Individual retirement accounts (IRAs) and other qualified retirement plans are increasingly common assets in a client's estate. Thus, determining how to properly transfer and distribute such assets is critical to proper estate planning.

This chapter focuses on the distribution of an IRA or other qualified retirement plan (also referred to as retirement account or retirement benefits) to a minor beneficiary at the plan participant's death. Such distributions present unique considerations and demand careful and customized estate plan drafting.

The sample language provided in this chapter specifically deals with the situation of a trust for the benefit of minor beneficiaries. For an in-depth discussion of naming trusts as beneficiaries of retirement accounts, see Emily L. Bowman and David W. Kirch, *Avoiding Pitfalls for Minor Beneficiaries of IRAs and Other Qualified Retirement Benefits*, 46 Colo. Law. 9 (2017), and Natalie B. Choate, *Life and Death Planning for Retirement Benefits: The Essential Handbook for Estate Planners*, Boston, Massachusetts, Ataxplan Publications, 7th ed. revised (2011).

I. Why Use Trusts to Hold Retirement Benefits?

Some of the common reasons to use trusts to hold assets in lieu of outright distributions include provisions for minor or spendthrift beneficiaries, asset protection, and preservation of the grantor's dispositive intentions following the death of the primary beneficiary. Similar factors apply to the use of trusts to receive the proceeds of individual retirement accounts (IRAs) and other qualified retirement accounts (collectively referred to herein as "retirement accounts"), but with the added complexity of 1) the timing of required distributions from the retirement account and 2) income tax considerations related to such required distributions.

Retirement accounts funded with pre-tax dollars have long held the advantage of being income-tax free while held in the retirement account, only becoming subject to income tax upon distribution from the retirement account. Upon the death of the owner of a retirement account, the non-spouse beneficiary generally has three options to receive the assets of the retirement account (subject to the terms of the retirement account): 1) a one-time lump-sum payout, 2) distribution over five years, or 3) distribution over the beneficiary's life expectancy, also known as a "stretch" payout. Many clients may prefer to give their beneficiaries the opportunity to use the stretch payout in an effort to keep assets inside the plan as long as possible, which allows the assets to appreciate tax-free and may result in decreased income tax liability when compared to a lump-sum or 5-year payout.

When leaving retirement accounts in trust, only certain types of trusts will qualify for the stretch payout. While this chapter discusses general requirements related to stretch payouts, the example trust language and beneficiary designation language provided is specific to the limited and narrow scenario of obtaining a stretch payout when leaving retirement accounts to a trust for the benefit of multiple children (*i.e.,* a *pot trust*) that will distribute any funds from the retirement account to the beneficiaries (*i.e.*, a *conduit trust*). A full discussion of the intricacies of leaving retirement accounts in trust is beyond the scope of this chapter. Additional considerations are involved when leaving retirement accounts to a trust intended to qualify for the marital deduction. For more in-depth discussions, see Emily L. Bowman and David W. Kirch, *Avoiding Pitfalls for Minor Beneficiaries of IRAs and Other Qualified Retirement Benefits*, 46 Colo. Law. 9 (2017), and Natalie B. Choate, *Life and Death Planning for Retirement Benefits: The Essential Handbook for Estate Planners*, Boston, Massachusetts, Ataxplan Publications, 7th ed. revised (2011).

II. Qualifying a Trust for Stretch Payout

In order for a trust to qualify for stretch payout treatment, the trust must be a "designated beneficiary" under I.R.C. 401(a)(9)(E) and 26 C.F.R. 1.401(a)(9)-4, A-1., and the beneficiaries of the trust must be individuals as of the "beneficiary finalization date" (September 30 of the year following the year of the participant's death).

A. In order for a trust to be a "designated beneficiary", the trust must qualify as a "see-through" trust. This means that:
   1. The trust must be valid under state law;
   2. The trust must be irrevocable as of the participant's date of death;
   3. The trustee must provide certain documents to the plan administrator by October 31 of the year following the year of the participant's death; and
   4. The trust beneficiaries must be identifiable from the trust instrument.
      a. The beneficiary does not need to be identified by name;
      b. If naming a class of beneficiaries, members of the class are "identifiable" if it is possible to identify the class member with the shortest life expectancy at the time of the participant's death;
      c. The beneficiaries which must be considered for this purpose differ if the trust is an accumulation trust or a conduit trust.

