BENEFICIARY DESIGNATIONS

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The beneficiary designation of an employer-sponsored retirement plan or IRA (which may be established by an individual or be part of a retirement plan such as a SEP or SIMPLE plan) is just as important as preparing the client's Will. The attorney may have prepared a beautiful Will or Revocable Trust that uses both spouses' estate tax exemptions, that maximizes estate tax savings, creditor protection with all the bells and whistles. However, if the client's primary assets are benefits from a retirement plan or an IRA and the beneficiary designations have not been updated to include that beautiful Will or Revocable Trust, the plan is useless. Many clients have 3 significantly valued assets- the home, the retirement plan/IRA and life insurance policies. Properly drafting beneficiary designations for retirement plans or IRAs (and life insurance policies) is a large part of the estate plan, and sometimes that means drafting a more particular beneficiary designation than the pre-printed form provided by the Plan/IRA administrator or insurance company, even if that means continued communication with the Plan/IRA administrator or insurance company after completion of the client's other planning documents. In all cases the aim is the same. Determine the client's intended disposition of his or her assets, and to the extent permitted by the law implement those intentions, which may change as the client's circumstances change.

I. <u>TYPES OF ASSETS.</u>

The 2006 changes to the state laws permit owners of bank and brokerage accounts to avoid probate and achieve "simplicity" with beneficiary designations. While the avoidance of probate seems to be a major marketing point by banks and brokers, this advice fails to recognize that avoiding probate may also negate a testator's goals with respect to distributions to minors or beneficiaries who have poor spending habits. If the young person is named as the beneficiary of the account (or the account is a payable on death/transfer on death account) a Will that includes a trust for a young person (under 30 years old) will be ignored for those assets. Another problem

with these types of designations is that they often do not allow for contingent beneficiaries or "per stirpes" designations.

a. **Totten Bank Accounts.**

EPTL 7-5.1(a) defines a "beneficiary" as a person for whom a trust account is established or maintained by a person who is described by a depositor (defined in EPTL7-5.1(b) as a person in whose name a trust account subject to EPTL Article 7 Part 4 is established or maintained). EPTL 7-5.1(c) provides that a "financial institution" is a bank, trust company, national banking association, savings bank, industrial bank, private banker, foreign banking corporation, federal savings and loan association, a savings institution chartered or supervised as a savings and loan or similar institution under federal law or the laws of a state, a federal credit union, or a credit union chartered and supervised under the laws of a state. EPTL 7-5.1(d) defines a "trust account" as a savings, share, certificate or deposit account in a financial institution established by a depositor describing him/herself as trustee for another, other than a depositor describing him/herself as acting under a Will, trust or other instrument, court order or decree. Such accounts are often called Totten bank accounts.

The funds in a trust account under EPTL 7-5.2 are subject to the following terms:

- The trust may be revoked, terminated or modified by depositor during his/her lifetime by depositor's withdrawal against the trust account or by a writing specifically naming beneficiary and financial institution (acknowledged and filed with the financial institution).

- Depositor's Will may revoke, terminate or modify the trust account by express direction concerning the trust account and describing the account. A testamentary revocation, termination or modification may be effected by express words of revocation, termination or modification or by specific bequest of the trust account.

- If depositor survives the beneficiary, the trust terminates and title to funds continues in depositor free and clear of the trust.

- If beneficiary survives the depositor, AND depositor's Will contains no provision revoking, terminating or modifying the trust, the trust is terminated and title to funds vests in the beneficiary free and clear of the trust.

- If depositor's Will revokes, terminates or modifies the trust, that part of the trust is terminated and title to the funds shall be subject to disposition by the depositor's Will, free and clear of the trust.

EPTL 7-5.3(b) provides for the distribution of less than $10,000 to the parent/guardian of a beneficiary under the age of 18 to be held for the use and benefit of the infant beneficiary or to a duly appointed guardian of the property. If the trust account exceeds $10,000, distribution may only be made to a duly appointed guardian of the property.

EPTL 7-5.4 provides protection and a release from liability to a financial institution which makes payment to a beneficiary or a minor beneficiary's guardian prior to service upon the financial institution of a restraining order, injunction or other appropriate process from a court of competent jurisdiction prohibiting payment.

EPTL 7-5.6 allows for the funds of joint multiple depositors in form to be paid or delivered to the survivor of them or in trust for another, except that title between the depositors is governed by Banking Law Article XIII-E.

EPTL 7-5.7 provides for equal distribution between multiple beneficiaries unless the terms of the trust provide otherwise. If a beneficiary predeceases the depositor, the proceeds are distributed equally to the surviving beneficiaries, unless the terms of the trust provide otherwise.

b. <u>Brokerage Accounts and Non-Totten Bank Accounts.</u>

EPTL Article 13 Part 4, effective as of January 1, 2006, allows for transfer-on-death designations on securities, which may include bank accounts other than Totten bank accounts. EPTL 13-4.1 includes the following definitions:

- "Beneficiary form" means a registration of a security which indicates the present owner of the security and the intention of the owner regarding the person who will become the owner of the security upon the death of the owner.
- "Devisee" means any person to whom real property is transferred by will.
- "Distributee" means any person entitled to take or share in the property of a decedent under the statutes governing descent and distribution.
- "Legatee" means any person designated to receive a transfer by will of personal property.
- "Person" means an individual, a corporation, an organization or other legal entity.
- "Personal representative" includes executor, administrator, successor personal representative, preliminary executor, temporary administrator and persons who perform substantially the same function under the law governing their status.
- "Property" includes both real and personal property or any interest therein and means anything that may be the subject of ownership.
- "Register" including its derivatives, means to issue a certificate showing the ownership of a certificated security or, in the case of an uncertificated security, to initiate or transfer an account showing ownership of securities.
- "Registering entity" means a person who originates or transfers a security title by registration, and includes a broker or banking institution, as defined in paragraph (b) of subdivision three of section nine-f of the banking law maintaining security accounts for customers and a transfer agent or other person acting for or as an issuer of securities.
- "Security" means a share, participation or other interest in property, in a business or in an obligation of an enterprise or other issuer, and includes a certificated security, an uncertificated security and a security account.

- "Security account" means (i) a reinvestment account associated with a security, a securities account with a broker or banking institution, as defined in paragraph (b) of subdivision three of section nine-f of the banking law, a cash balance in a brokerage account or securities account, cash, interest, earnings, or dividends earned or declared on a security in an account, a reinvestment account or a brokerage account, whether or not credited to the account before the owner's death, or (ii) a cash balance or other property held for or due to the owner of a security as a replacement for or product of an account security, whether or not credited to the account before the owner's death.

- "State" includes any state of the United States, the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession subject to the legislative authority of the United States.

EPTL 13-4.2 permits the usage of transfer-on-death registration only by individuals whose security registration shows sole ownership by one individual or multiple ownership by two or more with right of survivorship. Multiple ownership as tenants in common is not permitted.

EPTL 13-4.6 provides that beneficiary/TOD/POD registration has no effect on ownership until the owner’s death. The designation may be changed or revoked at any time by the sole owner or all then surviving owners without beneficiary consent. Express direction in the owner’s Will specifically referring to such designation may also revoke or change the beneficiary/TOD/POD registration.

EPTL 13-4.8 provides protection for registering entities. A registering entity is not required to offer or to accept a request for security registration in beneficiary form. EPTL 13-4.8(a). EPTL 13-4.8(c) discharges a registering entity from all claims to a security by the estate, creditors, distributees, legatees or devisees of a deceased owner if the entity registers a transfer of the security in accordance with EPTL 13-4.7 and does so in good faith reliance (i) on the registration, (ii) on Part I of EPTL Article 13, and (iii) on information provided to it by affidavit of the personal representative of the deceased owner or by the surviving beneficiary.

EPTL 13-4.10 provides the terms, conditions and forms of registration, and includes illustrations of registration in beneficiary form with a registering entity. EPTL 13-4.10(b).

c. **Life Insurance.**

Life insurance presents several different issues with respect to estate planning and proper beneficiary designations. Remember that life insurance policies are contractual; and that the designation of a beneficiary must comply with the contract with the insurance company. "My estate" should almost never be named as the beneficiary of a life insurance policy; and it is important to remember that "my estate" is subject to the decedent's creditors' claims and estate administration expenses. Naming an individual or a trust beneficiary is best practice. If a trust is an intended beneficiary, be sure that the designation is acceptable to the insurance company.

While the changes to the estate tax rules have decreased the need and use of insurance as a source of estate tax funding, irrevocable life insurance trusts remain a viable plan for protection from a beneficiary's creditors and the potential for divorce. An irrevocable life insurance trust may remove the policy proceeds from the estates of both the insured and the surviving spouse, while making the proceeds fully available to meet the needs of the surviving spouse and the insured's estate.

An irrevocable gift of a life insurance policy in a trust is made by the irrevocable assignment of all of the incidents of ownership in one or more life insurance policies to the trustee of an irrevocable life insurance trust. An irrevocable life insurance trust (ILIT) may be either funded or unfunded. A funded trust contains assets other than life insurance policies, and these assets are often held to produce sufficient income to pay the insurance premiums. An unfunded ILIT contains only life insurance policies. The insured typically pays premiums on policies held by an unfunded ILIT, either by direct payments to the insurer or by annual gifts to the trustee in amounts sufficient for the trustee to pay the premiums.

The dispositive provisions of a single policy (insurance only insuring one person) ILIT are normally designed so as to make the proceeds available to the surviving spouse, while still preventing inclusion of the proceeds in the surviving spouse's estate. The trust for the surviving

spouse must not give the surviving spouse any powers that would constitute a general power of appointment or the proceeds will be included in the surviving spouse's gross estate.

d. Non-Qualified Annuities.

Previous presentations included a greater explanation of annuities. For purposes of our discussion regarding beneficiary designations, a simple definition of an annuity is that it is a form of insurance designed to pay the policy holder a fixed, set sum of money annually over the policy term.

A qualified annuity is usually part of an employer-sponsored retirement plan benefit or is a part of an IRA (contributions are made pre-tax). A non-qualified annuity is a type of annuity that is not affiliated with either an IRA or an employer sponsored plan (contributions are made after-tax), but defers tax on gains until annuity payments are made.

A surviving spouse may have certain rights if the surviving spouse is the sole beneficiary of a non-qualified annuity. In most cases, the surviving spouse is permitted to continue a tax-deferred annuity and keep tax deferred status intact. The surviving spouse assumes ownership of the policy/contract at the current accumulation value and the existing surrender charge schedule. Similar benefits are not extended to none-spouse beneficiaries.

The annuity policy/contract may have specific settlement alternatives available for distributing the proceeds to the beneficiaries. The original policy will include the alternatives. If the policy/contract does not have specific alternatives, the death benefit proceeds will be distributed in a lump sum check. Policies/contracts typically allow the survivor to choose whether to take equal period payments over a period of years or over a lifetime.

e. Social Security Survivor and Death Benefits.

A widow or widower may receive Social Security benefits, which consist of a monthly annuity, beginning at age 60 or older, at age 50 or older if disabled, or at any age if the marriage lasted at least ten years and if she or he takes care of a child of the deceased who is younger than age 16 or disabled.

A divorced widow or widower may receive benefits, which consist of a monthly annuity, beginning at age 60 or older if the marriage to the deceased lasted at least 10 years; at age 50 or older if disabled and the marriage to the deceased lasted at least 10 years; or at any age if the marriage lasted at least ten years and if she or he takes care of a child of the deceased who is younger than age 16 or disabled.

Unmarried children may receive survivor benefits, which consist of a monthly annuity, beginning after the date of death, if they are younger than age 18 (or up to age 19 if they are attending elementary or secondary school full time); or any age and were disabled before age 22 and remain disabled. Under certain circumstances, benefits, which consist of a monthly annuity, beginning after the date of death, also may be paid to stepchildren, grandchildren, step-grandchildren or adopted children.

Parents age 62 or older who received at least one-half of their support from the deceased may receive survivor benefits, which consist of a monthly annuity, beginning after the date of death.

A one-time death benefit payment of $255 may be made only to a spouse or child if they meet certain requirements. Survivors must apply for this payment within two years of the date of death.

f. <u>IRAs.</u>

An IRA (Individual Retirement Arrangement) is a private individually owned retirement account. IRAs are not subject to the Employee Retirement Income Security Act (ERISA) unless they are part of a SIMPLE Plan or a SEP plan discussed previously. IRS Publications 590-A (focusing on contributions to traditional and Roth IRAs) and 590-B (focusing on distributions from traditional and Roth IRAs) are available at www.irs.gov). The publications are well written, easy to understand, and provide the basics:

Traditional IRAs may be opened and contributions made by anyone who has received taxable compensation during the year and who is not age 70 ½ by the end of the year (or, if you file a joint return, a spouse). If both spouses have taxable compensation and are under 70 ½, each spouse may establish an IRA. If the spouses file a joint return, either may establish an IRA

even if only one has compensation income. Compensation includes wages, salaries, tips, professional fees, bonuses and other amounts received for providing personal services. For a self-employed person, compensation is the net earnings from a trade or business reduced by the deduction for contributions made on the self-employed person's behalf to retirement plans and the deduction allowed for the deductible part of self-employment tax. Compensation also includes any taxable alimony and separate maintenance payments received under a divorce decree. Compensation does not include rental income, interest, dividends, or deferred compensation received.

