneficiaries; this would cut out the children of a deceased child.

4. Note, even if there is a per stirpes box, clients are unlikely to get this right or understand what it means.

5. This leads to a Natalie Choate comment that attorneys should always complete IRA beneficiary designations; the matter is too complex and often too important to let the matter be handled by clients on their own. Given a chance, more often than not, client will get IRA beneficiary wrong. This could lead to assessing blame on the estate planning attorney. (Recall the maxim of the fecal matter hitting the fan.)

6. If the client's estate is large enough for us to do the planning, clients have typically respond favorably to my suggestion that the children get their shares in a GST-type trust.

a. I emphasize divorce and creditor protection and state estate tax benefits, if not federal. (Fifteen states still impose a separate state estate tax with a variety of exemptions, some as low as $675,000.) Children move and, even if not subject to state estate tax currently, they might be later.

b. If the child's GST trust is named as beneficiary, many of these contingent beneficiary concerns go away because the child's trust provides what happens to the benefits and also provides protection until the child reaches a suitable age, so no need to worry about UTMA or guardianship. Indeed, this is what Daniel Wentworth of Fidelity suggests, put all the complications necessary to fully implement the estate plan in the trust provisions, NOT in the beneficiary designations.

7. A path of least resistance which many planners may follow is to name spouse as primary beneficiary, secondary children in percentages, and simply assume that if a child dies, the beneficiary form will be revised.

   a. The death of a child does typically spark a review of the estate plan, but if it does not, then the omission of the issue of a deceased child could arise. (Clients frequently call about the births of grandchildren – not usually an issue – so hopefully they would call if a child dies.)

   b. A functioning two-year reminder system would likely address the issue, but I think some lawyers are not as disciplined, nor are clients always responsive to the reminders. (Could be a case of the child who cried "Wolf!".)

   c. Death of a child should also trigger a review of any irrevocable life insurance trusts the client has created; if GST exemption has not been allocated to the trust, consider allocating exemption to cash value as opposed to death proceeds when insured dies and face value is paid. There is no generation promotion in an irrevocable trust.

D. Spousal Rollovers.

1. If an IRA owner dies, survived by a spouse, the spouse is often the desired beneficiary. There is a possible exception if there has been a second marriage.

2. Spousal rollovers have a number of advantages:

   a. If SPOUSE is under 70 RMDs can be delayed until spouse is 70.

   b. If DECEDENT is under 70, RMDs can be delayed until decedent would have been 70 even if spouse is over 70.

   c. The rate at which RMDs come out is made lifetime table (spouse + beneficiary 10 years younger, thus a slower distribution runway and more tax deferral).

d. But the most significant advantage of a spousal rollover is that upon death of spouse, RMDs are recalculated (slower) for child's life expectancy. (Subject to law changes attempting to kill the stretch out.)

3. According to Natalie Choate, a trust is always the worst choice from a tax perspective when a spouse survives; there are probably some exceptions, but they have to be more important than the tax issues.

4. If a rollover is desired, it is obvious that the spouse should be named as beneficiary.

5. When this doesn't happen, it is usually a mistake.

   a. No beneficiary was named. Default beneficiary is often estate, though the tendency of modern, enlightened IRA agreements is to provide as default beneficiary first spouse, second children of the IRA owner. Both approaches have the risk of unfavorable consequences, but spouse as beneficiary would more often than not be the desired result.

   b. The blank beneficiary form often occurs when IRA has been transferred to a new provider (usually without consulting estate planner) and no beneficiary is named as the investment advisor has just assumed that the beneficiary should be the revocable trust, or worst yet, the estate.

   c. The estate of a deceased IRA owner's beneficiary is not a great choice for a number of reasons, (i) it subjects the assets to probate, (ii) if the IRA owner is under age 70 1/2, the payout period is five years, (iii) if the IRA owner is over age 70 1/2, the payout period is the deceased account holder's remaining actuarial life expectancy, which, incidentally, is often more than 5 years.

6. Only a spouse can do a spousal rollover. True, beneficiaries can set up inherited IRA accounts, but they are not as good as a spousal rollover. Inherited IRAs do not have the 70-1/2 delay rollover, joint life table recalculating.