B. In order for the beneficiaries of the trust to be considered individuals as of the "beneficiary finalization date":
   1. The beneficiaries of the trust cannot be a charity or business entity, unless the charity or business entity receives its share of the retirement account outright before the beneficiary finalization date.
   2. No part of the retirement account may go to the participant/decedent's estate.
      a. Retirement account proceeds cannot be used to pay for the participant/decedent's debts, administration expenses, or taxes.
      b. The beneficiary designation should not state that benefits will be paid according to the participant/decedent's will.
      c. Note: often, in the absence of a valid beneficiary designation, the terms of the retirement account will require the retirement account be paid to the participant/decedent's estate. Even if the participant/decedent's estate plan

includes trusts that could qualify for stretch payout if directly designated as beneficiary, causing the retirement account to be paid to the estate would in itself, prevent the trustee from taking advantage of the stretch payout because an estate is not considered an individual and does not qualify as a "designated beneficiary" under the Regulations (see 26 C.F.R. 1.401(a)(9)-4, A-3).

III. Structuring the Trust to Meet the Client's Needs

When using trusts in an estate plan, the client faces many decisions regarding structure. As outlined below, certain decisions regarding trust structure will impact the stretch payout of retirement accounts left to the trust.

A. Accumulation Trusts vs. Conduit Trusts

A "see-through" trust may be structured as an accumulation trust or a conduit trust. As indicated by their names, an accumulation trust allows distributions from a retirement account to be retained (accumulated) in trust, while a conduit trust requires distributions from a retirement account to be further distributed to the trust's beneficiaries within the tax year.

1. Conduit Trusts
    a. A conduit trust requires all distributions from the retirement account to be distributed to the beneficiary within the taxable year.
    b. If a conduit trust is set up as a separate trust rather than a pot trust (see section III(B) below), it will be considered a "safe harbor" to qualify as a "see-through" trust.
    c. The life expectancy of the oldest <u>current</u> beneficiary is the only life expectancy considered in determining the annual required minimum distribution (RMD); remainder beneficiaries are not considered.
    d. The current beneficiary will pay all income taxes on the retirement benefits.
        i. The "kiddie tax" may apply.
    e. If the beneficiary to whom the retirement account distributions must be distributed is a minor, the funds will need to be distributed to the beneficiary's custodian for the minor's benefit, to an UTMA, or to a court-appointed conservator.
        i. Even through this immediate distribution may seem to defeat the purpose of naming a trust as beneficiary of the retirement account, using the conduit trust prevents the beneficiary from electing a lump sum payout or accessing all retirement account assets once he/she reaches the age of majority.
2. Accumulation Trusts
    a. An accumulation trust may be useful if the client wants to protect the proceeds for future use by a beneficiary.
        i. For example, an accumulation trust may be ideal when the beneficiaries are minors or spendthrifts.

b. An accumulation trust allows distributions from a retirement account to be retained in the trust rather than mandating that the distributions to be further distributed to the beneficiaries during the taxable year.
   i. The terms of the trust may give the trustee discretion as to when and how to use trust assets, including retirement account proceeds.
   ii. The trustee will want to consider the income tax consequences of retaining retirement account distributions in trust versus distributing to the beneficiaries under the distribution terms of the trust (see section (e) below).
c. The rules around accumulation trusts qualifying for the stretch payout are complex. Care must be taken in drafting the provisions of the trust so as to not violate any of the stretch or "see-through" rules. Potential issues include:
   i. Remote beneficiaries must be considered:
      1. In order to qualify a trust for "see through" requirements, the remote beneficiaries must meet the "identifiable" and individual requirements (see sections II(A) and (B) above).
      2. In calculating the RMD, the life expectancies of both current and remote beneficiaries must be considered. Determining the extent of remote beneficiaries that need to be considered can be complicated. For more information, see Natalie Choate, *Life and Death Planning for Retirement Benefits*, Seventh Ed. (2011).
   ii. The trust must provide that no person older than the beneficiary with the shortest life expectancy at the time of the participant's death be permitted to be a future beneficiary.
      1. Powers of appointment should be limited to exclude any possibility that the retirement account assets would be distributed to a beneficiary with a shorter life expectancy.
      2. Consideration must be given to including language limiting the addition of beneficiaries via adoption.
d. The RMD is calculated based on the life expectancy of the oldest beneficiary, whether the beneficiary is a primary or remainder beneficiary.
   i. This may be a problem if the remainder beneficiary is older than the primary beneficiary (for example, if the primary beneficiary is a grandchild, and the remainder beneficiary is a child).
e. Regarding taxes on the benefits received annually from the retirement accounts:
   i. The trust will pay the income taxes on the amount of annual proceeds from the retirement benefits that is not distributed to the beneficiary
      1. Income tax rates for a trust are usually higher than a beneficiary's individual tax rate
   ii. The beneficiary will pay the income taxes on the amount of annual proceeds from the retirement benefits that is distributed to the beneficiary
      1. Minors pay a "kiddie tax"