In 2015, the total contribution to all traditional and Roth IRAs may not be more than $5,500 ($6,500 if age 50 or older) or a person's taxable compensation for the year, whichever is less.

The IRS website includes the following helpful tables with respect to the phase out of income tax deductions for traditional IRA contributions:

2015 IRA Deduction Limits - Effect of Modified AGI on Deduction if You Are Covered by a Retirement Plan at Work

If you are covered by a retirement plan at work, use this table to determine if your *modified AGI* affects the amount of your deduction. See IRAs for more information.

If Your Filing Status Is...	And Your Modified AGI Is...	Then You Can Take...
single or **head of household**	$61,000 or less	a full deduction up to the amount of your contribution limit.
	more than $61,000 but less than $71,000	a partial deduction.
	$71,000 or more	no deduction.
married filing jointly or **qualifying widow(er)**	$98,000 or less	a full deduction up to the amount of your contribution limit.
	more than $98,000 but less than $118,000	a partial deduction.
	$118,000 or more	no deduction.
married filing separately	less than $10,000	a partial deduction.
	$10,000 or more	no deduction.
If you file separately and did not live with your spouse at any time during the year, your IRA deduction is determined under the "Single" filing status.		

Page Last Reviewed or Updated: 16-Jan-2015

2015 IRA Deduction Limits - Effect of Modified AGI on Deduction if You Are NOT Covered by a Retirement Plan at Work

If you're not covered by a retirement plan at work, use this table to determine if your *modified AGI* affects the amount of your deduction.

If Your Filing Status Is...	And Your Modified AGI Is...	Then You Can Take...
single, **head of household**, **or qualifying widow(er)**	any amount	a full deduction up to the amount of your contribution limit.
married filing jointly or **separately** with a spouse who **is not** covered by a plan at work	any amount	a full deduction up to the amount of your contribution limit.
married filing jointly with a spouse who **is**covered by a plan at work	$183,000 or less	a full deduction up to the amount of your contribution limit.
	more than $183,000 but less than $193,000	a partial deduction.
	$193,000 or more	no deduction.
married filing separately with a spouse who **is** covered by a plan at work	less than $10,000	a partial deduction.
	$10,000 or more	no deduction.
If you file separately and did not live with your spouse at any time during the year, your IRA deduction is determined under the "Single" filing status.		

Page Last Reviewed or Updated: 16-Jan-2015

A Roth IRA is an IRA, except as explained below, that is subject to the rules that apply to a traditional IRA. Qualified distributions from a Roth IRA are tax-free. Contributions to a Roth IRA may be made after age 70 ½; and required minimum distributions after age 70 ½ are not required except for beneficiaries. Roth IRA contributions are not deductible. The same combined contribution limit applies to all of your Roth and traditional IRAs.

IRS' website has the following chart comparing traditional and Roth IRAs:

Traditional and Roth IRAs

Traditional and Roth IRAs allow you to save money for retirement. This chart highlights some of their similarities and differences.

Features	Traditional IRA	Roth IRA
Who can contribute?	You can contribute if you (or your spouse if filing jointly) have taxable compensation but not after you are age 70½ or older.	You can contribute at any age if you (or your spouse if filing jointly) have taxable compensation and your modified adjusted gross income is below certain amounts (see 2014 and 2015limits).
Are my contributions deductible?	You can deduct your contributions if you qualify.	Your contributions aren't deductible.
How much can I contribute?	The most you can contribute to **all** of your traditional and Roth IRAs is the smaller of: $5,500 (for 2014 and 2015), or $6,500 if you're age 50 or older by the end of the year; or your taxable compensation for the year.	
What is the deadline to make contributions?	Your tax return filing deadline (not including extensions). For example, you have until April 15, 2015, to make your 2014 contribution.	
When can I withdraw money?	You can withdraw money anytime.	

Do I have to take required minimum distributions?	You must start taking distributions by April 1 following the year in which you turn age 70½ and by December 31 of later years.	Not required if you are the original owner.
Are my withdrawals and distributions taxable?	Any deductible contributions and earnings you withdraw or that are distributed from your traditional IRA are taxable. Also, if you are under age 59 ½ you may have to pay an additional 10% tax for early withdrawals unless you qualify for an exception.	None if it's a qualified distribution (or a withdrawal that is a qualified distribution). Otherwise, part of the distribution or withdrawal may be taxable. If you are under age 59 ½, you may also have to pay an additional 10% tax for early withdrawals unless you qualify for an exception.

g. ERISA Plans, Private Plans (including those sponsored by Tax-Exempt Entities), Retirement Accounts.

The Employee Retirement Income Security Act (ERISA) sets standards of protection for individuals in most voluntarily established, private-sector employer retirement and life insurance plans. Such plans may be funded with trusts, insurance contracts, or individual retirement accounts. ERISA requires plans to provide participants with plan information, including important facts about plan features and funding; to set minimum standards for participation, vesting, benefit accrual, and funding; to provide fiduciary responsibilities for those who manage and control plan assets; to establish a claims and appeals process for participants to get benefits from their plans; to give participants and beneficiaries the right to bring an action to enforce benefit rights and compel plan fiduciaries to comply with their fiduciary responsibilities; and if a defined benefit pension plan is terminated, to guarantee payment of certain benefits through a Federally chartered corporation, the Pension Benefit Guaranty Corporation (PBGC).

ERISA generally covers pension plans that are defined benefit plans and defined contribution plans. A defined benefit plan promises a specified monthly benefit at retirement to the employee. With a defined contribution plan, the employer and/or the employee contribute to the employee's individual account in the plan. The value of an employee's account depends on how much is contributed and how well the investments perform. Examples of defined contribution plans include:

- 401(k) Plans. There are four different types of 401(k) plans: traditional 401(k), safe harbor 401(k), SIMPLE 401(k), and automatic enrollment 401(k).

- Profit Sharing Plans. A profit sharing plan allows the employer each year to determine how much to contribute to the plan (out of profits or otherwise).

- Employee Stock Ownership Plans (ESOPs). An ESOP is a type of defined contribution plan that is invested primarily in employer stock.

- Simplified Employee Pension Plans (SEPs). A SEP is a plan in which an employer makes contributions on a tax-favored basis to individual retirement accounts (IRAs) owned by most of the employer's employees.

- Savings Incentive Match Plans for Employees of Small Employers (SIMPLEs). A SIMPLE is a plan in which a small business with 100 or fewer employees may offer retirement benefits through employee salary reductions and matching contributions (similar to those found in a 401(k) plan) to individual retirement accounts (IRAs) owned by most of the employer's employees. The plan may be either a SIMPLE IRA or a SIMPLE 401(k).

h. Non-ERISA Pension Plans, Government and Church Plans, Owner Employee Plans and Top Hat Plans.

Non-ERISA pension plans are those that are not governed by ERISA.

Owner-employee retirement plans are plans that have no participants other than the owner-employees and their spouses. They are not governed by ERISA. They are usually designed to provide tax-qualified benefits. Benefits from these plans may be transferred to IRAs.

Federal governments provide retirement and life insurance benefits to their employees. Such plans are not governed by ERISA. Their benefits are treated favorably for tax purposes. Benefits from these retirement plans may be transferred to IRAs.

State and local governments often provide retirement or life insurance benefits to their employees. Such plans are not governed by ERISA, but like owner-employee plans often designed to provide tax-qualified retirement benefits. Government plans may not be 401(k) plans but may be other tax-qualified retirement plans that are available to private employers. However, government employees of public educational organizations or of certain IRC

501(c)(3) tax-exempt organizations tax may be given the option choose to contribute some of their salaries to 403(b) plans, also called tax sheltered annuity plans. As with 401(k) plans employers may also make plan contributions. Benefits from these retirement plans may be transferred to IRAs.

Churches may generally choose whether to have ERISA govern their retirement and life insurance plans, and may use the same kind of plans as private employers

Section 457 plans, which also provide retirement without the use of tax-qualified trusts or annuities may be made available to employees of state and local government and of tax-exempt organizations. Contributions and earnings are tax-deferred until withdrawal. Distributions start at retirement age, but participants may also take distributions if they change jobs or if they have an emergency, including death. Participants may choose to take distributions as a lump sum, annual installments or as an annuity. Distributions are subject to ordinary income taxes and the amounts may not be transferred into an IRA.

Top-Hat plans are pension plans maintained primarily for the purpose of providing deferred compensation for a select group of management or highly compensated employees. They are not funded, but are governed by ERISA unless they are sponsored by a government, church, or are an owner-employee plan. Benefits from these plans may not be transferred to IRAs.

II. GOVERNING DOCUMENTS AND LAW.

While the client (and you) may think that your beneficiary designation form is great, if the governing law or document has conflicting rules, the plan document will control. Be sure to read the applicable sections of the governing document to ensure that the beneficiary designation and payout method are permitted.

Beneficiary designation forms for bank accounts and security registrations under EPTL Part 5 (EPTL 7-5.1 - 7-5.8) are not the same as beneficiary designations for retirement accounts. Each financial institution has its own requirements. The designation of a beneficiary for a Totten Trust or transfer-on-death securities registration will typically occur at the bank/broker with the assistance of the bank/broker using that financial institution’s specific forms. Beneficiary

designations for some retirement plans and accounts may be completed and submitted online. In some cases, the beneficiary designation will require a witness or notary for acceptance. The instructions accompanying the blank beneficiary designation forms should be carefully considered when completing the forms.

Practice Tip: When first meeting a new client, request that they provide you with copies of all beneficiary designation forms and plan documents. If the client does not have copies, have the client request the plan documents and change of beneficiary forms. You can then work with the client to ensure that the overall estate plan is achieved by submitting proper beneficiary designation forms. When submitting beneficiary designations, request confirmation in writing that the designation form was received and accepted by the financial institution or the plan administrator.

Example: Husband named Brother as designated beneficiary of his retirement plan. Husband marries Wife. 90 days later Husband dies. The plan document provides that a surviving spouse for purposes of the plan's surviving spouse benefits is not a "surviving spouse" until the couple has been married for 1 year. Since Husband did not change his beneficiary designation after marriage and was not married to Wife for 1 year, Brother takes.

a. Totten Bank Account Deposit Agreement.

As discussed above, EPTL Part 5 (EPTL 7-5.1 - 7-5.8) governs the designation of beneficiaries for Totten bank accounts. These accounts may be revoked, terminated or modified by the depositor during his lifetime only by means of, and to the extent of, withdrawals from or charges against the trust account made or authorized by the depositor or by a writing which specifically names the beneficiary and the financial institution. EPTL 7.5-2 However, beneficiary designations must be acknowledged or proved in the manner required to entitle conveyances of real property to be recorded. In addition, such accounts are covered by additional requirements set forth in the financial institutions' own agreements. See Matisoff v. Dobi, 90 N.Y.2d 127, 681 N.E.2d 376 (N.Y. 1997) for a discussion of the significance of these requirements.

b. Bank or Brokerage Account Deposit Agreement.

EPTL Article 13 Part 4 allows for transfer-on-death designations on securities, which include non-Totten bank accounts. There is no requirement that these designations be signed, notarized, or in writing. Such accounts are covered by the financial institutions' own agreements. Some financial institutions are more flexible than others. For example, many financial institutions will allow ownership by 2 revocable trusts as tenants in common (considered when planning to minimize estate tax), and others will not. Care should be given to ensure that ownership of these accounts not only is permissible under applicable law, but that the deposit agreement will meet the client's overall goals with respect to surviving ownership or beneficiary after death.

c. Insurance Policy.

Other presenters will provide significant detail with respect to life insurance contracts. Designations must be made in writing and signed by the person making the designation and be agreed to by the insurance company or the savings bank authorized to conduct the business of life insurance. EPTL 13.3-2(e). The following is meant as a refresher when reviewing beneficiary designations as an issue.

Life insurance is a contract between an insured (person whose life is being insured) and an insurance company, where the insurance company promises to pay a designated beneficiary a sum of money in exchange for a premium, upon the death of the insured. The insured is not necessarily the owner (the use of life insurance trusts for estate tax planning purposes is discussed above). The insured or other typically pays a premium, either regularly (annually, quarterly or monthly) or as one lump sum (a single premium). Depending on the contract, permanent disability may waive the payment of future premiums.

Exclusions may apply. In most contracts, the policy will be null and void if the insured commits suicide within a specified time. Additionally, any misrepresentations on the application may also be grounds for nullification.