7. What to do? Client wants spouse to be primary beneficiary, but IRA owner's estate or revocable trust is named as default beneficiary. Only a surviving spouse can roll over. Trusts and estates are not eligible to roll over.

   a. The IRS through countless PLRs has allowed spousal rollovers under a certain set of circumstances. (See Natalie Choate's book, "Life and Death Lessons for Retirement Benefits", Section 3.2.09)

   b. Requirement #1, the named entity (the trust, estate) must be merely a conduit, i.e., it provides for an outright distribution to the spouse, and

   c. Requirement #2, the surviving spouse, without the consent of any other person, must be able to make the distribution to him or herself; HESM standard is not an impediment so long as the spouse is the sole trustee, though one assumes it must also be a proper exercise of discretion. (See PLRs 2009-34046, 2009-35045, 2009-50003)

  d. If spouse has a co-trustee, consider having the non-spouse trustee delegate all power relating to the IRA to the spouse trustee.

  e. In this instance the PLRs hold that a spousal rollover can be done.

  f. If IRA sponsor doesn't do a trustee to trustee rollover, but insists on paying out the income, tax reporting is interesting, but taking the IRA proceeds into the entity’s income and then showing the IRA proceeds distributed to the spouse separately on the K-1 as IRA proceeds, then reporting the proceeds on Line 16(b) as non-taxable (because they were rolled over) covers the bases.

8. So what is the problem here?

  a. Most IRA sponsors readily agree this can be done, but consistent with the authority you cite to them (largely PLRs), but sometimes they insist you get a PLR.

  b. Filing fee is $25,000 plus legal fees.

9. Most clients would rather not pay for the PRL.

  a. If the lawyer who did the planning is also doing the estate settlement, client will probably suggest the lawyer should pay for the PLR.

  b. So what can be done?

10. Ten of the 13 sponsors participating in the survey will allow the rollover, without the PLR, but getting them to do so is often like negotiating the Iran nuclear arms agreement.

  a. You almost always get the request for PLR and then have to talk the IRA sponsor off the ledge. This dance is usually satisfactory, but is mildly expensive and frustrating. Lawyer may need to do an “opinion” letter that the transaction is permitted under the law. Usually releases and/or indemnifications are involved.

  b. ACTEC has on three occasions asked IRS for a Rev. Rul. that this sort of conduit rollover is permissible as a general rule, but never received one. Maybe someday.

11. The best practice is to make sure spouse is named as direct beneficiary if you want to do spousal rollover.

    a. If spouse is not direct beneficiary.

    b. Hope that you qualify for the conduit procedure or can create it by creative construction and distribution.

    c. Hope you are not the one who was asleep at the switch when the entity got named as a beneficiary and the train went off the tracks. (If I do not do the IRA beneficiary form, I do a specific letter on beneficiary changes and specifically state that these changes are their responsibility and that I am relying on them to make them.)

    d. Hope you can convince the sponsor to do the rollover, hopefully trustee-to-trustee to simplify tax reporting.

    e. If not, establish inherited IRA in entity, move to another responsive IRA sponsor, e.g., Fidelity, Robert W. Baird.

E. Death of Beneficiary Before Benefits Are Taken.

1. I didn't think much of this question when the survey was being put together.

2. Issue here is decedent dies having named individual beneficiaries.

3. But before the beneficiary either takes a lump sum distribution or establishes an inherited IRA and transfers the funds, the beneficiary dies.

4. Issue is who gets the benefits?

5. Problem here is, it is not immediately apparent what the answer should be, and it probably depends on what the IRA agreement says, but sometimes the IRA agreement doesn't say anything, so then what?

6. There are four possibilities.

    a. IRA participant could direct what happens in the beneficiary agreement; likely to be a custom beneficiary attachment with all efforts attendant to issues. Not a common provision.

    b. Could be that the surviving primary beneficiaries named by the IRA account owner receive the benefits; a beneficiary form may have that language. (And I have seen a number that say this.)

    c. Could be that the contingent beneficiaries receive the benefits; some beneficiary forms may have that language.

d. Could be that the beneficiary's estate is determined to receive the benefits; this is the most common choice if the IRA agreement is silent on the issue. That makes some sense. Being named beneficiary is a vested right, the assets associated with that right pass with beneficiary's estate (think probate). The beneficiary's life expectancy would continue to be used.