B. Separate Trusts vs. Pot Trusts
  1. Separate Trusts
     a. A separate trust holds funds for the benefit of one primary beneficiary.
     b. If the client wishes to use separate trusts and has multiple beneficiaries, a separate trust would be established for each primary beneficiary.
     c. Calculating RMD:
        i. If the separate trust is a conduit trust, only the primary beneficiary's life expectancy is considered in calculating the RMD.
        ii. If the separate trust is an accumulation trust, the primary or remainder beneficiary with the shortest life expectancy is considered in calculating the RMD.
  2. Pot Trusts
     a. A pot trust holds funds for the benefit of several primary beneficiaries (for example, the trust is for the benefit of all of the children of the participant)
     b. When compared to separate trusts, pot trusts may involve simpler (or shorter) documents, as one trust is used for multiple beneficiaries rather than drafting separate trusts for each beneficiary. This may also result in simpler beneficiary designations (see section IV below).
     c. Calculating RMD:
        i. If the pot trust is a conduit trust, the primary beneficiary with the shortest life expectancy is considered in calculating the RMD.
        ii. If the pot trust is an accumulation trust, the primary or remainder beneficiary with the shortest life expectancy is considered in calculating the RMD.
           1. Consider the impact if the beneficiaries are not close in age. For example, if the primary beneficiaries are two children, one of whom is substantially older than the other, the older child's life expectancy will apply to the trust, and the younger beneficiary will not get the full benefit of using his/her longer life expectancy.

C. RMD Summary

The following chart summarizes the basic rules used for life expectancy RMD calculations, based on a trust's characteristics:

	Conduit Trust	**Accumulation Trust**
Separate Trust	Use Life Expectancy of Primary Beneficiary	Use Life Expectancy of Oldest Primary or Remote Beneficiary
Pot Trust	Use Life Expectancy of Oldest Primary Beneficiary	Use Life Expectancy of Oldest Primary or Remote Beneficiary

D. Additional Drafting Considerations

In order to increase the likelihood that the trust will be treated in the manner intended by the client, the practitioner should consider including additional trust provisions (see Natalie Choate, *Life and Death Planning for Retirement Benefits*, Seventh Ed. (2011)):

1. Include a Statement of Intent.
    a. Include language in the trust setting forth the settlor's intent that the trust qualify for stretch treatment in determining RMDs.
    b. This may assist in any needed court reformation action in the event the trust fails to qualify for stretch treatment. The practitioner is cautioned that the IRS may not accept a state court's post-death reformation of a trust for this purpose.
2. Define Retirement Benefits for purposes of the trust.
3. Specify the difference in determining RMD if the participant dies before or after his required beginning date.
4. Require that the trustee withdraw the RMD from the retirement account each year, and specify when withdrawals should begin.
5. If the client so intends, include discretionary provisions allowing the trustee to withdraw assets in excess of the RMD from the retirement account.
6. Include language specifying that only individuals are beneficiaries of the trust for purposes of distribution of retirement assets.
7. Include language prohibiting the participant/decedent's debts, expenses of administration and taxes from being paid from the retirement assets.

