



TEXAS CAPITAL BANK™

ROLLOVER IRAS IN THE NEW MILLENNIUM

**AN UPDATE ON THE MINIMUM DISTRIBUTION, ROTH,
CHARITABLE CONTRIBUTION RULES AND ESTATE
PLANNING CONSIDERATIONS**

DALLAS ESTATE PLANNING COUNCIL

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This outline has been prepared to help an attorney, a CPA, an actuary, or other tax advisor navigate the muddy waters of minimum distribution planning. Because of the complexity and rapidly changing nature of the law, the reader is warned not to place blind faith in the statements made herein, to verify independently any points upon which reliance is to be placed, and not to assume that all relevant IRA, income and estate tax issues have been addressed and/or answered. This is not intended as a substitute for a tax practitioner's own research and advice.

HISTORY:

In 1987, the IRS drafted proposed regs for required distributions from IRAs at 70 ½. They were arbitrary, complicated, full of traps and required difficult and confusing choices to be made irrevocably at 70 ½. In 2003, the IRS released new regs, which simplified those rules and significantly reduced required distributions. Those changes also applied to qualified employee benefit plans such as 401(k)s and profit sharing plans, 403(b) plans, and Sec. 457 plans.

The overall goal was to simplify the previous rules. The changes occurred primarily in three areas. First, life expectancies were standardized resulting in greater simplicity and lower required distributions. Second, the designating and changing of beneficiaries were vastly simplified. Finally, the audit and enforcement abilities of the IRS were greatly enhanced with numerous reporting responsibilities imposed on trustees/custodians.

Since then, the Tax Increase Prevention and Reconciliation Act of 2006 made changes with respect to the rollover rules to Roth IRAs. The Pension Protection Act of 2006, as amended, allowed for “qualified charitable distributions” directly from an IRA for those over age 70 ½ and, importantly, provided for “inherited IRAs”. The Worker, Retiree, and Employer Recovery Act of 2008 waives required distributions for 2009.

WHO SHOULD PAY ATTENTION?

- Immediately - anyone who has an IRA who is over 70 ½, who will turn 70 ½ this year, or who is the beneficiary of an “inherited” IRA.
- Long Term - Anyone who has an IRA or other qualified plan or who may inherit an IRA or qualified plan - Everyone in the United States? As of 12/31/2007, the Investment Company Institute estimated that US households held \$4.7 trillion in all types of IRAs and \$4.5 trillion in all types of defined contribution plans.

ROLLOVER IRAs IN THE NEW MILLENNIUM

1. Standardized Life Expectancies
 - a. The IRS now uses “standardized” life expectancies for all IRA owners. 1.401(a)(9)-5, A 4(a). See **Addendum 1**. Those with younger spouses as a beneficiary, more than 10 years younger, will use their joint life expectancies, recalculated annually, 1.401(a)(9)-5, A4(b). A spouse is considered a “spouse” for the entire year if participant and spouse were married to each other on January 1 and the IRA owner does not change his beneficiary prior to the end of the year, 1.401(a)(9)-5, A-4 (b)(2).
 - b. For IRA owners this table can be used whether there are later beneficiary changes or whether qualifying or non-qualifying beneficiaries such as charities, estates or pets are used.
 - c. The required distribution is calculated by dividing the appropriate life expectancy factor of the IRA owner, **Addendum 1**, into the preceding year’s fair market value on the last business day of the year. Thus if an IRA had a fair market value of \$1,000,000 on 12/31/09 and the IRA owner was age 74 during 2010, the expectancy factor for age 74, 23.8, would be divided into \$1,000,000 with a resulting minimum required distribution (MRD) of \$42,017 for the year of 2010.
 - d. For the initial required distribution, for the year in which the IRA owner turns 70 ½, it is possible to defer that distribution until April 1 of the following year. The prior year-end account balance for the second distribution year is not reduced by the amount of any required distribution for the first distribution year that was deferred into the second year, 1.401(a)(9)-5, A-3(c).
 - e. If an IRA owner does not need funds in the excess of the distributions, the IRA could last for a long time. See **Addendum 5**.
 - f. Special note for 2009. Worker, Retiree and Employer Recovery Act of 2008, Sec. 201 (a), (WRERA). No distributions are required for 2009 for IRAs or qualified defined contribution plans (401k, 403b or 457) - whether owners or beneficiaries. Distribution factors do not change for 2010, essentially you first skip 2009. IRS Notice 2009-9.
 - g. While the required distribution rules are simplified, the penalties for not taking the correct distributions are **50%** of the amount not distributed, IRC 4974. This is a draconian penalty in an area where it is easy to make a mistake. Until 2006, the rule was to pay the penalty and ask for a refund (which could take as long as three years). The taxpayer now needs to file Form 5329 and attach a letter of explanation and the steps being taken to rectify the error. The IRS will notify the tax payer if a penalty is due. In this situation a taxpayer should always enlist the help