7. What can be done proactively so this is not a problem?

   a. If the attorney knows beneficiary has one foot in the grave and the other on a banana peel, DO SOMETHING (disclaim – if that works) OR DO INHERITED IRA PROMPTLY.

   b. The planner could read the IRA adoption agreement and beneficiary form to see what it says (unless IRA is quite large, the planner is not likely to get paid to do that).

   c. Roll the dice, take whatever comes up; likely the estate of the beneficiary unless the beneficiary form or the IRA agreement specifically deals with the issue.

   d. Or simply ignore the issue; hope it never happens.

   e. Honestly, this has never happened to me, but it has happened to enough ACTEC committee members to make it an issue on the survey.

8. I think the best practice is sensible:

   a. See if your beneficiaries are healthy.

   b. Determine promptly if a rollover should be done. Resolve the disclaimer issue THEN DO THE ROLLOVER, ESTABLISH THE INHERITED IRA ACCOUNT! Note, owner of the inherited IRA should name a beneficiary, or if not, then would repeat this process, i.e., rights to IRA benefits passes in beneficiary's estate.

   c. Best practice is to promptly establish inherited IRA account.

   d. Recall 9/30 after date of death beneficiary designation date and 12/31 established account to get separate life expectancy, but don't run this decision to the end of the string.

   e. Recall Natalie Choate's advice – This is complicated, the results of failure are disastrous; if there is a tax melt-down, and the estate settlement attorney is bound to be blamed. Remember the fan and the fecal matter.

F. Durable FPOA.

1. The question here is what can a power of attorney do with respect to an IRA account if the IRA owner is disabled?

2. Over my years as an estate planning lawyer, I and all the other grey-haired, crusty, conservative Boomers have seen what some would consider a steady erosion of the sanctity of the estate plan.

   a. The old guard (I don't necessarily include myself in this category) would have the testator say "I said what I said and I mean what I said." You can't change my words in my plan. I took my finger off the checker, a card laid is a card played. That is the old-fashioned conservative view.

   b. The powers added to the Uniform Power of Attorney Act, trust protectors, non-judicial settlement agreements and decanting set up a choice of "what does the trust say? I don’t know. Tell me, what you want it to say? No trust is irrevocable. Of course, you could lock out UTC changes by stating categorically that your provisions serve a material purpose, but that seems a bit too far in the other direction.

3. In the context of IRAs, this controversy typically comes down to whether POA has the ability to name or change beneficiaries.

4. I think it is safe to say that no IRA sponsor will allow a FPOA to change an IRA beneficiary without explicit language in the power itself, or the state law governing the power, and even then it is easier to have it stated directly in the power.

5. There are times when it would be especially useful to have the power to name a beneficiary or at least the power to continue a beneficiary named in a previous IRA adoption agreement, e.g., when an account is moved from one provider to another; this is something which happens from time to time for where the IRA owner (i) needs to move because of fees, (ii) needs to move because of investment performance, or (iii) a trusted advisor moves firms to get a better deal.

   a. It would be a shame if this otherwise justified move could not be accomplished just because a successor beneficiary could not be named.

   b. I have also seen a general power to name spouse and issue or trusts for their benefit added to the FPOA.

   c. Another legitimate change would be to fulfill charitable bequests provided in the estate plan. Nothing better than fulfilling charitable bequests at death than with benefits. Also, consider providing for a charitable rollover in the financial power of attorney. (This will be more common in an era of $24,000 standard deductions for married clients.) Note, your document would need to provide that the charitable bequest is reduced if assets pass outside probate or the trust to satisfy the charitable bequest. I would avoid using the word “satisfy” to avoid the risk that IRD is recognized by satisfying a pecuniary bequest.

d. In these limited circumstances I should think a power to name a beneficiary is acceptable and I think even the old guard would approve.

e. Be careful adding a power to change beneficiaries that must be consistent with the estate plan; how does IRA plan sponsor know if this condition has been met? Remember, IRA sponsors are allergic to situations where they have to exercise discretion and are paranoid about liabilities. Letter from estate planning lawyer; could be ok, but presents an additional obstacle.

6. Putting aside the change of beneficiary, IRA administrators should be comfortable letting FPOA do almost everything else, though a charitable rollover would need to be coordinated with the gifting power in the financial power of attorney.

   a. Offer an affidavit that to agent's knowledge power has not been revoked.

   b. Also affidavit that principal is alive. Note, Wisconsin statutes provide a form suitable for this purpose.

   c. If springing, evidence of disability satisfactory to IRA sponsor (I tend to make FPOA for older people effective immediately (crossover 70+?).

   d. Note, Florida statutes no longer provide for a springing power of attorney. All powers of attorney in Florida must be effective immediately, rather a “meat cleaver” approach to the issue of determining the disability of the principal.