Beneficiary designations for life insurance policies are also controlled by the contract. The contract will determine who receives the policy proceeds if the named beneficiaries have

predeceased the insured (or there is no named beneficiary). As discussed previously, "my estate" should almost never be named as the beneficiary of a life insurance policy. If "my estate" is the named beneficiary, the policy proceeds will be subject to the decedent's creditors. Naming a beneficiary provides simple creditor protection.

d. Non-Qualified Annuity Contract.

Non-qualified annuity contracts provide who may be designated as a beneficiary of the contract. Designations must be made in writing and signed by the person making the designation and be agreed to by the insurance company or the savings bank authorized to conduct the business of life insurance. EPTL 13.3-2(e). Typically, the following types of beneficiary designations are allowed: Individual beneficiary, corporation or other entity, estate, trust or collateral assignee. A custodian, guardian, conservator or agent under power of attorney may submit a claim on behalf of an individual beneficiary

A surviving spouse may have certain rights under the terms of the contract not available to other beneficiaries. In most cases, a surviving spouse may continue an individual tax-deferred annuity contract and keep its tax-deferred status intact. The surviving spouse assumes ownership of the contract at the current accumulation value and the existing surrender change schedule. In doing so, the surviving spouse may maintain the contract and avoid paying tax until the surviving spouse decides to withdraw funds from the annuity or surrender the contract.

Practice Pointer: Request a copy of the annuity contract before submitting the claim forms, especially if you have a surviving spouse named as beneficiary. In one case recently, we had to show the financial institution a copy of the contract before the surviving spouse was permitted to assume ownership of the annuity (at a 5% guaranteed interest rate). The financial institution attempted to force surrender of the policy prior to being shown the terms of the contract.

e. Social Security Law.

Payment received from Social Security as "retirement" is governed by the Social Security Act (P.L. 74-271, approved August 14, 1935, 49 Stat. 620) and various regulations, which are available www.ssa.gov, and is administered by the Department of Health and Human Services.

Full retirement age is the age at which a person may first become entitled to full or unreduced retirement benefits. No matter what your full retirement age (also called "normal retirement age") is, you may start receiving benefits as early as age 62 or as late as age 70. The www.socialsecurity.gov website includes great information and FAQs with respect to Social Security and provides the following chart:

Full Retirement and Age 62 Benefit By Year Of Birth

Year of Birth	Full (normal) Retirement Age	Months between age 62 and full retirement age	At Age 62			
			A $1000 retirement benefit would be reduced to	The retirement benefit is reduced by	A $500 spouse's benefit would be reduced to	The spouse's benefit is reduced by
1937 or earlier	65	36	$800	20.00%	$375	25.00%
1938	65 and 2 months	38	$791	20.83%	$370	25.83%
1939	65 and 4 months	40	$783	21.67%	$366	26.67%
1940	65 and 6 months	42	$775	22.50%	$362	27.50%
1941	65 and 8 months	44	$766	23.33%	$358	28.33%
1942	65 and 10 months	46	$758	24.17%	$354	29.17%
1943-1954	66	48	$750	25.00%	$350	30.00%
1955	66 and 2 months	50	$741	25.83%	$345	30.83%
1956	66 and 4 months	52	$733	26.67%	$341	31.67%
1957	66 and 6 months	54	$725	27.50%	$337	32.50%
1958	66 and 8 months	56	$716	28.33%	$333	33.33%
1959	66 and 10 months	58	$708	29.17%	$329	34.17%
1960 and later	67	60	$700	30.00%	$325	35.00%

1. If you were born on January 1st, you should refer to the previous year.
2. If you were born on the 1st of the month, we figure your benefit (and your full retirement age) as if your birthday was in the previous month. If you were born on January 1st, we figure your benefit (and your full retirement age) as if your birthday was in December of the previous year.
3. You must be at least 62 for the entire month to receive benefits.
4. Percentages are approximate due to rounding.
5. The maximum benefit for the spouse is 50% of the benefit the worker would receive at full retirement age. The % reduction for the spouse should be applied after the automatic 50% reduction. Percentages are approximate due

Full Retirement and Age 62 Benefit By Year Of Birth

Year of Birth	Full (normal) Retirement Age	Months between age 62 and full retirement age	At Age 62			
			A $1000 retirement benefit would be reduced to	The retirement benefit is reduced by	A $500 spouse's benefit would be reduced to	The spouse's benefit is reduced by
to rounding.						

f. <u>IRA Agreements.</u>

IRA trust or custodial account agreements must meet the following requirements:

- The trustee or custodian must be a bank, a federally insured credit union, a savings and loan association, or an entity approved by the IRS to act as trustee or custodian.
- The trustee or custodian generally may not accept contributions of more than the deductible amount for the year (not including rollovers).
- Contributions must be made in cash (not including rollovers).
- There must be a non-forfeitable right to the amount at all times.
- IRA assets may not be combined with other property, except in a common trust fund or common investment fund.
- Distributions must commence by April 1 of the year following the year in which age 70 ½ is attained.

IRS Publication 590-B discusses distributions from an IRA and discusses the required minimum distribution rules. The required minimum distribution rules are covered in further detail as separate sections of this program. Designations must be made in writing and signed by the person making the designation and be agreed to by the insurance company or the savings bank authorized to conduct the business of life insurance. EPTL 13.3-2(e).

g. **ERISA Retirement Plan Document.**

State designation laws do not govern ERISA plans except to the extent that the documents incorporate such laws. Thus, state laws requiring that designations be in a writing or signed by the participant are generally disregarded. Simply providing that The United States Department of Labor's website has a simple and thorough explanation of the documents that must be furnished to participants and beneficiaries of ERISA retirement plans, other than Top-Hat plans (http://www.dol.gov/ebsa/faqs/faq_compliance_pension.html), and provides as follows with respect to information that may be relevant to retirement and life insurance plan designations:

- The Summary Plan Description (SPD) is a plain language explanation of the plan comprehensive enough to apprise participants of their rights and responsibilities under the plan. It also informs participants about the plan features and what to expect of the plan. This document is given to employees after they join the plan and to beneficiaries after they first receive benefits. SPDs must also be redistributed periodically and provided on request. This document generally describes the plan's designation procedures.

- The Summary of Material Modification (SMM) apprises participants and beneficiaries of changes to the plan or to the information required to be in the SPD. The SMM or an updated SPD for a retirement plan must be furnished automatically to participants within 210 days after the end of the plan year in which the change was adopted.

- An Individual Benefit Statement (IBS) provides participants with information about their account balances and vested benefits. Plans that provide for participant-directed accounts must furnish statements on a quarterly basis. Individual account plans that do not provide for participant direction must furnish statements annually. Traditional defined benefit pension plans must furnish statements every three years.

h. Rules for Distributions for Tax-Qualified Retirement Plans.

Tax-qualified retirement plans include some but not all ERISA plans (Top-Hat Plans are excluded) and include some non-ERISA plans, such as many owner-employee plans and local government plans. A comprehensive discussion of the required minimum distribution rules for such plans has been provided separately as part of this program. Generally, if the owner died on or before the owner's required beginning date, a designed beneficiary must base required minimum distributions for years after the year of the owner's death on the longer of the designated beneficiary's single life expectancy (shown on Table I in Appendix B) as determined under "Beneficiary an individual" or the owner's life expectancy as determined under "Death on or after required beginning date," under "Beneficiary not an individual."

If the owner dies after the owner's required beginning date, the designated beneficiary generally must base required minimum distributions for years after the year of the owner's death using the single life expectancy table (shown on Table I in Appendix B) as determined under "Beneficiary an individual." Do not forget, however, that these distribution rules are based on there being a designated beneficiary. A beneficiary that does not qualify as a designated beneficiary may be subject to the 5 year rule.

i. Non-ERISA Retirement Plan Document.

State designation laws control owner-employee plans and state or local government retirement and life insurance plans, which are not governed by ERISA such as the requirement for written designations. EPTL 13.3-2(e). However, the principal determination of the designation terms for these plans are the governing documents. In contrast, for federal plans, their governing documents control except to the extent that they incorporate state law, such as for marital dissolutions. Thus, participant must use the federal plan designation forms, such as the Form TSP-3 for the Federal Thrift Plan. https://www.tsp.gov/PDF/formspubs/tsp-3.pdf

j. Effects of Marriage/Divorce.

Tax-qualified pension plans must provide a participant's spouse with survivor benefits unless the spouses consents to the participant's waiver of such benefits after a year of marriage. Code § 401(a)(11). However, the participant's spouse may not enforce this requirement. In

contrast spouses may enforce the ERISA requirement that most retirement plans other than Top-Hat Plans, SIMPLE Plans and SEPs provide the same spousal survivor benefit. ERISA §§ 205, 502(a)(1)(B). There is similar spousal benefit requirement for most federal retirement plans, which requires no enforcement by the spouse. *See e.g.*, 5 U.S.C. § 8339 (the spousal survivor benefit requirement for civil service retirement system benefits) There is no similar spousal survivor benefit requirement for federal or ERISA life insurance plan benefits. Nor is there a spousal survivor benefit for IRA benefits or for benefits from most state or local government plans.

Example: Husband named Sister as designated beneficiary of his ERISA retirement plan. Husband marries Wife without changing designation. A year after the marriage, Wife must be entitled to Husband's benefits. If Husband dies after the year passes without obtaining Wife's consent to Husband's waiver of Wife's survivor benefit, Wife would be entitled to the survivor benefit. If the retirement plan were an IRA and Sister survived Husband, Wife would not be entitled to the survivor benefit unless Husband designated Wife as Husband's beneficiary.

EPTL 5-1.4 provides for the automatic revocation of **revocable** beneficiary designations and testamentary gifts to a former spouse upon divorce, annulment or dissolution of marriage. The divorced spouse is treated as having immediately predeceased his or her spouse for all purposes of inheritance. EPTL 5-1.4 does not apply to irrevocable beneficiary designations or testamentary gifts. It is important to note, and will be discussed in further detail separately, how EPTL 5-1.4 and ERISA operate exclusively. EPTL 5-1.4 provides as follows:

> (a) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage revokes any revocable (1) disposition or appointment of property made by a divorced individual to, or for the benefit of, the former spouse, including, but not limited to, a disposition or appointment by will, by security registration in beneficiary form (TOD), by beneficiary designation in a life insurance policy or (to the extent permitted by law) in a pension or retirement benefits plan, or by revocable trust, including a bank account in trust form, (2) provision conferring a power of appointment or power of

disposition on the former spouse, and (3) nomination of the former spouse to serve in any fiduciary or representative capacity, including as a personal representative, executor, trustee, conservator, guardian, agent, or attorney-in-fact.

(b)(1) Provisions of a governing instrument are given effect as if the former spouse had predeceased the divorced individual as of the time of the revocation. (2) A disposition, appointment, provision, or nomination revoked solely by this section shall be revived by the divorced individual's remarriage to the former spouse.

(c) Except as provided by the express terms of a governing instrument, a divorce (including a judicial separation as defined in subparagraph (f)(2)) or annulment of a marriage severs the interests of the divorced individual and the former spouse in property held by them at the time of the divorce or annulment as joint tenants with the right of survivorship, transforming their interests into interests as tenants in common.

(d)(1) A payor or other third party is not liable for having made a payment or transferred an item of property or any other benefit to a beneficiary (including a former spouse) designated in a governing instrument affected by a divorce, annulment, or remarriage, or for having taken any other action in good faith reliance on the validity of the governing instrument, before the payor or other third party received written notice of the divorce, annulment, or remarriage.

(2) Written notice of a divorce, annulment, or remarriage under subparagraph (1) must be mailed to the payor's or other third party's main office or home by registered or certified mail, return receipt requested, or served upon the payor or other third party in the same manner as a summons in a civil action and may be filed with the secretary of state if real property or a cooperative apartment is affected. Upon receipt of written notice of the divorce, annulment, or remarriage, a payor or other third party may pay any amount owed or transfer or deposit any item of property held by it or with the court having jurisdiction of the probate proceedings relating to the decedent's estate or, if no proceedings have been commenced, to or with the court having jurisdiction over the divorce, the real property or cooperative apartment, securities, bank accounts or other assets affected by the divorce or annulment under this section. The court shall hold the

funds or item of property and, upon its determination under this section, shall order disbursement or transfer in accordance with the determination. Payments, transfers, or deposits made to or with the court discharge the payor or other third party from all claims for the value of amounts paid to or items of property transferred to or deposited with the court.

(e) A person who purchases property from a former spouse or any other person for value and without notice, or who receives from a former spouse or any other person, a payment or other item of property in partial or full satisfaction of a legally enforceable obligation, is neither obligated under this section to return the payment, item of property or benefit, nor is liable under this section for the amount of the payment or the value of the item of property or benefit. But a former spouse or other person who, not for value, received a payment, item of property or any other benefit to which that person is not entitled under this section is obligated to return the payment, item of property or benefit, with interest thereon, to the person who is entitled to it under this section.

(f) For purposes of this section, the following terms shall have the following meaning and effect:

(1) "Disposition or appointment of property" includes a transfer of an item of property or any other benefit to a beneficiary designated in a governing instrument.