of a tax professional. The 50% penalty also applies to beneficiaries of inherited IRAs. The IRS has shown leniency with inherited IRAs, PLR 200811028.

- h. For qualified plans only, the regs confirm earlier PLRs that allowed tax free distributions of after-tax contributions as may be found in some retirement plans (employer stock), to count towards the minimum required distribution amount, 1.401(a)(9)-5, A9 and 1.408-8, A-11, using the cost basis of the employer stock only, without paying income tax on the fair market value of the distribution. The tax on this NUA (net unrealized appreciation) is taxed at capital gains rates when the stock is later sold.

2. Beneficiaries

Beneficiaries take over different distribution periods depending on whether they are a surviving spouse, a qualifying designated beneficiary, or a non-qualifying beneficiary.

- a. Under the final rules, the beneficiary's status is not established until September 30th of the year following the year of death. Thus disclaimers and payout of non-qualified beneficiaries before that date can assist in the overall estate planning process, 1.401(a)(9)-4, A 4(a), PLR 200837046. Disclaimers must be valid under IRC 2518.
- b. The contingent beneficiary has to be identified or identifiable from the beneficiary form, 1.401(a)(9)-4, A1. You can only subtract beneficiaries; you cannot add beneficiaries.
- c. The 5-year rule for distribution in the event of the death of the IRA owner prior to 70 ½ is done away with as a default rule (other than for non-qualified beneficiaries), but it is still available as an election, if allowed under the plan, 1.401(a)(9)-3, A4(c). If a beneficiary fails to take the minimum distribution in year after owners death, he/she is not locked into the 5 year rule, PLR 200811028.

3. Surviving Spouse as Sole Beneficiary

- a. If a deceased IRA owner had not begun required distributions, the surviving spouse can wait until the year the deceased spouse would have turned 70 ½ and take distributions based on the surviving spouse's life expectancy, recalculated annually, 1.401(a)(9)-3, A 3(b) and 1.401(a)(9)-5A(c)(2). **Addendum 2**, recalculated annually.
- b. If the IRA owner had begun required distributions, the surviving spouse takes distributions based on her own life expectancy, 1.401(a)(9)-5, A5(c)(2), **Addendum 2**, recalculated annually.

- c. In either case, the surviving spouse, if the sole beneficiary, has the option to declare the IRA to be the surviving spouse's own for all purposes including the use of the "standardized" life expectancy table, **Addendum 1**. This election can be made at any time without regard to the commencement of required distributions (hers or her predeceased spouse's). The required distribution for the year does not have to be taken before the rollover, 1.408-8, A 5(a). However, once so declared, she can't remove that choice and return to "spouse" or beneficiary status, i.e. no pre 59 ½ 10% penalty, PLR 200650023.
- i) For many, this is the simplest and the best option. The spouse can use the extended owner's life expectancy, can name new beneficiaries, which effectively allows more deferral, and can even convert to a Roth IRA.
 - ii) The new rules allow a spouse to simply redesignate the IRA as his/her own, 1.408-8, A 5(b). This is much easier, but the spouse must pay attention to the beneficiary designation and make appropriate changes. The old rules, which are still an option, allow a spouse to designate the IRA as his/her own by acting inconsistent with his/her position as a beneficiary or by rolling over the IRA into his/her own IRA, making a contribution, or not taking a required distribution.
 - iii) As the **sole** beneficiary, the spouse must also have an unlimited right of withdrawal; this requirement is not necessarily satisfied if the spouse is merely the beneficiary of a trust, which is the beneficiary of the IRA, 1.408-8, A 5(a).
- d. As with all beneficiaries, in the year of the death of the IRA owner, the required minimum distribution must still be taken for that year and cannot be rolled over, 1.401(a)(9)-5, A 4(a). If the IRA owner did not take the required distribution, the beneficiary (not the IRA owner's estate), must take the distribution.
- e. At the death of the surviving spouse there are four possibilities.
- i) If she declared the IRA to be her own, the rules are the same as if she were the IRA owner.
 - ii) If at the death of the original IRA owner spouse, that spouse had passed the required beginning date (over 70 ½), the life expectancy of the surviving spouse (now deceased) in the year of death (Addendum II) is now used as the base life expectancy in each succeeding year. The remaining funds are paid out based on her life expectancy on her birthday in the year of death, 1.401(a) (9)-5, Q&A 5(c) (2). In the following year, one whole number is