7. Obviously it is better if what you want to do is specifically listed in the FPOA or in the statute describing powers that a statutory POA grants; not fatal necessarily, but it makes your job easier.

8. If IRA is big:

   a. Owner is older, possibly failing.

   b. Consider using IRA sponsor's own paperwork to establish agent's co-authority.

   c. I did this with my children's Roth IRAs which I fund.

   d. Authority can be partial.

      1. Do everything except request distributions (which I chose for my kids).

2. Authority can be full, agent can do everything and request distributions (this would typically be needed for disabled client).

3. This is not a springing power.

4. It is on their forms, it is done while principal is competent and is able to jump through any hoops needed to make it work, such as a medallion guarantee.

5. Using the IRA sponsor's forms when the IRA owner is competent and can jump through all the necessary hoops (many of which are unknown to the estate planner) may be the best practice for the failing owner of a large IRA.

G. IRA Benefits Payable to a Child, Including Minor Children.

1. Whether to pay IRA assets directly to adult children or to a trust for children usually involves consideration of the advantages and costs of a trust.

a. If assets are small, trust probably isn't practical from an administrative cost perspective, especially if there is to be a corporate trustee or in fact, any trustee that charges a market rate fee.

b. If children are responsible, can handle debt and can handle spending well, the children seem monogamous, an outright distribution is (i) simple – something clients like, (ii) cheap – another thing clients like even more than simplicity, and (iii) flexible something lawyers promote in estate planning every day. BUT INHERITED IRAs OUTSIDE SPENDTHRIFT TRUSTS ARE NOT PROTECTED FROM CREDITORS IN BANKRUPTCY PER CLARK CASE UNLESS A SEPARATE STATE LAW PROTECTS THEM FROM CREDITORS. (<u>Clark v. Rameker</u>, 134 S.Ct. 2242, (2014).) (Note, a number of states, Wisconsin not included, have in effect reversed Clark by extending state exemption from creditors statutes to inherited IRAs.

c. There is a predilection among some estate planners (I am one) to create GST trusts for children if each receives $1 million or so. Typically conduit language is incorporated in the GST trust (i) the class of beneficiaries is child and issue, (ii) trustee may apply benefits for benefit of any member of the class, (iii) must distribute RMD, but trustee can choose a beneficiary who is not in bankruptcy (obviously in the bankruptcy context – child should not be trustee), (iv) I am convinced this works from a creditor point-of-view – assets in spendthrift trust are EXCLUDED from the bankruptcy estate under the other applicable law exclusion language of the Bankruptcy Code; spendthrift law is other bankruptcy law. I believe this is value added estate planning, but I admit that only one of my clients ever went into bankruptcy – he didn't have any inherited IRAs. (A number of my clients' children have gone into bankruptcy, causing issues with insurance trust withdrawal rights, though.)

2. When IRA benefits are paid to a minor child, it is usually a mistake – a child cannot legally enter into contracts or manage money; no inherited IRA can legally be set up. The child even lacks the ability to legally request distributions.

    a. The client may on his or her own initially have named minor children.

    b. Maybe there was a box that a client checked that named issue as contingent beneficiaries.

    c. More probably, a child died and the deceased child's issue are the successor beneficiaries; they are the unintended consequence of an unexpected death. (Recall the need to review estate plans if a child dies.)

    d. Perhaps no beneficiary was named; modern IRA agreements often provide spouse as beneficiary where there is no completed beneficiary form, but perhaps there is no spouse; then IRA agreements say that issue are beneficiaries OR MAYBE

    e. Attorney is working with a client who wants to name grandchildren and doesn't use trust.

    f. Possibly a disclaimer which is made to improve the length of the stretch causes benefits to be paid to a minor.

3. If trust is not used to manage assets passing to a minor, then next best thing is an UTMA custodian.

    a. Uniform law allows donor to name a custodian to manage assets of a minor (18 or 21 depending on whether state updated from UGMA).

    b. An UTMA arrangement is not a trust; client creating the UTMA account can't give custodian a standard.

    c. Custodianship and protection typically ends at age 21.

    d. UTMA custodians are not the most protective arrangements, but have the advantage of being cheap and easy, two things clients love until they produce unwanted results that could have been addressed by something more complicated.