(2) "Divorce or annulment" means a final decree or judgment of divorce or annulment, or a final decree, judgment or order declaring the nullity of a marriage or dissolving such marriage on the ground of absence, recognized as valid under the law of this state, or a "judicial separation, which means a final decree or judgment of separation, recognized as valid under the law of this state, which was rendered against the spouse.

(3) "Divorced individual" includes an individual whose marriage has been annulled or subjected to a judicial separation.

(4) "Former spouse" means a person whose marriage to the divorced individual has been the subject of a divorce, annulment, or judicial separation.

(5) "Governing instrument" includes, but is not limited to, a will, testamentary instrument, trust agreement (including, but not limited to a totten trust account under 7-5.1(d)), insurance policy, thrift, savings, retirement, pension, deferred compensation, death benefit, stock bonus or profit-sharing plan, account, arrangement, system or trust, agreement with a bank, brokerage firm or investment company, registration of securities in beneficiary form pursuant to part 4 of article 13 of this chapter, a court order, or a contract relating to the division of property made between the divorced individuals before or after the marriage, divorce, or annulment.

(6) "Revocable," with respect to a disposition, appointment, provision, or nomination, means one under which the divorced individual, at the time of the divorce or annulment, was empowered, by law or under governing instrument, either alone or in conjunction with any other person who does not have a substantial adverse interest, to cancel the designation in favor of the former spouse, whether or not the divorced individual was then empowered to designate himself or herself in place of the former spouse and whether or not the divorced individual then had the capacity to exercise the power.

These provisions govern IRAs that are not part of ERISA plans, state and local government plans, and owner-employee plans. They, however, do not govern ERISA plans. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001) (holding ERISA prevents state revocation upon divorce statutes from being used to wrest retirement and life insurance benefits from a designated beneficiary, who was the participant's former spouse) Nor do they govern federal plans. *Hillman v Maretta*, 569 U.S. ___, 133 S. Ct. 1943, 2013 U.S. LEXIS 4167 (June 3, 2013) (holding that the Federal Employees Government Life Insurance Act preempts the use of state revocation upon divorce laws to wrest benefit distributions from beneficiaries)

Domestic relations issues will be discussed in further detail separately. <u>In the Pursuit of Domestic Tranquility-Matrimonial Attorneys Should Follow the Bouncing Beneficiary</u>

Designations, 43 Comp. Plan. J. 43 (March 6, 2015) http://ssrn.com/abstract=2579403, authored by Andrew L. Oringer and Albert Feuer, provides a detailed explanation regarding the inconsistencies between the beneficiary designation under an ERISA-governed plan and other domestic-relations documents, or otherwise inconsistent with the parties' apparent intent. As discussed in this article, the beneficiary designation will nevertheless govern the plan's benefit payment obligation.

Practice Pointer: EPTL 5-1.4 only applies to the former spouse. A testamentary gift or fiduciary appointment to a relative of the former spouse is not automatically revoked and remains effective. EPTL 5-1.4 only applies to a revocable designation and thus does not affect irrevocable designations, which is often the case for designations in which the participant has begun to receive a joint and survivor annuity.

III. DESIGNATED BENEFICIARIES.

a. Is there a "Designated Beneficiary"?

Or maybe the better question is, "Who is a designated beneficiary?" Not every beneficiary named on a beneficiary designation form is a "designated beneficiary." A "designated beneficiary" is a term of art specifically defined in the Internal Revenue Code. While there are times that a beneficiary and a designated beneficiary have no distinguishable difference, the pay out options are generally less favorable to the beneficiary who is not a designated beneficiary.

Retirement plans generally pass outside of the decedent's probate estate by operation of law, if the beneficiary designation form sets forth who will receive the retirement plan on the death of the plan participant. Unless a beneficiary designation form specifically includes reference to the instructions contained in a decedent's Will or Trust, the Will or Trust are irrelevant to the distribution to the beneficiary named in the beneficiary designation form.

For purposes of the post-death required minimum distribution rules, a beneficiary is the person (or persons) who inherit the retirement account on the participant's death. A "designated beneficiary" is an individual who is designated as the beneficiary under the plan. So what is the difference between a beneficiary and a designated beneficiary?

Treas. Reg. §1.401(a)(9)-4, A-1 provides that "A designated beneficiary is an individual who is designated as a beneficiary under the plan. An individual may be designated as a beneficiary under the plan either by the terms of the plan or, if the plan so provides, by an affirmative election by the employee . . . specifying the beneficiary. A beneficiary designated as such under the plan is an individual who is entitled to a portion of an employee's benefit, contingent on the employee's death or another specified event . . . A designated beneficiary need not be specified by name in the plan or by the employee to the plan in order to be a designated beneficiary so long as the individual who is to be the beneficiary is identifiable under the plan. The members of a class of beneficiaries capable of expansion or contraction will be treated as identifiable if it is possible, to identify the class members with the shortest life expectancy." The fact that an employee's interest under the plan passes to a certain individual under a Will (or otherwise under applicable state law) does not make that individual a designated beneficiary unless the individual is designated as a beneficiary under the plan.

In deciphering Treas.Reg. §1.401(a)(9)-4, A-1, we learn that only a human (an individual) may be a designated beneficiary. An estate does not have a life expectancy and may not be a designated beneficiary. If the beneficiary listed on the beneficiary designation form is "my estate," there is no designated beneficiary even if all of the beneficiaries of the estate are individuals. Treas. Reg. §1.401(a)(9)-4, A-3(a), §1.401(a)(9)-8, A-11. However, if the participant names as the beneficiary "the residuary beneficiaries under my Will," or "the residuary beneficiaries under my Revocable Trust," this should suffice to establish them as designated beneficiaries if the residuary beneficiaries are restricted to identifiable individuals. Remember that the Regulations do not require beneficiaries "specified by name" as long as they are "identifiable under the plan."

While a trust does not have a life expectancy and is not an individual, if certain rules are satisfied (discussed in further detail separately), the trust beneficiaries (the humans) may be treated as the designated beneficiaries just as if the participant had named the humans as beneficiaries. A corporation, partnership or limited liability company is not an individual and will not be treated as a designated beneficiary even though the shareholders/partners/members are human (sometimes).

Treas. Reg. §1.401(a)(9)-4, A-1 also points out that there may be several designated beneficiaries when there is a class of multiple individual beneficiaries. However, it must be possible to identify the oldest member of the class. It is not necessary to specifically name individuals as long as they may be identified (i.e. my spouse, my children, my grandchildren, my brother and sister).

Example: Grandma completes her beneficiary designation form naming "my grandchildren" as the primary beneficiaries of her IRA. When Grandma completes the form she only has 3 grandchildren. The IRA administrator accepts the beneficiary designation form. On Grandma's date of death, she has 6 grandchildren. The designated beneficiaries of the IRA are all 6 grandchildren as it was possible to identify the oldest grandchild (oldest member of the class). Unless the grandchildren divide the IRA into separate accounts (by December 31st of the year after the participant's death), all of the grandchildren must receive the benefits over the oldest grandchild's life expectancy.

> **Sample Language**: Upon my death, I designate as my beneficiary, my spouse, WIFE'S NAME, to receive all benefits payable under the above account/plan. If my spouse does not survive me, I designate as my beneficiary, in equal shares, my children, SON'S NAME and DAUGHTER'S NAME, who survive me; provided that if any of my children shall predecease me, such child's descendants/issue shall take, per stirpes/by representation, the share such child would have received if living. Any benefits distributable to a person under the age of 21 shall be distributed to my surviving child, as custodian for such person under the Uniform Transfers to Minors Act. Such custodian shall be entitled to act for the minor in all respects with regard to the benefits.

> **Sample Language**: Upon my death, I designate as my beneficiary, my spouse, WIFE'S NAME, to receive all benefits payable under the above account/plan. If my spouse does not survive me, I designate as my beneficiary, in equal shares, my children, SON'S NAME and DAUGHTER'S NAME, who survive me; provided that if any of my children shall predecease me, such child's descendants/issue shall take, per stirpes/by representation, the share such child

would have received if living. Any benefits becoming distributable to a person under the age of 30 shall be distributed to the Trustee then serving as such under Article _____ of my Will/Revocable Trust dated January 1, 2007, to be held and administered for the benefit of such person as provided therein. Regardless of who is named as beneficiary, the Plan/IRA Administrator will provide to the executor, administrator or other duly appointed representative of my estate such information regarding me, my account, or my beneficiary or beneficiaries as such representative may reasonably request in connection with the performance of such representative's duties.

Corresponding Underage Trust Sample Language: Any property that would otherwise pass outright under this Will to a descendant of mine who has not attained the age of 30 shall instead be held by my Trustee as a separate trust for that descendant (the "Beneficiary") upon the following terms: (A) My Trustee may distribute to the Beneficiary any part or all of the income and principal of the trust as my Trustee may determine for health, support, maintenance or education. Any income not paid shall be accumulated and added at least annually to principal. (B) My Trustee shall distribute the remaining principal of the trust to the Beneficiary upon his or her attaining the age of 30. [*ALTERNATE* (B) My Trustee shall distribute to the Beneficiary one third of the remaining principal of the trust upon the Beneficiary's attaining the age of 25, one half of the remaining principal of the trust upon the Beneficiary's attaining the age of 27, and the entire remaining principal of the trust upon the Beneficiary's attaining the age of 30. If the Beneficiary has attained the age of 25 or 27 before his or her share is set apart, then as soon as such share is set apart one third or two thirds thereof, as the case may be, shall be distributed to the Beneficiary.] (C) Each year, beginning with the year of my death, my Trustee shall withdraw from any deferrable retirement benefit the Minimum Required Distribution for such deferrable retirement benefit for such year, plus such additional amount or amounts as the Trustee deems advisable in my Trustee's sole discretion and shall distribute such amounts (net of expenses charged properly thereto) to the Beneficiary. (D) If the Beneficiary dies prior to attaining the age of 30, then upon his or her death the remaining principal

of the trust shall be distributed, subject to this Article, in equal shares to his or her then surviving children; or if there is none, to the then surviving descendants, per stirpes, of the person who, among a class consisting of me and my descendants, is the Beneficiary's closest ancestor with any then surviving descendant.

Practice Pointer: When drafting the beneficiary designation, provide for a default beneficiary should no issue survive (contingent beneficiaries discussed in further detail below).

b. Contingent and Default Beneficiaries.

A beneficiary designation form generally has space for primary and contingent beneficiaries. If the primary beneficiary predeceases the plan participant, the contingent beneficiary steps into the shoes of the primary beneficiary and receives the benefit. If the primary beneficiary dies *after* the plan participant, the primary beneficiary's death does not erase the primary beneficiary's status as the beneficiary, unless the beneficiary designation form contains a survival clause (such as, if the primary beneficiary fails to survive the participant by 30 or 60 days, the primary beneficiary loses the right to benefits and the contingent beneficiary becomes the beneficiary).

Example: Mike completes and submits his beneficiary designation form naming Mary the beneficiary of his retirement plan. The form is accepted by the plan administrator, but the plan document provides that a beneficiary must survive the participant by at least 30 days. Mike dies on March 1st. Mary dies on March 28th. Mary did not survive Mike by the required 30 days. Unless the plan document provides for a contingent beneficiary, Mike has died without a designated beneficiary and his estate will be the beneficiary. The life expectancy payout method (benefits stretched out over beneficiary's life expectancy) will not be available to the beneficiaries of Mike's estate and they must receive all of the benefits within 5 years of Mike's death. If Mike had named an individual as a contingent beneficiary, that person would receive the benefits and would be able to stretch out the distributions (and the tax) over his or her life expectancy.

Example: Same facts as above, but Mary does survive Mike by the required 30 days. Thereafter, Mary dies before receiving all benefits. While some may think that the contingent beneficiary named by the participant will receive the remaining benefits, such a result is not typical. The person entitled to the benefits after the original beneficiary's death is the successor beneficiary. Who the successor beneficiary is depends on the plan document or IRA agreement. Some plans and custodians allow the beneficiary to name a successor beneficiary. Others require that the benefits be paid to the original beneficiary's estate.

Practice Pointer: Be sure that there is a default contingent beneficiary. In the event that there is no named contingent beneficiary, the plan documents control the disposition of the plan benefits. In such event, the documents usually provide that the default is the decedent's estate, which means the Will may control the disposition (assuming there is one) or without a Will, the laws of intestacy apply. In such cases, for purposes of the required minimum distribution rules, there is no designated beneficiary.

c. Separate Accounts.

If multiple beneficiaries are designated, the general rule provides that required minimum distributions are based on the life expectancy of the oldest member of the group. This requirement may be changed after the participant's death by dividing the account into "separate accounts" for multiple beneficiaries, one account payable to each respective beneficiary. Separate accounts must be established by the end of the year after the year of the participant's death to avoid the oldest member's life expectancy controlling all beneficiaries. In other words, separate accounts must be established before the last day of the year following the calendar year of the participant's death.

d. Trusts as Designated Beneficiaries.