subtracted from her life expectancy in the year of death, just as though she were the owner.

- iii) If at the death of the original IRA owner, that spouse had not passed the required beginning date (under 70 ½), and if the IRA owner would have passed the required beginning date in the year of the death of the surviving spouse, the remaining funds are paid out based on her life expectancy on her birthday in the year of death. In the following year, one whole number is subtracted from her life expectancy in the year of death, just as though she were the owner.
 - iv) If at the death of the original IRA owner, that spouse had not passed the required beginning date (under 70 ½), and if the IRA owner would not have passed the required beginning date in the year of the death of the surviving spouse, then payments are made over the life expectancy of the designated beneficiary (determined as of 9/30 following year of death) beginning no later than in the year following the year in which the surviving spouse died, 1.401(a)(9)-3, A 5, PLR 200644022.
- f. A Qualified Terminable Interest Trust (QTIP) for the benefit of the surviving spouse can be a qualified beneficiary, but the length of payout period will depend on the type of rights the spouse has. In a QTIP, the spouse is the beneficiary during life, but the IRA owner can designate in the Trust who is to receive the property after the surviving spouse's death.
- i) The QTIP must first meet a series of hurdles:
 - a. The trust rules discussed later under the rules for trusts.
 - b. The IRS rules for QTIPs under Revenue Ruling 2000-2, as updated by Revenue Ruling 2006-26, effective for all QTIPs after May 29, 2006.
 - c. Payout all of the annual income as determined by the trust accounting rules, p. 13, plus income on the non-distributed part. The new Rev. Rul. 2006-26 significantly complicates the process and a QTIP should only be used as a last resort.
 - d. The QTIP election must be made for both the IRA and the QTIP Trust.
 - ii) If all required distributions from the IRA are paid out to the spouse during lifetime, the trust can qualify under the spousal payout rules above 1.401(a)(9)-5, Q&A 7(c), Example 2. Thus the trust can use the spouse's own life expectancy, recalculated annually, and wait until 70 ½ to begin distributions. This is a "conduit QTIP".

- iii) If the spouse is not entitled to all of the distributions from the IRA (amounts in excess of income can be retained in the trust), the QTIP qualifies as a designated beneficiary and takes distributions under those rules, 1.401(a)(9)-5, Q&A 7(c), Example 2. Distributions begin immediately based on spouse's life (not recalculated), reduced by one whole number each year. This is a "traditional QTIP".
- iv) If a charity is the remainder beneficiary (even contingent, contingent?), the QTIP may still qualify for the marital deduction, but the Trust may not "qualify as a beneficiary" for longer payout treatment because a non-individual is a beneficiary (unless you use a "conduit trust"). The trust must then use the non-qualifying rules, page 10. Disclaimers to cure an ineffective QTIP are perilous, PLR 200846003.

4. Other Individuals as Beneficiaries

- a. These rules apply **whether or not** the IRA owner died before or after age 70 ½.
- b. The beneficiary of the account will be determined as of September 30th of the year after the year of the IRA owner's death, 1.401(a)(9)-4, A 4(a).
- c. If the beneficiary is an individual, a group of individuals ("children"), or a qualified trust, the beneficiaries can use extended life expectancies beginning in the year following the year of death. The life expectancy of the beneficiary, or the life expectancy of the oldest beneficiary if the IRA is paid to a trust or to a group, is used, 1.401(a)(9)-5, A 7(a)(1).
- d. Generally, this results in smaller required distributions than when the IRA owner was alive because non-spouse beneficiaries are generally significantly younger than the deceased IRA owner. See **Addendum 5**. If the beneficiary is older than the IRA owner and required distributions have begun, the non-qualifying beneficiary rules utilizing the life expectancy of the IRA owner are used and will give a better result, 1.401(a)(9)-5, A 5(a)(1).
- e. Separate shares can be created for beneficiaries at any time. The important question will be whether the beneficiary can use his or her own life expectancy or will have to use the life expectancy of the oldest beneficiary.
 - i) For purposes of determining a designated beneficiary, separate qualifying accounts (see ii below) must be established by September 30 of the year after the year of IRA owner's death (charities, estates, etc., must be removed or separated).