4. There are a number of ways to invoke UTMA in the context of an IRA.

    a. Probably the best practice is to name the custodian in the beneficiary designation form itself, e.g., "Uncle Mark as custodian for Jennifer, a minor, under WUTMA."

    b. The client could also name the custodian in another document such as a will or trust (i) it is better to provide a specific name rather than a relationship (otherwise need to prove relationship to the IRA administrator), (ii) best practice maybe to have a general statement that revocable trust trustee shall be UTMA custodian for any IRA assets payable to minors (note these are not assets paid to the trust – but rather this is a nomination of the person who is the trustee to serve as the non-trustee custodian under UTMA), (iii) if trustee declines, UTMA says fiduciary can appoint a successor – thus naming the trustee is just a mechanism to get the custodian that the facts of the case require at the relevant time, hopefully far in the future.

    c. Clients often do the same with respect to the successor for § 529 plan ownership, but this is better done on the § 529 document itself.

    d. Interestingly, the UTMA custodian cannot name a beneficiary of the IRA should the minor die; benefits must be paid to the child's estate until child is 18 and has legal authority to name a beneficiary.

5. While UTMA statutes vary, it is usually possible to have a family member hold the assets in the IRA if the value of benefits is under $10,000 even if no UTMA custodian is named.

6. If benefits exceed $10,000 in value, and an UTMA custodian is not named and IRA sponsor is "sticky" client may have to appoint a guardian of the minor's estate.

    a. Can't just let the assets sit until age 18 because of the RMDs.

    b. Skipping RMD distributions would rack up 50% penalties for failure to distribute.

7. If child is over age 14, UTMA permits a child to choose a custodian from a list of eligible family members.

8. Estate planners should not just assume that an UTMA custodian can be named after death; there is a need to be proactive in the estate planning process to actually name the custodian.

H. Spousal Consent.

1. All estate planners have seen IRA beneficiary forms which require spousal consents.

    a. If the spouse is not the beneficiary, then the spouse must consent to payment to a non-spouse beneficiary, e.g., children of first marriage, or trust.

    b. Interestingly, the current requirement applies to 100% of the account balance even though the spouse's interest can never under the marital/community property laws, exceed 50%; thus, spousal consent laws go far beyond any community property rights which they are arguably trying to protect.

    c. If client names spouse as beneficiary of 50% of his or her account, why should client need spouse's consent to give away his or her own 50%. There is no logic under the marital/community property laws to support a spousal consent as to the entire account.

    d. This does parallel a provision in qualified plans and contained in the Retirement Equity Act where spouse must be 100% beneficiary. Unless there is a spousal consent to a non-spouse beneficiary, spouse remains the 100% beneficiary. The consent practice may have grown out of the mandatory joint and survivor annuity for pension plans – and brings essentially the same rule to non-annuity based individual account plans, such as profit-sharing/401(k). Note, the Retirement Equity Act (a part of ERISA) does not apply to IRAs. Thus, spousal consents are entirely the creature of IRA sponsors' legal departments not any law, state or federal requiring them.

    e. On the other end of the spectrum, some IRA sponsors require spousal consent even if the account owner does not live in a community property state. Perhaps it is just easier administratively to have one system nationwide – i.e., all spouse's consent.

2. Also interesting, the form asks if the account owner currently lives in a community property state, if so, need consent; if not, no consent – no matter if the client accumulated all the IRA funds in Wisconsin (a community property state) but changed his or her residence to Florida in retirement, but the whole account remains community or marital property – no need for a spouse to consent because CLIENT LIVES IN FLORIDA, A COMMON LAW STATE.

    a. It is obvious what is going on here.

    b. Plan administrators don't really want to become involved in community property issues; each community property state regime differs; plan administrators are not getting paid to figure this out. A question never asked is what duty the plan administrator has to enforce marital property/community property rights. I submit that the answer is none. A spouse named as owner has management and control rights.