A segment of the program will be devoted to how to properly designate a trust as the beneficiary of a retirement account. When naming a trust as the beneficiary, careful consideration should be made in drafting to ensure that the trust qualifies as see-through – the human beneficiary of the trust qualifies as the designated beneficiary. If the retirement account is left to a see-through trust, the benefits may be distributed annually

over the oldest trust beneficiary's actuarial life expectancy. If the trust does not qualify as a see-through trust, the trust is treated as not having a designated beneficiary, and all sums must be paid out within 5 years of the participant's death; or if the participant died after the required beginning date, the balance of what would have been the participant's life expectancy.

Separately considered should be the designation of a trust as beneficiary of insurance policy proceeds. If there are minor children involved (typically as contingent beneficiaries), consider naming the testamentary trusts established under the parent's Will or Revocable Trust, as the beneficiary (not the minor child or the estate). If the minor child is named as the beneficiary of a life insurance policy, the policy will be held by the insurance company subject to the terms of the contract or distributed to a guardian of the property, and will be under the control and supervision of the court until the minor attains the age of 18.

e. <u>Charitable Beneficiaries.</u>

If the client has significant charitable intent, naming the charity as the beneficiary of a retirement plan is an ideal way to fulfill that intent because the charity will receive the benefits income-tax free and there will be a deduction for estate tax purposes. However, the beneficiary designation must be carefully drafted to ensure that the charity receives the benefit without being tied to non-charitable beneficiaries.

Retirement plan distributions to a beneficiary are "income in respect of a decedent" (IRD); and IRD does not get a step-up in basis on the participant's death, meaning that the plan distributions to the beneficiary are subject to income tax when received after the participant's death. Since charities are exempt from income tax, the full benefit passes to the charity (and no income tax is paid on the distribution).

The easiest way to benefit a charity is to name the charity as the only beneficiary of the retirement plan/IRA. When a charity is the only beneficiary of the retirement plan/IRA, income tax is avoided and the estate receives an estate tax charitable deduction. This is true even if more than one charity is named as beneficiary so long as all of the beneficiaries are charities.

Be careful. The result is not the same if a charity and a human are named as co-beneficiaries of the retirement plan/IRA. Remember that only a human may be classified as a "designated beneficiary." Being classified as a "designated beneficiary" permits the beneficiary to stretch out the distributions (and the income tax) over the lifetime of the beneficiary. A charity is not an individual and may not be classified as a "designated beneficiary." If there are multiple beneficiaries, all of them must be individuals or none of them may stretch out the distributions unless an exception applies. While it is not good practice to name a charity and a human as co-beneficiaries, the exceptions may save a poorly drafted beneficiary designation form.

First, if there are multiple beneficiaries but each beneficiary's interest in the retirement plan is a "separate account," each separate account is treated as a separate retirement plan for minimum distribution rules purposes and each human beneficiary may use his or her life expectancy payout (stretch-out) for the beneficiary's separate account. The problem with this exception is that the beneficiary may miss the deadline for establishing separate accounts (by December 31st of the year after the participant's death). If the deadline is missed, all the beneficiaries must take the benefits as if there is no designated beneficiary (within 5 years of the participant's death).

The other exception is that a beneficiary is "disregarded" for purposes of determining the applicable distribution period (stretch out over life expectancy versus 5 year rule) if that beneficiary's interest is entirely distributed (or disclaimed) by September 30th of the year after the year of the participant's death (this September 30 is the "Beneficiary Finalization Date"). So long as the charity's share of the benefit may be paid out immediately after the participant's death (or at any time before the Beneficiary Finalization Date), the remaining individual beneficiaries will be entitled to use the life expectancy payout method (stretch out over life expectancy).

Practice Pointer: Consider establishing separate IRAs during the participant's lifetime-one payable to the charity (or charities) and one payable to individual beneficiaries. By doing so, you do not risk reliance on the exceptions (and the beneficiaries missing the deadlines).

Another way to leave retirement benefits to a charity is to name the charity as the beneficiary of a pecuniary (fixed dollar amount) portion of the account with the balance being distributed to individual beneficiaries (assuming that the plan administrator will accept the pecuniary gift on the beneficiary designation form). If a pecuniary gift from the retirement plan is desired, the next determination is whether the charity receives a proportionate share of gains/losses after the participant's death and such determination needs to be specified within the beneficiary designation form.

> **Sample Language**: I designate XYZ CHARITY as the primary beneficiary.

> **Sample Language**: I designate XYZ CHARITY, ABC CHURCH and DEF CHARITY, equally, as the primary beneficiaries.

> **Sample Language**: Pay $100,000 to XYZ CHARITY and pay the balance to my daughter, DAUGHTER'S NAME; or if she does not survive me, to my son, SON'S NAME. This is a pecuniary gift and XYZ CHARITY shall only receive $100,000. All appreciation and depreciation after my death shall be allocated to the balance. However, if neither of my children survives me, the entire balance shall be distributed to XYZ CHARITY.

Practice Pointer: Be sure that there is a default contingent beneficiary should neither child survive the participant. In the event that there is no contingent beneficiary, for purposes of the required minimum distribution rules, there is no designated beneficiary.

IV. INCORPORATING QUALIFIED DISCLAIMERS.

Estate planning for clients with significant balances in retirement or life insurance plans becomes a balancing act between use of the clients' estate tax exemptions and the deferral of income tax. If the surviving spouse is named the beneficiary of the plan, the plan benefits pass automatically to the surviving spouse, and while the gift will permit the

deferral of estate tax until the second death, the first spouse's estate tax exemption may be wasted.

Example: Husband has $1 Million in an IRA. Wife has $500,000 in non-qualified investments. Husband and Wife own their $500,000 home jointly. Husband and Wife both have Wills that include a family trust funded with the New York State estate tax exemption and an outright distribution of the excess over the estate tax exemption to the surviving spouse. Husband's beneficiary designation form provides that (1) Wife is the primary beneficiary of his IRA, and (2) Child is the contingent beneficiary. IRA administrator accepted the beneficiary designation. Husband dies first. Wife receives the IRA as designated beneficiary and the home as surviving tenant by the entirety. Husband's NYS estate tax exemption is completely wasted because there is no portability under the New York estate tax laws. If Wife disclaims the IRA, Child takes the $1 Million IRA free from estate tax.

Example: Same facts as above, but Wife dies first. Husband receives the house as surviving tenant by the entirety. Family trust under Wife's Will is funded with $500,000 in non-qualified investments. Only a portion of Wife's estate tax exemption is used.

Example: Same facts as above, but Husband and Wife re-titled home in Wife's name only. Husband's beneficiary designation provides that if Wife makes a qualified disclaimer, the IRA will be distributed to the family trust established under his Will. Husband dies. Wife makes qualified disclaimer. The family trust established under Husband's Will is funded with Husband's IRA, using all of Husband's NYS estate tax exemption. If Wife dies first, the family trust established under her Will is funded with the $500,000 house and the $500,000 in non-qualified investments. Both spouses' NYS estate tax exemptions are used.

a. <u>Requirements for IRS Purposes.</u>

A "disclaimer" is the refusal to accept an inheritance or gift and is not generally treated as a taxable transfer (assuming it meets the requirements of IRC §2518). For a disclaimer to qualify as a "qualified disclaimer," IRC §2518 requires that:

- The disclaimer must be irrevocable, unconditional and in writing.

- The person disclaiming must have not accepted the interest disclaimed or any of its benefits (the disclaiming person may not have used the benefit).
- The disclaimer must be determined within 9 months of the participant's (donor's) death.
- The disclaimer must be delivered to the correct parties (In New York State, the persons now entitled to the benefit and the Surrogate's Court for the County within which the decedent was domiciled even if there is no probate estate. If there is a probate estate, the executor must also receive a copy of the disclaimer).
- The property subject to the disclaimer must pass to someone other than the disclaiming person.
- The property must pass, as a result of the disclaimer, to whomever it passes without any direction on the part of the disclaiming person (*i.e.,* disclaiming person is treated as having immediately predeceased the participant/donor and the beneficiary designation form or plan provides who receives in the event of a disclaimer).

A qualified disclaimer made by September 30th of the year after the year of the participant's death (the "Beneficiary Finalization Date") is effective to remove the disclaiming person as the beneficiary for purposes of determining the designated beneficiary under the required minimum distribution rules. Even though the Beneficiary Finalization Date may be more than 9 months after the participant's death, the time within which a qualified disclaimer may be made remains 9 months from the date of the participant' death.

Example: Husband named Wife as the designated beneficiary of his IRA. Husband named Child as contingent beneficiary should Wife predecease Husband. IRA administrator accepted the beneficiary designation. Husband died on March 1st and before his required beginning date (usually 70 ½ but may be different based on type of plan). Wife makes a qualified disclaimer within 9 months of Husband's death. Because Wife made the qualified disclaimer before the Beneficiary Finalization Date, Child is now the designated beneficiary and may stretch out the distributions over Child's life expectancy.

Be careful. If funding the family trust with retirement plans, the language of the family trust must comply with the power of appointment rules (i.e. the beneficiary of a trust resulting from a disclaimer may not have a power to appoint [change the beneficiaries] of the trust).

> **Sample Language**: If my spouse survives me, I designate my spouse, SPOUSE'S NAME, as my primary beneficiary. If my spouse survives me, but disclaims the death benefit (or any part of the death benefit), I designate as my contingent beneficiary, to receive the part (or all) of the death benefit so disclaimed, TRUSTEE'S NAME, as the Trustee of TRUST NAME, under agreement dated January 1, 2007, a copy of which is attached hereto; provided that with respect to any portion of the death benefit that is also disclaimed by said trust, or with respect to which my spouse also disclaims all interests passing to my spouse under said trust, my spouse shall be deemed to have predeceased me. If my spouse does not survive me, or with respect to any portion of the death benefit as to which my spouse is deemed (pursuant to the preceding sentence) to have predeceased me, I designate as my contingent beneficiary, my descendants/issue, per stirpes/by right of representation.

Practice Pointer: Be sure that there is a default contingent beneficiary when completing the beneficiary designation forms. In the event that there is no contingent beneficiary, the plan documents control the disposition of the plan benefits; and for purposes of the required minimum distribution rules, there is no designated beneficiary.

b. <u>Requirements for Surrogate Court Purposes.</u>

EPTL 2-1.11 establishes the rules for disclaimers/renunciations in Surrogate's Court. EPTL 2-1.11(a) specifically provides that a disclaimer made for Surrogate Court purposes shall not necessarily constitute a qualified disclaimer within the meaning of IRC §2518.

Disclaimers for Surrogate Court purposes are permitted for "dispositions," specifically a disposition under a Will or trust, including the granting of a power of appointment, a disposition created by the exercise or non-exercise of a power of appointment, a distributive share under EPTL 4-1.1, Totten trust bank accounts under EPTL 7-5.1, a transfer created by a life insurance

or annuity contract, a transfer resulting from the creation of a joint tenancy or tenancy by the entirety, succession to an interest occurring by operation of law on the death of a joint tenant or tenant by the entirety, a transfer under an employee benefit plan (including, without limitation, any pension, retirement, death benefit, stock bonus or profit-sharing plan, system or trust), a transfer of a security to a beneficiary pursuant to EPTL 13-4.1, any other disposition or transfer created by any testamentary or nontestamentary instrument, or by operation of law, and any of the foregoing created or increased by reason of a renunciation made by another person. EPTL 2-1.11(b)(1). Even though not explicitly mentioned in EPTL 2-1.11, the rules with respect to disclaimers apply to IRAs.

The effective date of disposition for a disposition created by Will, the exercise or non-exercise of a testamentary power of appointment, a distribution pursuant to 4-1.1, Totten trust bank accounts under EPTL 7-5.1, the registration of a security in beneficiary form pursuant to EPTL 13-4.1, a life insurance or annuity contract, the death of a joint tenant or tenant by the entirety, or an employee benefit plan is the date of death of the deceased testator, the holder of the power of appointment, the intestate, the creator of the trust account, the registered owner of the security, the insured, the annuitant, the other joint tenant or tenant by the entirety, or the employee. EPTL 2-1.11(b)(2)(A).

The effective date of disposition for a disposition created by trust agreement, the exercise of a presently exercisable power of appointment, the creation of a joint tenancy or tenancy by the entirety, or the renunciation of a disposition created by another is the date as of which the transfer in trust is irrevocable and is a completed gift for federal gift tax purposes [regardless of whether a gift tax is imposed on the completed gift], the date of the exercise of the power of appointment, the creation of a joint tenancy or tenancy by the entirety, or renunciation. EPTL 2-1.11(b)(2)(B). The effective date of a disposition which is of a future estate is the date on which it becomes an estate in possession. EPTL 2-1.11(b).