- ii) In order for separate accounts to be recognized, the beneficiaries must have separate interests (in “equal shares”), and between the date of death and date of “establishment” of the separate accounts, gains and losses must be allocated pro rata to all the accounts and distributions must be charged to the account of the beneficiary who receives the distribution, 1.401(a)(9)-8, A 3.
 - iii) A pecuniary bequest of dollars or shares of stock or property cannot qualify as a separate account unless it will share in profits and losses post-death.
 - iv) Accounts must be physically separated by December 31 of the year after the year of participant’s death, 1.401(a)(9)-8, A 2 (three months after separate beneficiaries are identified). Very probably, the IRS is requiring physical separation to assist them in auditing distributions.
- f. Calculation of Beneficiary’s Required Distribution
- i) The life expectancy of the beneficiary is determined using the beneficiary’s age in the year following the year of the death of the IRA owner and deducting one whole number each year following, 1.401(a)(9)-5, A 5(c)(1). Thus a beneficiary who turned 50 in the year of death would be 51 the following year. See **Addendum 2**. The first divisor would be 33.3, which is divided into the fair market value of the IRA as of the last day of the year in which the IRA owner died. For the following years, the divisor would be 32.3, 31.3, 30.3, 29.3, and so on.
 - ii) The beneficiary’s life expectancy is now the default rule, not 5 years as before. This is true even if the beneficiary fails to take the first 2 years of required distributions, PLR 200811028.
 - iii) If using the beneficiary’s life expectancy results in a period that is shorter than the owner’s life expectancy, you can use the owner’s life expectancy, 1.401 (a)(9)-5, A-5 (a)(1).
 - iv) At the death of the qualifying beneficiary (or the oldest beneficiary, if a group), the initial period which has been reduced by one each year, continues until the remaining portion of the beneficiary’s initial life expectancy established in the year following the year of the IRA owner’s death is extinguished, 1.401(a)(9)-5, A 7(c) 2. In the example above for 33.3 years.
 - v) If the qualifying beneficiary does not survive until September 30 of the year following the year of death, the contingent beneficiary, if specifically named and if a qualifying beneficiary (individual or

as part of a class), takes over the life expectancy of the first now deceased beneficiary, 1.401(a)(9)-4, A 4(c).

vi) The combination of the standardized life expectancy and the likely payout after the death of the IRA owner and spouse to children may mean that many IRAs are in existence for over 45 years after the required beginning date.

g. The final regs seem to contemplate allowing a designated beneficiary to name a beneficiary to receive the balance of the IRA at his/her death without impacting the required distribution rules (the proposed regs explicitly allowed, 1.401(a)(9)-5,A-7 (d)(1)). The successor beneficiary takes under the period fixed when the primary beneficiary began withdrawal, PLR 199936052.

h. Inherited IRAs do not qualify for 60 day rollover treatment. They can only be transferred directly from one IRA custodian to another.

5. Non-Qualifying Beneficiaries

a. Non-qualifying beneficiaries are non-individuals and will normally include an estate, a charity, a pet or a non-qualifying trust. If no beneficiary is named, often the “estate” will be the default beneficiary per the IRA agreement, which the IRA owner signed when the IRA was created. These beneficiaries receive disappointing deferral treatment compared to qualified beneficiaries and should be avoided whenever possible. If IRA beneficiary designations says “as stated in Wills”, the IRS considers that to be the estate and will not allow extended payouts, PLR 200811028.

b. Non-qualifying beneficiaries disqualify other qualified beneficiaries (even a spouse) from longer deferrals, 1.401(a) (9)-5, A 7(a), if in same group.

c. If the charity or other non-qualifying share is distributed or disclaimed by September 30 of the year following the year of death, the disqualification as to other qualifying beneficiaries is removed, 1.401(a)(9)-4, A 4(a). If separate accounts were used for the charity and the other beneficiaries; this is not an issue, 1.401(a) (9)-8, A 2 & 3, because each IRA account is treated separately. It appears that if the estate is the beneficiary (either directly or thru disclaimer) and the executor has the power, the executor can assign any IRA for which the estate is the beneficiary to a charity to satisfy a charitable bequest under the will, PLR 20085004 and PLR 200633009.

d. The distribution rules for non-qualified beneficiaries depend on whether the IRA owner died before or after required distributions have begun.