E. Sample Language: Conduit Pot Trust
The following sample language may be included in Form 531 – Will with Contingent Trust (Couple) in Orange Book Forms Chapter 5 – Non-Taxable Estates – Married Couples, to create a conduit pot trust for retirement accounts held in trust:

ARTICLE 5 – DEFERRABLE RETIREMENT BENEFIT TRUST[i]

Any deferrable retirement benefit (as defined below) that becomes payable to this trust or to my trustee as a result of my death shall be held and administered as follows:

5.1 DEFINITIONS: As used in this article, unless the context otherwise requires:

a) "I.R.C." means the Internal Revenue Code of the United States. Any reference to specific sections of the I.R.C. shall include sections of like or similar import which replace the specific sections as a result of changes to the I.R.C. made after the date of my will.

b) "Retirement benefit" and "benefit" means the trust's interest in one of the following types of assets if payable to this trust as beneficiary or owned by this trust: a qualified or nonqualified annuity; a benefit under a qualified or a nonqualified plan of deferred compensation; any account in or benefit payable under any pension, profit-sharing, stock bonus, or other qualified retirement plan; any individual retirement account or trust; and any and all benefits under any plan or arrangement that is established under § 408, § 408A, § 457, § 403, § 401, or similar provisions of the I.R.C. "Retirement benefits" means all such interests collectively.[ii]

c) "Minimum distribution rules" means the rules of I.R.C. § 401(a)(9), including Treasury Regulations thereunder. The terms "life expectancy," "designated beneficiary," and "applicable distribution period" shall have the same meaning as under the minimum distribution rules.[iii]

d) "Deferrable retirement benefit" means any retirement benefit that meets the following two requirements: First it is subject to the minimum distribution rules. Second, a designated beneficiary of such benefit has the option (either under the terms of the plan or arrangement that governs such benefit, or by causing the benefit to be transferred to an inherited IRA) to take distribution of such benefit in annual installments over the life expectancy of the (or of the oldest) designated beneficiary. "Deferrable retirement benefits" means all such interests collectively. Benefits under a plan or arrangement that is not subject to the minimum distribution rules (such as, under current law, a "nonqualified deferred compensation plan" are not deferrable retirement benefits.[iv]

e) "Required minimum distribution" for any year means, with respect to any retirement benefit: (1) the value of the retirement benefit as of the preceding year-end, divided by (2) the applicable distribution period; or such greater or lesser amount as the trustee shall be required to withdraw under the laws then applicable to this trust to avoid penalty. Notwithstanding the foregoing, the required minimum distribution for the year of my death shall mean (1) the amount that was required to be distributed to me with respect to such benefit during such year under the minimum distribution rules, minus (2) amounts actually distributed to me with respect to such benefit during such year.[v]

5.2 REQUIRED MINIMUM DISTRIBUTIONS: Each year, beginning with the year of my death, my trustee shall withdraw from any deferrable retirement benefit the required minimum distribution for such deferrable retirement benefit for such year, plus such additional amount or amounts (if any) as my trustee deems advisable in its discretion. My trustee shall forthwith pay all amounts so withdrawn (net of expenses properly charged thereto)[vi] to any one or more of the living members of that group consisting of my children, in such proportions among them as my trustee in its discretion deems advisable, without the necessity of equalization among them at any time. My trustee shall consider all circumstances relevant to the administration of the trust including, but not limited to: (a) financial and other resources of the beneficiary which are outside the trust and are known to or are readily ascertainable by the trustee; and (b) the failure by a beneficiary to provide required information. Prior to distributing any amount in excess of the required minimum distribution from a deferrable retirement benefit, my trustee should consider, to the extent possible, the availability of assets of any other trust under my will from which the excess distribution could be made.

5.3 TERMINATION OF TRUST: The Deferrable Retirement Benefit Trust shall terminate when there is no living child of mine under the age of ____________ years. Upon termination, the trust as it then exists shall be distributed to my then living descendants by representation. My trustee shall arrange for the transfer of a beneficiary's interest in the trust upon termination in such a manner so as to minimize causing a taxable distribution for federal income tax purposes of the deferrable retirement benefit.