A disclaimer must be in writing, signed and acknowledged by the person renouncing, and filed within 9 months of the effective date of disposition in the Surrogate Court having jurisdiction over the Will or trust governing the property from which the disposition would otherwise be made. EPTL 2-1.11(c)(2). If no administration or probate proceeding is filed, the

appropriate place for filing is the Court where the administration/probate proceeding would have been filed (county Surrogate where the decedent resided). EPTL 2-1.11(c)(2).

Notice of renunciation, including a copy of the renunciation, must be served personally or as the court directs upon the fiduciary directed by the Will or trust agreement to make the disposition or upon the administrator or such other person who was directed to make the disposition or upon any other person having custody or possession of or legal title to the property, an interest in which is being renounced, and by mail or in such manner as the court may direct upon all persons whose interest may be created or increased by reason of such renunciation. EPTL 2-1.11(c)(2).

A renunciation may be made by the guardian of the property of an infant (when authorized by the court having jurisdiction of the estate of the infant), the committee of an incompetent (when authorized by the court that appointed the committee), the conservator of a conservatee (when authorized by the court that appointed the conservator), an Article 81 guardian (when authorized by the court that appointed the guardian), the personal representative of a decedent, provided that the personal representative may seek authorization from the court having jurisdiction of the estate of the decedent, and an attorney-in-fact, when so authorized under a duly executed power of attorney. EPTL 2-1.11(d)(1) – (6).

c. Requirements for Non-ERISA Pension Plans, State and Local Government and Church Plans, Owner Employee Plans, IRAs. and Top Hat Plans that are not ERISA plans.

All these plans must defer to the Surrogate's Court renunciation procedures described above. Ideally, the plan document should be reviewed prior to the participant's death if the use of disclaimer Wills is incorporated as part of the estate plan. In drafting the beneficiary designation with the disclaimer of plan benefits, ensure that the designation will be accepted and honored under the terms of the plan.

Assuming that estate tax or long term care planning was not anticipated at the estate planning engagement and that disclaimers are being considered post mortem, in addition to the requirements for a qualified disclaimer under both the EPTL and Internal Revenue Code, be sure

to review the plan document before making the disclaimer to ensure that the end result of bypassing the spouse will be achieved, and that the plan document does not provide for an alternative distribution scheme.

d. Requirements for ERISA and Federal Plans with Death Benefits or Survivor Benefits.

ERISA and the laws governing federal benefit plan preempt state laws that attempt to determine beneficiary designations. Thus, EPTL 2-1.11 may not be used to compel an ERISA plan to comply with a disclaimer. The plan terms determine who is entitled to the plan benefits. If the plan documents provide that a participant's survivor benefit to be paid to the beneficiary named by the participant, and there are no plan provisions permitting the disclaimer at issue the plan must pay the benefit to the named beneficiary when the named beneficiary is still living. Kennedy v. Plan Adm'r of the Du Pont Sav. and Inv. Plan, 555 U.S. 285 (2009) (holding that ERISA plan must disregard a disclaimer that is consistent with the plan document) In such a situation, the Code still permits the beneficiary to make a benefit disclaimer.

Example: Participant, P, dies and the participant's spouse, S, wishes to disclaim an ERISA plan survivor benefit that is a lump sum so that P's default beneficiary will obtain the benefit. However, the plan refuses to accept a written disclaimer that complies with the requirements of Code § 2518(b)(2) on the basis that under the plan terms do not permit such a disclaimer. Nevertheless, S may use Code § 2518(c)(3) to achieve a disclaimer after receiving the benefit payment. In particular, by immediately transferring the lump sum amount to the default beneficiary and the earnings, if any,that accrued on the sum before the transfer could be effectuated the statutory conditions for a Section 2518 disclaimer will be satisfied.

It is again important to review the plan document before including disclaimer planning as part of the estate plan; or in a worst-case scenario, post mortem. Failure to do so may result in the unintentional distribution of the account to someone other than the presumed recipient.

V. <u>MARITAL/CREDIT SHELTER TRUST VERSUS ROLLOVER</u>.

a. <u>Rollover Consequences.</u>

A retirement plan distribution is not taxed in the year received if it is "rolled over" to the same or a different retirement plan or IRA. A distribution from one plan/IRA to the participant (or participant's surviving spouse) is "rolled over" if the recipient re-deposits the distribution in the same or another plan/IRA within 60 days. There is also no tax due if assets from the participant's account in a qualified retirement plan or IRA are transferred to an IRA in the name of the participant or the participant's surviving spouse.

When the surviving spouse inherits an IRA as the sole beneficiary, the surviving spouse has the option to elect it as the surviving spouse's own IRA (rollover). Unmarried couples are not afforded the benefits of rollovers. The surviving spouse's ability to roll over inherited benefits to the surviving spouse's own IRA gives the surviving spouse the power to defer the start of plan distributions, an option that is not available to non-spouse beneficiaries. By rolling over the inherited benefits to the surviving spouse's own IRA, the surviving spouse becomes the participant under the required minimum distributions rules. This gives the surviving spouse distinct income tax advantages:

- Non-spouse beneficiaries must commence taking required minimum distributions by the end of the year after the year of the participant's death. A surviving spouse who is under age 70 ½ may postpone distributions until the year after the surviving spouse reaches age 70 ½ .

- Non-spouse beneficiaries must take required minimum distributions over one life expectancy. A surviving spouse's required minimum distributions from a rolled over IRA may be determined using the Uniform Lifetime Table under which the surviving spouse's applicable distribution period is the joint life expectancy of the spouse (as participant) and a hypothetical beneficiary 10 years younger than the surviving spouse. Once the surviving spouse has rolled over benefits to the surviving spouse's own IRA or other plan, the benefits now belong to the

surviving spouse and are no longer in an "inherited plan." The surviving spouse now takes distributions as "participant" rather than as "beneficiary."

- The surviving spouse may name a new designated beneficiary for the rollover IRA. After the surviving spouse's death, required minimum distributions will be based on the life expectancy of the surviving spouse's new designated beneficiary.

b. <u>Marital Trust / Credit Shelter Trust</u>

Many times the estate plan for our clients includes the use of a family trust (also known as a credit shelter trust or bypass trust) funded with the current estate tax exemption and a marital trust (a qualified terminable interest property trust) funded with the excess over the estate tax exemption. Use of the family trust ensures that assets within the family trust are available for the family's needs (health, support, maintenance or education), while permitting the family trust assets to qualify for the estate tax and generation skipping transfer tax exemptions and therefore, to appreciate free from future estate tax during the surviving spouse's lifetime. Given the increase of the federal and New York State estate tax exemptions and federal portability, this becomes less of a concern. However, there may be non-tax reasons for using marital and credit shelter trusts.

By using the marital trust, we may provide protection from the surviving spouse's creditors, potential new spouses and unscrupulous caregivers, while ensuring that the surviving spouse is well provided for (only the surviving spouse may benefit from the marital trust and the surviving spouse must receive the marital trust income at least annually) and the estate tax is deferred until the second death.

By naming either the family or marital trust as the beneficiary of a participant's retirement plan, we ensure maximum estate tax savings and protection from the decedent's creditors, new spouses and unscrupulous caregivers, but the surviving spouse loses the advantages associated with rolling over the inherited IRA funds into a new IRA.

Naming the marital trust as the beneficiary of a retirement plan/IRA often results in forced distribution of the benefits sooner than would be required had the surviving spouse been

the designated beneficiary with the ability to rollover the benefits into a new account. Even if the marital trust qualifies as a see-through (remember trusts are not humans and are not designated beneficiaries unless an exception is met), distributing the benefits over the single life expectancy of the surviving spouse (as the oldest beneficiary of the trust) results in substantially less deferral than a rollover would. In contrast, if the surviving spouse is the named designated beneficiary and the surviving spouse rolls over the benefit into a new IRA, the surviving spouse is considered a participant and is not required to take distributions until the surviving spouse reaches age 70 ½.

If the marital trust is the chosen beneficiary, it is also important to ensure that the marital trust includes language that the surviving spouse is entitled to all of the income of the trust (the standard language) *plus* all the income of any retirement plan payable to the trust. The IRS views "income" of a retirement plan that the surviving spouse must be entitled to for marital deduction purposes as either the plan's internal investment income or an acceptable annual unitrust percentage amount (generally 3-5%) of the value of the retirement plan account.

Example: Husband is 70. Wife is 59. Husband names Wife as designated beneficiary of his IRA. IRA administrator accepts beneficiary designation. Husband dies at age 70. Wife may roll over the IRA into Wife's own IRA, defer distributions until Wife is 70 ½ and may choose her own designated beneficiary.

Example: Same facts but Husband is paranoid that Wife will marry a 30 year old when he dies so he names a "marital trust" (qualifying as a qualified terminable interest property trust") as the beneficiary of his IRA. Assuming either that Wife receives other assets sufficient to satisfy her right of election or that she waives the right of election, the marital trust receives the benefit. If the marital trust qualifies as "see through," Wife may take distributions over her life expectancy.

Difference between examples: at age 59, Wife could defer taking any distributions until 70 ½ when she is the designated beneficiary (permitting the IRA to grow with tax deferral).

> **Sample Language**: If my spouse survives me, I designate as my primary beneficiary, to receive 100% of the benefit, TRUSTEE'S NAME, as Trustee of

the TRUST NAME, under agreement dated January 1, 2007, a copy of which is attached hereto. If my spouse does not survive me, I designate as my contingent beneficiary, my descendants/issue who survive me, per stirpes/by representation; provided that if any contingent beneficiary is under the age of 30 such beneficiary's share shall not be paid to the beneficiary outright, but shall instead be paid to the trustee then serving as such under the separate trust established or to be established for such beneficiary under Article ____ of my Will/Revocable Trust dated January 1, 2007, a copy of which is attached hereto, to be held, administered and distributed for the benefit of such beneficiary as provided therein.

Corresponding Marital Trust Sample Language: If any marital trust created under this Agreement becomes the beneficiary of any retirement benefit, the Trustee must withdraw from the marital trust's share of such retirement benefit each year the greater of (1) the net income of the marital trust's share of such retirement benefit for such year; or (2) the Minimum Required Distribution for such year with respect to such retirement benefit. This paragraph shall not be deemed to limit the Trustee's power and right, in any year, to withdraw from the marital trust's share of the retirement benefit more than the greater of said amounts.

Practice Pointer: When drafting the beneficiary designation, provide for a default beneficiary should no issue survive.

VI. TIPS AND TIDBITS.

a. Designations to Reflect Changes in Family, Friends and Finances.

It is important to review beneficiary designations on a regular basis. Reliance on EPTL 5-1.4 only applies to spouses whose marriage ends in divorce or annulment. What is not considered are unmarried couples who live together (remember, no common law marriage in New York State), the birth or death of persons other than a spouse, or other changes in family circumstances. Many beneficiary designation forms only allow for specific named individuals.

If a grandchild is born, that company's form probably won't allow for the newly born grandchild to be included (as would occur with a Will which does not provide otherwise under EPTL 5-3.2).

b. <u>Acceptance of Beneficiary Designation Form.</u>

While we may have control over the beneficiary designation forms that are submitted by our clients, and we may even ensure that our clients' beneficiary designation forms are accepted by the Plan/IRA Administrator (including IRA trustees, custodians and insurers), we are often brought in as counsel for the executor or trustee of an estate that we did not plan. Unfortunately, more often than not, when we are presented with the administration of an estate or trust for which we did not prepare the planning documents, there are issues, either with the language of the Will or Trust (i.e. "I give the sum of $10,000 to my brothers and sisters" with the actual intent being "I give the sum of $10,000 to each of my brother and sisters") or locating and distributing retirement accounts and life insurance. In these situations, it is not uncommon that the decedent submitted a change of beneficiary or new beneficiary designation form and then did not follow up to ensure that the beneficiary designated was accepted by the Plan/IRA Administrator.

Example: Tim completed and submitted a beneficiary designation form changing the beneficiary from an ex-girlfriend to his brother, John. Soon after mailing in the beneficiary designation form to Plan/IRA Administrator, Tim moved. After moving he changed his address with Plan/IRA Administrator. In the interim, Plan/IRA Administrator sent a letter of rejection to Tim's old address because Tim did not include John's Social Security Number on the beneficiary designation form. Tim died never knowing that the Plan/IRA Administrator had rejected his beneficiary designation form. Who is the beneficiary of the plan/IRA? Plan/IRA Administrator claims ex-girlfriend is the proper beneficiary given that they rejected the beneficiary designation.

Practice Pointer: Make sure that any beneficiary designation form that you helped a client prepare is actually accepted by the Plan/IRA Administrator. Best practice is for the attorney to prepare the beneficiary designation form for the client's signature and thereafter mail the beneficiary designation form to the Plan/IRA Administrator certified mail, return receipt requested with a cover letter requesting that acceptance of the beneficiary designation form be mailed to the client. Then, follow up with the client to make sure that the client receives

confirmation of acceptance. Keep copies! With mergers on top of mergers occurring in the banking and financial industries, locating the beneficiary designation form within the company (that was a result of a merger on top of merger on top of merger) may delay (or prohibit) processing of a claim.

c. Requirement to Communicate with Personal Representative/Trustee.