- i) If the IRA owner died before required distributions were required to begin, the IRA must be distributed within 5 years of the end of the year in which he/she died, 1.401(9)(a)(9)-3, A 2. **Very bad news.**
 - ii) If the IRA owner died after required distributions were required to begin, the beneficiary looks to the actual life expectancy (not the standardized life expectancy) of the IRA owner in the year of death and reduces it by one each year until distributed, 1.401(a)(9)-4, Q&A 3(b) and 1.401(a)(9)-5, A 5(a)(2). **Addendum 2.**
 - iii) For example, if an individual dies at age 79, for that year he or his beneficiary would have to take the required distribution based on the standardized tables, using a factor of 19.5. In the year that he died, his regular life expectancy (**Addendum 2**) is 10.8. For the following year, one whole number is subtracted, 9.8, and that is the divisor to be used by non-qualifying beneficiaries. Each year thereafter the divisor reduces by 1.
- e. An estate will be a non-qualifying beneficiary even if the IRA is assigned to beneficiaries specifically in the will. The estate can also assign interests to beneficiaries if not specifically named, but payout in all cases will have to be made under the non-qualifying beneficiary rules, PLR 200343030. It appears that an estate can distribute an IRA to a charity to satisfy a charitable bequest in the will and not subject the estate to an income tax, PLRs 200850004 and 200617020.
 - f. The IRS has accepted a judicial modification of a beneficiary designation that clearly had been incorrectly filed out, PLRs 200616039, 200616041, or as a result of a litigation settlement, PLR 200707158; but the IRS does not always accept judicial modifications, PLR 200848020 and 200742026.

6. Beneficiaries of Qualified Plans

- a. Qualified plans often **only** allow for a lump sum distribution at the death of the employee/retiree.
- b. If the spouse is the beneficiary, she may roll it over into her own IRA, declare it to be her own and take distributions over her life.
- c. Prior to January 1, 2007, all other beneficiaries did not have the option to rollover to an IRA. Under the Pension Protection Act of 2006, IRC section 402(c)(11) non spousal beneficiaries (including trusts) are permitted to do a direct rollover from a qualified plan (i.e., 401(k) plan), into an inherited IRA. The inherited IRA must be set up under the decedent's name (e.g. "John Doe, Deceased, IRA f/b/o Jane Doe (beneficiary) and must be done in a "trustee to trustee transfer" or a

“direct rollover”. **Beneficiaries must qualify as a “designated beneficiary.”** See IRS Notice 2007-7 and February 13, 2007 Clarification of IRS Notice 2007-7, IRS Employee Benefits Newsletter.

- d. Currently 401(k) plans do not have to allow this option, but Worker, Retiree, and Employer Recovery Act of 2008 will require all plans to offer beginning in 2010. It is only necessary that plans have adopted the amendment when the transfer is made, PLRs 200717022, 20071703.
- e. All required minimum distributions, prior and current, must be paid out before transfer to the inherited IRA and the transfer must take place by the end of the year following the year of death of the owner. Transfers must be direct to the inherited IRA custodian not to beneficiary.
- f. If a surviving spouse rolls over their interest in their deceased spouses IRA and they are under 59 ½ it will not necessarily convert that interest into an owner’s interest, PLR 200650023.
- g. Estates and other non-qualified beneficiaries do not qualify.