3. There is a good deal of uncertainty among community property lawyers whether a spousal consent actually destroys the community property rights (in Wisconsin I doubt a consent is an enforceable marital property classification) – most likely a consenting spouse can seek to recover the marital property/community property interest which the titled spouse has given away; results will vary among jurisdictions.

    a. Is a consent a transmutation? Probably not, unless it specifically says so (and one IRA sponsor does).

    b. As previously mentioned, the consent likely does not rise to the level of an agreement to classify property in a marital property agreement.

    c. If the consent is somehow treated as if a marital property agreement, query whether there was (i) full and fair disclosure, (ii) opportunity to consult with independent counsel, (iii) a knowing waiver of community property rights, (iv) query whether there was waiver of conflicts at the ethics level by the lawyer?

    d. Probably not.

    e. The lesson here is that if the client wants the spousal consent to hold up in a community property/marital property state, the best practice is to do more than just rely on the consent; estate planers should follow local law to make the IRA benefits individual property, e.g. a clear marital property classification in a properly drafted marital property agreement.

    f. Note, some states, California is an example, have detailed state law requirements relating to the consent required to comply with local community property laws. (Another reason why I would never draft any estate planning document for a California resident without local counsel at my side.)

4. Why does the IRA sponsor care?

    a. Almost all community property/marital property regimes give the titled spouse power to manage assets titled in that spouse's name.

    b. If accountholder disburses of marital property/community property in a way that invokes spouse rights of recovery, those rights are not against the IRA sponsor, but rather against the beneficiary.

5. Why should IRA benefits be singled out for a hyper protective spousal consent system when no such protection apply to (i) life insurance, (ii) joint tenancy, (iii)

POD accounts, (iv) non-qualified annuities and a host of other non-probate transfers.

6. Interestingly, five of the 13 IRA sponsors who participated in the ACTEC provider survey DO NOT REQUIRE SPOUSAL CONSENTS even if account owner lives in a community property/marital property state.

7. If the estate planner doesn't like the spousal consent of a particular IRA sponsor, then client should move IRA to Northern Trust, TIAA/CREF, Fidelity, Bernstein or Vanguard. No spousal consent is needed to make the move; and then there is the supreme irony, no spousal consent is needed to move the assets out of a qualified plan with a 100% spouse as beneficiary requirement to an IRA which may have no spousal consent requirements.

I. Requesting an Acknowledgement or Receipt of IRA Beneficiary Designation.

1. While not common, many practitioners have experienced a situation where the IRA sponsor has lost or cannot find a beneficiary designation which the client has submitted.

2. Not having a beneficiary can severely derail the tax planning that the client seeks to accomplish. Common default beneficiaries include:

   a. Accountholder's estate (usually a stretch out disaster).

   b. Spouse could be outright beneficiary (frustrating QTIP and GST planning)

   c. Children outright (no GST or creditor protection, possible issues with minors).

3. If the client is fortunate, the IRA adoption agreement might say if there is no beneficiary, then beneficiary is spouse, if living, if not children, per stirpes, but other IRA agreements may provide that the beneficiary will be the accountholder's estate. As mentioned, the modern tendency is where no beneficiary is named, to have spouse be the beneficiary or if none, then children; this probably solves more problems that it creates, but it is not substitute for a thoroughly considered, properly signed, sealed and delivered beneficiary designation.

4. If beneficiary is estate, assets will probably end up where they should, but (we've said this before) the deferral options maybe much less favorable.

   a. Owner under 70 1/2 at time of death – 5 year distribution period

   b. Owner over 70 1/2 at time of death – the remaining life expectancy distribution period – probably not a very long deferral period if the accountholder lived to his or her actuarial life expectancy, but still longer than 5 years, which is reached at age 92.

5. The best practice is probably to send beneficiary forms to IRA sponsor return receipt requested or in a manner which tracks delivery so delivery can be proved.

    a. This almost always means that the lawyer will need to send in the beneficiary designation.

    b. Lawyer will need to keep the evidence of delivery.

    c. Recall Natalie Choate's adage – beneficiary designation is too important to let the client do it.

6. Query Cost Benefit?

    a. How many do you send in?

    b. How many are lost?

    c. Why take your umbrella on a sunny day?

7. Another thought.

    a. When client comes in to update plan every 10 or 15 years, simply redo the beneficiary designations.

    b. Plan administrators seem to lose old beneficiary designations more often than new ones – change of computer system?

    c. It is often easier to change beneficiary designations than it is to get the plan sponsor to confirm the old ones. To get a copy of an old beneficiary designation or confirmation of beneficiary (i) lawyer will need client consent, (ii) lawyer will have to deal with old or complex data retrieval systems.

8. Some sponsors (THEY ARE TO BE APPLAUDED – VANGUARD IS AMONG THEM)

    a. Put current beneficiary information on each statement, or

    b. Once a year at end of year say who beneficiary is.

    c. In such instances, the client is prompted to look at the current beneficiary and will react appropriately when the WRONG person is named.