How many of us have called Plan/IRA Administrators on behalf of our client, the executor, only to be told that the customer service representative only has the authority to speak with the designated beneficiary? A little smile comes across my face when responding to that customer service representative that the beneficiary designation form includes the authority of the personal representative to speak with and receive information from the Plan/IRA Administrator.

Sample Language: The IRA custodian or trustee named above shall provide to the personal representative of my estate any information such executor shall request in connection with the performance of such personal representative's duties (including the preparation of any tax return) regarding the benefits, the terms of the account, and the beneficiary or beneficiaries, including information as to matters prior to such personal representative's appointment, to the same extent and on the same terms that such information would have been provided to me had I requested it. Any beneficiary, by accepting benefits, is deemed to have consented to the release of information to my executor as provided in the preceding sentence.

d. Titling Inherited IRAs.

Remember that an "inherited IRA" is not necessarily a rollover IRA, as surviving spouses are the only designated beneficiaries who may "roll over" the IRA into a new IRA of which the surviving spouse is the new participant/owner. A non-spouse beneficiary who inherits a traditional IRA may treat the IRA as his or her own by not withdrawing minimum distributions. However, it is better practice to have the account retitled as an account of her creation, so there is no question about the account's character.

According to IRS Notice 2007-7, an inherited IRA must be "established in a manner that identifies it as an IRA with respect to a deceased individual and also identifies the deceased

individual and the beneficiary, for example, 'Tom Smith as beneficiary of John Smith." In other words, be sure to include in the title both the name of the deceased IRA owner and an indication that it is for the benefit of the person who inherited it.

Recommended language: "John Smith, IRA (deceased on May 21, 2007) F/B/O John Smith Jr., beneficiary."

If the inherited IRA is not titled properly, or the beneficiary (other than a surviving spouse) puts the inherited IRA into his or her own IRA, immediate taxation is triggered on the account's entire value. It is also important to remember that the beneficiary of the inherited IRA also needs to name a beneficiary in the event he or she dies before the inherited IRA is completely distributed.

Practice Pointer: Again, be sure that there is a default contingent beneficiary. Some plans and IRAs require the benefits to be paid back to the original beneficiary's estate. However, the plan or IRA may permit the original beneficiary to name his or her own successor beneficiary. When assisting the family with the administration of the estate of the creator of the IRA, be sure to advise the beneficiaries of inherited IRAs to include beneficiary designations (assuming the plan or IRA allows it). Remember, if no designation is made, the estate may be the taker (assuming there is a Will) or the laws of intestacy may apply (depending on the plan document)

e. <u>Correcting Beneficiary Designation Mistakes.</u>

Hopefully, correcting the designated beneficiary mistake is happening while the participant is still alive and you are merely correcting a form executed before the participant sought your counsel. When meeting with clients for whom you are preparing an estate plan, it is important that you ask the clients to bring copies of all their beneficiary designation forms. This will permit you to make any corrections to the beneficiary designation forms while you still can. It also beats the merger on top of merger issue discussed above with respect to finding the beneficiary designation form after the beneficiary's death.

Unfortunately, you are often attempting to correct the beneficiary designation forms after the participant's death which had been submitted without advice of counsel. The desire is either

to (1) un-lump the human beneficiaries, so they need not take the distributions based on the oldest beneficiary's life expectancy, or (2) separate a charitable beneficiary from the human beneficiaries to avoid the 5 year payout rule.

"Fixing" the beneficiary designation usually involves the use of a disclaimer, the separation of shares or the removal of the charitable beneficiary from the "beneficiaries."

Using a disclaimer (discussed in further detail above) may correct the tax effects of a poorly thought out beneficiary designation. For example, if the participant did not include estate tax planning and the surviving spouse has sufficient "other" assets to maintain the surviving spouse's lifestyle, the surviving spouse may consider using a disclaimer to use the first spouse's estate tax exemption. In addition to the estate tax advantages, the qualified disclaimer may change the applicable distribution period by removing the older beneficiary. However, given that the surviving spouse may "roll over" the plan/account, income and estate tax consequences of the disclaimer need to be reviewed before the decision is made.

Example: Joe named his sister, Robin, as the primary beneficiary of his IRA with Robin's children, David and Dawn, named as the contingent beneficiaries. If after Joe's death, Robin determines that she would prefer the IRA be distributed to her children, she may make a qualified disclaimer. David and Dawn are now the designated beneficiaries and may take out the IRA over the eldest's life expectancy.

To cure a multiple beneficiary problem (requiring distribution over the eldest's life expectancy), distribution to any non-individual (or older beneficiary) may be made entirely before the Beneficiary Finalization Date. As long as the distribution is fully made before the Beneficiary Finalization Date, only the remaining (younger) beneficiaries who still have an interest will count for purposes of determining who is a designated beneficiary (and for purposes of stretching out the payments).

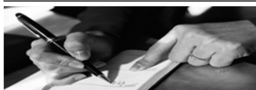
Example: Amy names her siblings, Denise (age 60) and Bob (age 62), and her niece and nephew, Stephanie (15) and Bobby (12), as equal primary beneficiaries. Amy dies. If Denise and Bob are paid out before the Beneficiary Finalization Date (distributions to Denise and Bob are completed by September 30th of the year after the year of Amy's death), Stephanie and

Bobby may stretch out their distributions over Stephanie's life expectancy (as the oldest designated beneficiary).

Normally, if the participant's retirement plan benefit "is divided into separate accounts and the beneficiaries with respect to one separate account differ from the beneficiaries with respect to the other separate accounts of the employee under the plan . . . the rules in section 401(a)(9) separately apply to such separate account" under Reg. §1.401(a)(9)-8, A-2(a)(2).

If there are multiple beneficiaries but each beneficiary's interest in the retirement plan is a "separate account," each separate account is treated as a separate retirement plan for minimum distribution rules purposes and each human beneficiary may use his or her life expectancy payout (stretch-out) for the beneficiary's separate account. To use "separate accounts" for purposes of the minimum distribution rules, the separate accounts must be established by December 31st of the year after the participant's death). If the deadline is missed, all the beneficiaries must take the benefits based on the oldest beneficiary's life expectancy (assuming all human designated beneficiaries); or if there are non-individual beneficiaries, as if there is no designated beneficiary (within 5 years of the participant's death, if the participant died before the required beginning date, or over the participant's actuarial life expectancy, if the participant died after the required beginning date).

Beneficiary Designations



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Estate Planning Considerations

- Beautiful Will or Revocable Trust:
  - Both spouses' estate tax exemptions
  - Maximum estate tax savings
  - Creditor protection
  - Bells and whistles.
- Primary Asset is IRA
  - Useless Will or Revocable Trust!

Types of Accounts

- Totten Trust
- Brokerage Accounts
- Life Insurance
- Non-Qualified Annuities
- IRAs
- ERISA Plans
- Non-ERISA Plans

Totten Trust Bank Accounts

- Controlled by EPTL §7-5.1 – §7-5.8.
- "Beneficiary"- person for whom a trust account is established/ maintained by a Depositor.
- Beneficiary entitled to funds on Depositor's death, outright and free of trust.
- Depositor may change beneficiary by withdrawal or by writing (acknowledged and filed with financial institution).

Totten Trust Bank Accounts

- Depositor's Will may revoke terminate or modify trust.
- EPTL §7-5.3(b)- allows for <$10,000 distribution to a parent/ guardian of beneficiary <18YO; guardian required if >$10,000
- EPTL §7-5.6- allows for joint depositors
- EPTL §7-5.7- allows for multiple beneficiaries (distributed equally after depositor's death)

Totten Trust Bank Accounts

- Governing Law/Documents.
- Beneficiary designation must be:
  - Acknowledged or proved in manner required to entitle conveyances of real property to be recorded.
  - Meet requirements of financial institution's own agreements.

Brokerage Accounts

- Controlled by EPTL Article 12 Part 4.
- EPTL §13-4.2- permits transfer-on-death registration by individuals with sole ownership or by multiple owners as joint tenants with right of survivorship.
- Multiple owners as tenants-in-common is not allowed.

Brokerage Accounts

- EPTL §13-4.6- beneficiary/TOD/POD has no effect until owner's death.
- Designation may be changed during owner's lifetime without beneficiary's consent.
- Owner's Will may change or revoke designation.
- EPTL §13-4.10- provides terms, conditions and forms of registration with illustrations.

Brokerage Accounts

- Governing Law/Documents.
- Beneficiary designation?
  - No requirement of signature, notarization or writing.
  - Covered by financial institution's own agreements.

Life Insurance

- Remember- contractual. Designation needs to comply with policy terms.
  - My estate as beneficiary?
    - Subject to creditor's claims.
  - Individual or Trust as beneficiary.
  - Insurance Trust as Owner/ Beneficiary.

Non-Qualified Annuities

- Defers income tax until annuity payments are made.
- Not affiliated with IRA or employer-sponsored plan.
- Beneficiary designation is contractual.
- Death benefit usually paid in lump sum.
- Surviving spouse may have power to continue the annuity and keep tax-deferred status in tact.

Non-Qualified Annuities

- Beneficiary Designations?
  - Usually allows for individual beneficiary, entity/corporation, estate, trust for collateral assignee.
  - Review annuity contract BEFORE submitting claim forms.

Social Security Death Benefits

- Widow/widower may receive benefits if over 60+YO, 50+YO if disabled, or at any age if marriage >10 years and child <16YO or disabled in widow/widower's care.
- One time death benefit- $255

IRAs

- NOT subject to ERISA unless part of a SIMPLE or SEP plan.
- Roth or Traditional?
- IRS Publication 590-A- focuses on contributions to traditional and Roth IRAs.
- IRS Publication 590-B- focuses on distributions from traditional and Roth IRAs.

Traditional IRAs

- May be opened and contributions made by anyone who received taxable compensation during year and is <70½ by 12/31.
  - If married filing joint, either may establish.
  - If both spouses have taxable compensation, both may establish.
- Taxable Compensation
  - Wages, salaries, tips, professional fees
  - Does not include rent, interest, dividends or deferred compensation.

Roth IRAs

- Contributions made with after-tax dollars; NOT deductible.
- Contributions may be made after age 70½.
- No required minimum distributions (unless a beneficiary).
- Same combined contribution limits as traditional IRAs.

Traditional or Roth IRAs

- Beneficiary designation?
  - Must be made in writing and signed by person making designation and agreed to by insurance company or bank/ financial institution.

ERISA Plans

- ERISA covers defined benefit and defined contribution plans, including:
  - 401(k)s- traditional, safe harbor, SIMPLE and automatic enrollment.
  - Profit Sharing Plans.
  - ESOPs.
  - SEPs.
  - SIMPLEs.

ERISA Plans

- Beneficiary Designations?
  - NOT controlled by state designation laws.

NON-ERISA Plans

- Not covered by ERISA, including:
  - Owner-employee/spouse plans (no other employees).
  - Federal Government.
  - State/Local Government.
  - Churches.
  - 457 Plans.
  - Top-Hat Plans.

Divorced? See EPTL §5-1.4

- Automatic revocation of **revocable** beneficiary designations and testamentary gifts/appointments upon divorce, annulment or dissolution of marriage.
- DOES NOT apply to **irrevocable** designations or testamentary gifts.
- Operates exclusively of ERISA.

Divorced?

- Former spouse treated as having immediately predeceased owner.
- NO protection for relatives of former spouse- designation for father-in-law as executor remains effective after divorce.

Is there a "Designated Beneficiary"?

- Or maybe the better question is, ***"Who is a designated beneficiary?"***
  - Not every beneficiary named on a beneficiary designation form is a "designated beneficiary."

Is there a "Designated Beneficiary"?

- For purposes of the post-death required minimum distribution rules, **a beneficiary** is the person (or people) who inherit the retirement account on the participant's death.
- A "**designated beneficiary"** is an individual who is designated as the beneficiary under the plan.

Is there a "Designated Beneficiary"?

- *So what is the difference between a beneficiary and a designated beneficiary?*
  - A **beneficiary** is not necessarily a human, could be a trust, corporation, LLC.
  - A **designated beneficiary** is a human (or a see-through trust). Must have a life expectancy to be a designated beneficiary!

Is there a "Designated Beneficiary"?

- So, again, what is the difference?
  - A **beneficiary** must take out the benefit within 5 years if the participant dies before the required beginning date (RBD).
  - A **designated beneficiary** gets special treatment. . . . Distributions may be *stretched out* over the life expectancy of the designated beneficiary if the participant dies before the RBD.

Is there a "Designated Beneficiary"?

- *Does a human actually need to be specifically named to be a designated beneficiary?*
  - **NO.** So long as the individuals are **identifiable,** this should be sufficient to establish them as designated beneficiaries.
  - "My children," "My grandchildren" are identifiable and will qualify as designated beneficiaries.

Is there a "Designated Beneficiary"?