7. Trusts as Beneficiaries

- a. Three issues are involved with trust planning and it is important to keep them separate. First, does a trust qualify as a “designated beneficiary” to get a longer payout? Second, if a trust qualifies as a “designated beneficiary”, what life expectancy is used? Third, what are the specific trust accounting rules for principal and income?
- b. For a trust to qualify as a designated beneficiary, there are several tests, 1.401(a)(9)-4, A 5:
 - i) Trust must be valid under state law.
 - ii) Trust must be irrevocable or irrevocable because of the death of the owner.
 - iii) Beneficiaries must be **individuals**.
 - iv) Beneficiaries must be identifiable from the trust document.
 - v) Proper documentation (the trust or appropriate substitute as defined by the regs) must be delivered to the IRA trustee/custodian by October 31 of the year following the year of death, 1.401(a) (9)-4, A 6.
 - vi) Other tests for trusts that have developed thru private letter rulings regarding payment of estate debts, expense and taxes, general and limited powers of appointment, charitable remainder trusts, and dynasty trusts were not addressed. Diane Perrin, an attorney

specializing in this area in Houston, has tried to concisely state these rules: “the governing instrument must now provide that if the IRA distributions will accumulate in trust through the life of its primary beneficiary, then the ultimate remainder beneficiaries must be individuals. In order to use the primary beneficiary as the measuring life for the post-death income tax payout, the remainder beneficiaries must be alive at the ‘deadline’ and must be younger than the primary beneficiary.” A power of appointment must be limited to persons younger than the beneficiary. Excellent summaries of the current rules can be found in PLRs 200432027, 200432028, 200432029, 200438044, 200537044 and 200610026.

- c. If a trust qualifies as a **designated beneficiary**, it can take an extended payout similar to an individual, 1.401(a)(9)-4, A 5. If a trust qualifies, the measuring period will be based on the life of the oldest beneficiary, 1.401(a)(9)-4, A 5(c). If there are sub-trusts or if a revocable trust is the beneficiary with distributions to individuals, the IRA can be split and transferred out in a trustee to trustee transfer to an IRA for the benefit of the sub-trusts or an individual, PLR 200349009. If it does not qualify, it falls under the non-qualifying beneficiary rules.
- d. After addressing issues one and two, trustees must still pay attention to “trust accounting” issues. Under the new Texas Uniform Principal and Income Act effective January 1, 2004, Sec. 116.172(c), unless otherwise provided, a distribution from a retirement plan is income to the extent of 4% of the asset’s value and is principal to the extent it exceeds 4% of the asset’s value. This is different from prior Texas law; the Uniform Acts in other states may have different standards.
- e. Distributions from an IRA can be made to a trust without requiring that the IRA distribution be immediately distributed out of the trust, 1.401(a)(9)-8, A 11.

8. Trust Solutions

Solutions to the trust issues are frustrating. It seems highly unfair to taxpayers and to their advisors to continually guess at what the IRS may require next week, let alone ten or twenty years from now. It is likely that IRAs will continue to grow in value. For many concerned about how to pass on their IRAs to the next generation! and to protect them from creditors (in Texas), trusts can be an excellent solution. What to do?

- a. First, it is important to remember that if a longer payout is to be used, and the life expectancies of different children are to be used, the IRS believes that it is necessary not only to have separate trusts but also that the IRA beneficiary designation **separately** name the trusts, 1.401(a)(9)-4, A5(c) and 1.401(a)(9)-5,A7(a)(2), PLR 200537044.

- b. Marjorie Hoffman, the co-drafter of the regulations, on May 23, 2002 at an ALI-ABA teleconference, Estate Planning for Distributions from Qualified Plans & IRAs, indicated several times that a “conduit” approach would insure that a trust could use an extended payout. This requires that any IRA payment made to a trust has to be distributed out to the beneficiary, 1.401(a) (9)-5, A-7(c). A “**conduit**” approach avoids the incredibly complicated rules discussed earlier to qualify as a **designated beneficiary** and to use payouts based on the beneficiary’s life. It has been subsequently approved in a number of PLRs, with excellent guidance in PLR 200537044.
- c. The question is raised as to whether a conduit approach, or a complete flow thru, defeats the trust concept. Except in “special needs” situations, spendthrift, or creditor situations, maybe not.
 - i) First, the trustee, who is the beneficiary of the IRA, still controls the investments and other distributions. Second, most importantly, the payout does not come automatically at a very high rate. If mom and dad have both passed away at age 82 with the oldest child at age 60, the pay out starts at 4 %. By age 70 the payout is 6.7%. At age 75, it is 10%. That is either less than or equal to an assumed payout that most trusts might make if income only is distributed on the original principal. The percentage of distribution gets higher at later ages, but the overall size of the IRA will be decreasing.
 - ii) One option might be a “toggle switch”, which changes a conduit trust to an accumulation trust if an election is made by a “Trust Protector” within 9 months after IRA owner’s death (Robert Keebler, PLR 200537044).
- d. If the primary concern is whether a bypass trust for the surviving spouse meets the test, the complex issues involved may be somewhat irrelevant. If required distributions have begun, even if the trust does not qualify, you would get to use the remaining life expectancy of the IRA owner, which may be very similar to that of the surviving spouse, which would be the other option if qualified. If the IRA owner dies prior to when required distributions have begun, you may be stuck with the 5-year rules.
- e. It still may be possible to disclaim the offending interest or to reform the trust and IRA beneficiary designation through a court proceeding prior to September 30 of the year following the year of death (question, can a custody IRA be reformed by a court?). See PLR 200218039 in which a charity with a remainder interest was segregated into a separate “share”(this PLR was issued prior to the final regulations). Perhaps the trustee might be given the power to amend the Trust with respect to the receipt of any retirement benefits so as to qualify the Trust as a