9. A great deal of time and expense can be wasted and more heartaches and malpractice allegations are created by beneficiary forms that are outdated.

J. Getting Information on Payment of IRA Proceeds where fiduciary is not beneficiary.

1. Privacy laws are important and protect our clients and us against identity theft, data mining and curious busy bodies.

2. But privacy laws are a major obstacle for lawyers who are doing estate planning or trying to settle the estate of a deceased client.

3. It does little or no good to say you are the attorney for the client or the estate. You will get the same smug rejection from the IRA administrator. (Sometimes I think they sound gleeful.)

   a. It does little good to be rude, sarcastic, or to swear at IRA administration personnel. I know. I've tried it and my experience proves these methods get very poor results. (It is my universal experience that few conversations that end with "F*** you" accomplish a great deal.)

   b. It is best to be proactive and get authorization letters from clients, or beneficiaries beforehand and send them or have them available when the need to get information arises. It is just so much less stressful for the estate planner.

4. There is, however, one situation which is troublesome.

   a. You represent the estate of a deceased individual who was not your estate planning client.

   b. You know there is an IRA, you even have a statement, but the statement is from a sponsor who is not kind enough to name the current beneficiary, or at least the statement you have doesn't name it.

   c. You have access to the decedent's files, but the decedent did not see a need to keep a copy of the IRA beneficiary form which he or she submitted. The estate planning attorney is no help because she/he is either unavailable, or simply gave the client directions on how to name the account, and doesn't have a copy.

   d. You have asked all the usual suspects, heirs at law, objects of the decedent's bounty, but none of them admit to being the beneficiary.

   e. You need to file a federal estate tax return OR, you don't know if you need to file a federal estate tax return because you don't have a statement and you don't know the value of the account as of the date of the decedent's death.

   f. You call the IRA sponsor, say you are the fiduciary and ask who the beneficiary is and how much was in the account on date of death.

g. IRA sponsor responds, you are not the beneficiary (this is useful information) but that unfortunately the privacy laws do not allow them to disclose either the identity of beneficiary or the amount of the account.

h. You could get a court order requiring disclosure but there is the expense (not to mention the aggravation factor) and timing may be critical.

5. There are several other approaches.

   a. Agree that sponsor doesn’t have to tell you, but advise the plan sponsor that they are a person in possession of assets and must file a federal estate tax return as to the assets they hold (this is Natalie Choate's approach), or

   b. In the beneficiary designation, have the IRA owner authorize IRA sponsors to disclose information to fiduciary of their estate (personal representative or revocable trust trustee).

6. Truthfully, this situation doesn't occur very often, in fact, it has never happened to me.

   a. Either I did the planning and I know the beneficiary, or

   b. IRA benefits follow the pattern set forth in estate planning documents; such as the will or the revocable trust.

7. But it is possible that the IRA is a rogue asset – maybe it was paid to a named charity.

8. Should the estate planner put this authorization in every beneficiary designation?

   a. I have always been able to get the information I needed, either by submitting domiciliary letters or more commonly a trust certificate.

   b. To prevent unnecessary aggravation, it might be advisable to get an authorization of the beneficiary to release information to the estate settlement attorney. Query whether this authorization is valid when death shifts the legal rights with respect to the benefit.

   c. This approach seems easier than trying to get IRA sponsor to find the beneficiary form, read it and agree that the attorney is eligible to receive the information.

9. If I am the planner, I know I might not be the estate settlement attorney (no one wins them all).

   a. If the IRA benefits go to a beneficiary who is outside the estate plan.

b. If the IRA beneficiary has to pay his or her portion of the estate taxes in a taxable estate (giving them a reason to lay in the weeds as far as being a beneficiary).

c. If the IRA is a charity (this is fairly common, I think).

d. Why not put the authorization to disclose information in the beneficiary designation.

10. Best practice.

a. If you are following Natalie Choate's advice you are doing the beneficiary form for the client.

b. It would take no more than two minutes to add the language

c. "I authorize my IRA sponsor to disclose information with respect to the beneficiary named and the amount of assets passing as a result of my death to any legal representative of my estate including the trustee of my revocable trust."

d. When this issue first appeared in the ACTEC survey, I thought it was a solution looking for a problem, but it is proactive, and in the right situation could save a fair amount of administration expense; it is also a reverse "gotcha" for the survey IRA administrator who is traumatizing the lawyer with its strict observance of the privacy laws.