- **Sample Language:** Upon my death, I designate as my beneficiary, my spouse, to receive all benefits payable under the above account. If my spouse does not survive me, I designate as my beneficiary, in equal shares, my children, who survive me; provided that if any of my children shall predecease me, such child's descendants shall take, per stirpes, the share such child would have received if living.

Contingent Beneficiaries.

- If the primary beneficiary predeceases the plan participant, the contingent beneficiary steps into the shoes of the primary beneficiary and receives the benefit.
- If the primary beneficiary dies *after* the plan participant, the primary beneficiary's death does not erase the primary beneficiary's status as the beneficiary, unless the beneficiary designation form provides for a survival clause.

Contingent Beneficiaries

- Example: Mike completes and submits his beneficiary designation form naming Mary the beneficiary of his retirement plan. The form is accepted by the plan administrator, but the plan document provides that a beneficiary must survive the participant by at least 30 days. Mike dies on March 1st. Mary died on March 28th. Mary did not survive Mike by the required 30 days. Unless the plan document provides for a successor beneficiary, Mike has died without a designated beneficiary and his estate will be the beneficiary.

Contingent Beneficiaries

- **Carry over from example:**
- The life expectancy payout method (stretch out over life expectancy) will not be available to the beneficiaries of Mike's estate and they must receive all of the benefits within 5 years of Mike's death.
- If Mike had named a contingent beneficiary, that person would receive the benefits and would be able to stretch out the distributions (and the tax) over his or her life expectancy.

Incorporating Charitable Gifts

- Retirement plan distributions to a beneficiary are "income in respect of a decedent" (IRD).
- IRD does not get a step-up in basis.
- Since charities are exempt from income tax, the full benefit passes to the charity (and no income tax is paid on the distribution).

Incorporating Charitable Gifts

- Easiest way to benefit a charity: Name the charity as the only beneficiary of the retirement plan/IRA.
- Because the charity is the only beneficiary of the retirement plan/IRA, income tax is avoided and the estate receives an estate tax charitable deduction.

Incorporating Charitable Gifts

- **Be careful.** A charity is not an individual and will not be classified as a "designated beneficiary."
- If there are multiple beneficiaries, all of them must be individuals or none of them may stretch out the distributions unless an exception applies.

Incorporating Charitable Gifts

- ***If multiple beneficiaries*** but each beneficiary's interest in the plan is a **"separate account,"** each separate account is treated as a separate retirement plan for minimum distribution rules and each human beneficiary may use that beneficiary's life expectancy payout for the beneficiary's separate account.
- Separate accounts may be accomplished ***after*** participant's death.

Incorporating Charitable Gifts

- **Don't miss the deadline-** must be complete by December 31st of the year after the participant's death).
- If the deadline is missed, all the beneficiaries must take the benefits as if there is no designated beneficiary (within 5 years of the participant's death if death before RBD).

Incorporating Charitable Gifts

- A beneficiary is "disregarded" for purposes of determining the applicable distribution period if that beneficiary's interest is entirely distributed (or disclaimed) by September 30th of the year after the year of the participant's death (the "Beneficiary Finalization Date").
- Pay charity's share of the benefit immediately after the participant's death (or before the Beneficiary Finalization Date).
- Remaining individual beneficiaries will be entitled to use the life expectancy payout method.

Incorporating Disclaimer Techniques

- A ***"disclaimer"*** is the refusal to accept an inheritance or gift and is not generally treated as a taxable transfer (assuming it meets the requirements of IRC §2518).
- **Why use?**
  - Correct mistakes.
  - Use estate tax exemptions.

Incorporating Disclaimer Techniques

- **What is a "Qualified Disclaimer"?**
  - Irrevocable, unconditional and in writing.
  - Person disclaiming must have not accepted the interest disclaimed or any of its benefits (no use).
  - Made within 9 months of the participant's death.

Incorporating Disclaimer Techniques

- **"Qualified Disclaimer" continued. . .**
  - Delivered to the correct parties (Surrogate's Court even if no probate, plan administrator, executor and people benefiting from disclaimer.
  - Disclaimed property passes to someone other than the disclaiming person.
  - Property passes to whomever it passes without any direction on the part of the disclaiming person.

Incorporating Disclaimer Techniques

- **Example:** Husband named Wife as the designated beneficiary of his IRA. Husband named Child as contingent beneficiary should Wife predecease Husband. IRA administrator accepted the beneficiary designation. Husband died before his RBD. Wife makes a qualified disclaimer within 9 months of Husband's death. Because Wife made the qualified disclaimer before the Beneficiary Finalization Date, Child is now the designated beneficiary and may stretch out the distributions over Child's life expectancy.

Incorporating Disclaimer Techniques

- **Example:** H has $1 Million in an IRA. W has $500,000 in non-qualified investments. H & W own their $500,000 home jointly. H and W both have Wills that include a family trust funded with the $1 Million NYS estate tax exemption and an outright distribution of the excess over the estate tax exemption to the surviving spouse. H's beneficiary designation form provides that W is the beneficiary of his IRA. Child is named as the contingent beneficiary. H dies first. W receives the IRA as designated beneficiary and the home as surviving tenant by the entirety.
  - **Husband's estate tax exemption is completely wasted.**
  - **If Wife disclaims, Child takes the $1 Million IRA.**

Incorporating Disclaimer Techniques

- Same facts as above, but W dies first.
  - H receives the house as surviving tenant by the entirety.
  - Family trust under Wife's Will is funded with $500,000 in non-qualified investments.
  - Only a portion of Wife's estate tax exemption is used.

Incorporating Disclaimer Techniques

- Same facts as above, but H & W re-titled home in W's name only. H's beneficiary designation provides that if W makes a qualified disclaimer, the IRA will be distributed to the family trust established under his Will. H dies. W makes qualified disclaimer.
  - Family trust established under H's Will is funded with H's IRA, using all of H's NYS estate tax exemption.
  - If W dies first, the family trust established under her Will is funded with the $500,000 house and the $500,000 in non-qualified investments.
  - **Both spouses' NYS estate tax exemptions are used.**

Incorporating Disclaimer Techniques

- **Be careful.**
  - If funding the family trust with retirement plans, the language of the family trust must comply with the power of appointment rules
  - Beneficiary of a trust resulting from a disclaimer cannot have a power to appoint (change the beneficiaries) of the trust.

Rollover or Marital Trust?

- ***What is a rollover?***
  - A distribution from one plan/IRA to the participant (or participant's surviving spouse) is followed by the participant's (or spouse's) re-depositing the distribution in the same or another plan/IRA within 60 days; or
  - The direct transfer of assets from the participant's account in a qualified retirement plan to an IRA in the name of the participant or the participant's surviving spouse.

Rollover or Marital Trust?

- **What happens if surviving spouse rolls over IRA:**
  - Surviving spouse has the option to elect it as the surviving spouse's own IRA (rollover).
  - By rolling over to the surviving spouse's own IRA, the surviving spouse becomes the participant under the required minimum distributions rules.

Rollover or Marital Trust?

- **Advantages of Rollover**
  - *Non-spouse* beneficiaries must commence taking required minimum distributions by the end of the year after the year of the participant's death.
  - A surviving spouse who is under age 70½ may postpone distributions until the surviving spouse reaches age 70½ .

Rollover or Marital Trust?

- **Advantages of Rollover**
  - *Non-spouse* beneficiaries must take required minimum distributions over one life expectancy.
  - A surviving spouse's required minimum distributions determined using the Uniform Lifetime Table
    - surviving spouse's applicable distribution period is the joint life expectancy of the spouse (as participant) and a hypothetical beneficiary 10 years younger than the surviving spouse.

Rollover or Marital Trust?

- **Advantages of Rollover**
  - The surviving spouse may name a new designated beneficiary for the rollover IRA.
  - After the surviving spouse's death, required minimum distributions will be based on the life expectancy of the surviving spouse's new designated beneficiary.

Rollover or Marital Trust?

- **Marital Trust Consequences:**
  - Results in forced distribution of the benefits sooner than rollover.
  - Even if the marital trust qualifies as a see-through, distributing the benefits over the single life expectancy of the surviving spouse results in substantially less deferral than a rollover would.

Rollover or Marital Trust?

- **Marital Trust Consequences:**
  - Make sue the marital trust includes language that the surviving spouse is entitled to all of the income of the trust (the standard language) *plus* all income of any retirement plan payable to the trust.
  - IRS' views "income" of a retirement plan that the surviving spouse must be entitled to for marital deduction purposes as either the plan's internal investment income or an acceptable annual unitrust percentage amount (generally 3-5%).

Rollover or Marital Trust?

- **Example:** Husband is 70. Wife is 59. Husband names Wife as designated beneficiary of his IRA. IRA administrator accepts beneficiary designation. Husband dies at age 70. Wife may roll over the IRA into Wife's own IRA, defer distributions until Wife is 70½ and may choose her own designated beneficiary.

Rollover or Marital Trust?

- **Example:** Same facts but Husband names a "marital trust" (qualifying as a qualified terminable interest property trust") as the beneficiary of his IRA.
- Assuming either that Wife receives other assets sufficient to satisfy her right of election or that she waives the right of election, the marital trust receives the benefit.
- If the marital trust qualifies as a "see through," Wife may take distributions over her life expectancy.
- At age 59, Wife could defer taking any distributions until 70 ½ when she is the designated beneficiary (permitting the IRA to grow with tax deferral).

Require the plan administrator to provide information to the executor.

- **Sample Language:** The IRA custodian or trustee named above shall provide to the executor of my estate any information such executor shall request in connection with the performance of such executor's duties (including the preparation of any tax return) regarding the benefits, the terms of the account, and the beneficiary or beneficiaries, including information as to matters prior to such executor's appointment, to the same extent and on the same terms that such information would have been provided to me had I requested it. Any beneficiary, by accepting benefits, is deemed to have consented to the release of information to my executor as provided in the preceding sentence.

Require the plan administrator to provide information to the executor

- **Other Sample Language:** Regardless of who is named as beneficiary, you will provide to the executor, administrator or other duly appointed representative of my estate such information regarding me, my account, or my beneficiary or beneficiaries as such representative may reasonably request in connection with the performance of such representative's duties.

How to Properly Title the IRA After Death

- **IRS Notice 2007-7:**
  - IRA must be "established in a manner that identifies it as an IRA with respect to a deceased individual and also identifies the deceased individual and the beneficiary.
- Be sure to include in the title *both* the name of the deceased IRA owner and an indication that it is for the benefit of the person who inherited it.

How to Properly Title the IRA After Death

- **Recommended language:**

  "John Smith, IRA (deceased on May 21, 2007) F/B/O John Smith Jr., beneficiary."

How to Properly Title the IRA After Death

- If the inherited IRA is not titled properly, or the beneficiary puts the inherited IRA into his or her own IRA, **IMMEDIATE TAXATION** is triggered on the account's entire value.
- **Don't Forget:** Beneficiary of the inherited IRA also needs to name a beneficiary.

Correcting Mistakes

- Use a disclaimer
  - May correct the tax effects of a poorly thought out beneficiary designation.
  - May be used to get IRAs to younger beneficiaries (longer life expectancies).
  - Or if estate tax planning was included (creating a credit shelter trust), the disclaimed IRA may pass into that credit shelter trust.

Correcting Mistakes

- Example: Joe named his sister, Robin, as the primary beneficiary of his IRA with Robin's children, David and Dawn, named as the contingent beneficiaries. If after Joe's death, Robin determines that she would prefer the IRA be distributed to her children, she may make a qualified disclaimer. David and Dawn are now the designated beneficiaries and may take out the IRA over the eldest's life expectancy.

Correcting Mistakes

- **To cure a multiple beneficiary problem** (requiring distribution over the eldest's life expectancy), distribution to any non-individual (or older beneficiary) may be made entirely before the Beneficiary Finalization Date.
- As long as the distribution is fully made before the Beneficiary Finalization Date, the remaining (younger) beneficiaries may stretch out.

Correcting Mistakes

- Example: Amy names her siblings, Denise (age 60) and Bob (age 62), and her niece and nephew, Stephanie (15) and Bobby (12), as equal primary beneficiaries. Amy dies. If Denise and Bob are paid out before the Beneficiary Finalization Date (distributions to Denise and Bob are completed by September 30th of the year after the year of Amy's death), Stephanie and Bobby may stretch out their distributions over Stephanie's life expectancy (as the oldest designated beneficiary).

Correcting Mistakes

- If there are ***multiple beneficiaries*** but each beneficiary's interest in the retirement plan is a "separate account," each separate account is treated as a separate retirement plan for minimum distribution rules purposes and each human beneficiary may use his or her life expectancy payout (stretch-out) for the beneficiary's separate account.

Correcting Mistakes

- To use **"separate accounts**" for purposes of the minimum distribution rules, the separate accounts must be established by December 31st of the year after the participant's death).
- If the deadline is missed, all the beneficiaries must take the benefits based on the oldest beneficiary's life expectancy.
- If there are non-individual beneficiaries, as if there is no designated beneficiary.

The end. . . . Questions?