5.4 REMOTE CONTINGENT DISPOSITION: If at any time there is no person or entity qualified to receive final distribution of my trust estate or any part of it, then any such portion of my trust estate with respect to which such failure of qualified recipients has occurred shall be distributed one-half to those persons who would inherit it had I then died intestate, unmarried, and not a partner in a civil union owning such property, and one-half to those persons who would inherit it had my spouse then died intestate, unmarried, and not a partner in a civil union owning such property, all as determined and in the proportions provided by the laws of Colorado then in effect, *provided, however,* that no person born in a year earlier than the year of birth of the oldest beneficiary of this trust shall be eligible to receive distribution of a deferrable retirement benefit under this paragraph.

5.5 PROTECTIVE PROVISIONS: Notwithstanding any other provision of my will to the contrary:

a) The purpose of this article is to qualify the Deferrable Retirement Benefit Trust as a conduit trust under Treasury Regulation § 1.401(a)(9)-5 to facilitate the distribution of a deferrable retirement benefit over the life expectancy of a trust beneficiary as permitted by Treasury Regulations. My trustee shall not exercise any discretion or power granted by my will or by law in a manner inconsistent with qualification of this trust as a conduit trust under applicable Treasury Regulations.

b) My trustee may not distribute to or for the benefit of my estate, any charity, or any other nonindividual beneficiary any deferrable retirement benefit payable to this trust. It is my intent that all such deferrable retirement benefits be distributed to or held for only individual beneficiaries, within the meaning of the minimum distribution rules. Accordingly, I direct that such benefits may not be used for or applied to payment of my debts, taxes, expenses of administration, or other claims against my estate; nor for payment of estate, inheritance or similar transfer taxes due on account of my death. This paragraph 5.5(b) shall not apply to any bequest or expense which is specifically directed to be funded with deferrable retirement benefits by any other provision of my will.[vii]

c) For purposes of this article, the term "descendants" shall not include an individual who is a descendant by virtue of adoption if such individual was so adopted after my death and is older than the oldest individual who was a beneficiary of this trust at my death.[viii]

d) No deferrable retirement benefit may be appointed, distributed or transferred to any other trust unless (i) the trust meets the requirements of Treasury Regulation § 1.401(a)(9)-4, Q & A 5, and (ii) the oldest beneficiary of such other trust was not born in a year earlier than the year of birth of the oldest beneficiary of this trust.[ix]

IV. Beneficiary Designations

Beneficiary Designations must be carefully drafted. Naming a sub-trust as beneficiary of a retirement account may create different results from naming a Master Trust (e.g., a family trust which then divides into separate trusts) as beneficiary.

A. Naming a Sub-Trust as Beneficiary
   1. In order for Sub-Trusts to use each beneficiary's individual life expectancy to calculate RMDs, each sub-trust must be specifically named in the retirement account's beneficiary designation document;
   2. Each sub-trust can be established and funded after the participant's death;
   3. Before each sub-trust receives any retirement benefits, it must be considered a "separate trust" under state law, with its own tax ID number.

B. Naming a Master Trust as Beneficiary
   1. While naming a Master Trust as beneficiary may seem optimal in that it will often result in a simpler and shorter beneficiary designation, doing so will cause the life expectancies of all beneficiaries of the Master Trust (rather than only the beneficiaries of the sub-trust) to be considered for purposes of calculating the RMD.

C. Sample Language: Beneficiary Designation
   1. The following provides an example of a beneficiary designation when naming a pot trust. For other examples of beneficiary designation language, see Natalie B. Choate, *Life and Death Planning for Retirement Benefits: The Essential Handbook for Estate Planners*, Boston, Massachusetts, Ataxplan Publications, 7th ed. revised (2011).

It is typically the case that the custodian or plan administrator will require the use of its own form for designating or changing the beneficiary of any retirement plan or individual retirement account. This form often does not have the option, or enough space, to allow a practitioner to designate a trust as a beneficiary in the manner required to achieve the income tax objectives desired in such planning. Accordingly, this Form [1240?] is designed to provide additional language which can be attached to a beneficiary designation or change of beneficiary form.

INDIVIDUAL RETIREMENT ACCOUNT BENEFICIARY DESIGNATION

SAMPLE LANGUAGE

The following is sample language designed for a family situation where there is a spouse and/or one or more children who are minors, and where a significant portion of the decedent's assets consist of retirement plan assets such as qualified defined contribution retirement accounts or individual retirement accounts (both traditional and Roth). This beneficiary designation is designed to be used in connection with the sample language comprising a Designated Retirement Benefit Trust under Form 15___, "Drafting for Retirement Assets." This language may not be appropriate for clients with tax planning wills or trusts which contain a marital deduction trust for the benefit of the surviving spouse.

Primary Beneficiary: My spouse, _____________, if my spouse survives me.

Contingent Beneficiary: My descendants, by representation (defined below); provided, however, that if a separate Designated Retirement Benefit Trust is created for a descendant of mine under my last will and testament dated ___________, or under the [NAME OF REVOCABLE TRUST] dated _____________, such descendant's share of the benefits shall be paid to the trustee of such descendant's Designated Retirement Benefit Trust.

By representation means that the property is to be divided into as many shares as there are then-living descendants in the nearest degree of kinship and then-deceased descendants in the same degree who left then-living descendants. Each then living descendant in the nearest degree shall receive one share and the share of each then-deceased descendant in the same degree shall be divided among his or her descendants in the same manner.

<u>Notes on Use</u>

[INSERT OR REFERENCE EMILY BOWMAN ARTICLE DRAFTED FOR THIS SUBCOMMITEE?]
In planning for the devolution of a client's retirement plan assets, it is recommended that a practitioner familiarize himself or herself with the specific tax planning requirements associated with retirement accounts under the Internal Revenue Code of 1986, specifically Code section 401(a)(9) and its associated Treasury Regulations. For a further discussion of these requirements, please see Natalie Choate, *Life and Death Planning for Retirement Benefits*, Seventh Ed. (2011).

1) This form designates the surviving spouse as primary beneficiary, mainly for purposes of preserving certain rights granted to a surviving spouse with respect to retirement benefits for which such spouse is the designated beneficiary. *See generally* Choate for a discussion of these benefits, including but not limited to the right of the spouse to rollover the account to an

individual retirement account for which the surviving spouse is treated as the "owner" instead of the "beneficiary" under Section 408 of the Internal Revenue Code of 1986.

2) In designating a Designated Retirement Benefit Trust for a client's descendant as the beneficiary of retirement benefits, the form of the Designated Retirement Benefit Trust provides for mandatory distributions, at least annually, of the "minimum required distribution" as determined under Section 401(a)(9) of the Internal Revenue Code of 1986, plus any retirement benefits withdrawn by the trustee of such trust above and beyond the minimum required distribution for a particular tax year. This distribution scheme is commonly referred to as a "conduit" trust. Special attention should be given to the practical effects of providing a guaranteed stream of distributions to a descendant of a client. Depending on the client's age, health status, and other factors requiring additional asset protection and management (such as addiction or debt problems), a conduit trust may not be appropriate for such descendant. In such a case, the practitioner should review alternatives to balance the need for asset protection and/or preservation of the income and principal of the trust with the tax objectives inherent in this type of planning.

3) The practitioner should also refer to the notes on use for Form 1230, "Life Insurance Beneficiary Designation Sample Language," for a discussion of the practical effects and choices associated with naming a trust for a minor child as a beneficiary versus naming the child as beneficiary, and the option to use a per capita distribution scheme as opposed to a per stirpital division.

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[i] *See* Natalie B. Choate, *Life and Death Planning for Retirement Benefits: The Essential Handbook for Estate Planners*, Boston, Massachusetts, Ataxplan Publications, 7th ed. revised (2011). Much of the inspiration for and text of this form is attributable to this invaluable publication, as more fully explained in the endnotes which follow.
[ii] *Id.* at 598. Form 4.11, Definition 2.
[iii] *Id.* at 598. Form 4.11, Definition 4 including part of Definition 5.
[iv] *Id.* at 598. Form 4.11, Definition 3.
[v] *Id.* at 598. Form 4.11, Definition 5.
[vi] *Id.* at 596. Form 4.8, Paragraph B.
[vii] *Id.* at 592. Form 4.2, *Version A*.
[viii] *Id.* at 593. Form 4.3.
[ix] *Id.* at 593. Form 4.4; (i) modified for simplicity.