designated beneficiary. The IRS may allow a court to modify the IRA, PLR 200616039, or may not, PLR 200848020 and 200742026.

- f. Another solution is to use a “Trustees IRA” in which the IRA itself is a Trust offered by a qualified corporate trustee, normally a bank, as opposed to a custody IRA offered by a brokerage firm or mutual fund company. Edwin Morrow, “Contrasting Conduit Trusts, Accumulation Trusts and Trustees IRAs”, Journal of Retirement Planning, May - June, 2007, also “Trusted IRAs: An Elegant Estate Planning Option”, Trusts and Estates, September, 2009.
- g. If potential bankruptcy is an issue with respect to the beneficiary of an inherited IRA, the only way to protect that inheritance would seem to be thru a “Trusteed IRA” or an IRA that pays out to a spendthrift trust. In Texas, inherited IRAs may not be exempt from bankruptcy claims, In re Russell Jarboe, 2007 WL 987314 (Bankruptcy, S.D. Tex. 2007). IRAs do not appear to be exempt from bankruptcy in KS, WI, CA, ND & FL.

9. Roth IRAs

A Roth IRA has the advantage of not requiring distributions during the lifetime of the IRA owner and then not having distributions which are taxable to the owner or the owner’s beneficiaries (after 5 years and over age 59 ½). The penalty is that taxes must first be paid on contributions to the Roth or upon a conversion from a regular IRA to a Roth IRA. **A conversion will require that a significant tax be paid at time of conversion and all converted amounts are ordinary income (except for pro rata after tax IRA contributions). With the significant drop in market values, projected higher income tax brackets, no required minimum distributions boosting tax brackets, all things being equal, 2009 might be an interesting year for some taxpayers to do a partial conversion.**

- a. Under current law a conversion can be made if, excluding the required minimum distribution, the taxpayer’s adjusted gross income is less than \$100,000 per year. Effective in 2010, the \$100,000 limit goes away. In addition, unless the taxpayer elects to pay for in 2010 tax year, 50% of the income will be attributed to each of 2011 and 2012 tax years.
- b. Conversions might be considered if:
 - i) Required distributions are not necessary for living expenses.
 - ii) Funds to pay the taxes on conversion are available outside of the IRA and do not impact the retiree’s “safety net.”
 - iii) The tax rates of conversion are the same as, or lower than the tax rate at a later distribution. If the tax incurred at conversion is 35% and the expected tax rate at distribution from an IRA is 28%, the

conversion may not make sense and careful calculations should be done. Planning may require that a series of conversions be done over a number of years to keep the tax rate on the conversion at a lower rate. **Perhaps the most important question is what will the federal tax rates be in the future. Conversions generally work for taxpayers who will always be in the highest income tax bracket.**

- iv) The remaining period of distribution of the Roth is greater than 6-10 years. Typically it will be considered that the beneficiaries will be the next generation(s), children or grandchildren. The advantage to the Roth, all things being equal, arises because the investments in the side fund for the IRA comparison earn a lower net after tax return and the IRA forces distributions which are exposed to ordinary income or capital gain taxes when they are reinvested.
 - v) Where maximum income and estate tax rates are present and where payout will be made to children and grandchildren, (but beware of any generation skipping tax implications), Roth conversions almost always make sense.
 - vi) If the investment return in the Roth is higher than in the regular IRA (longer time periods may allow higher risk, higher return assets), the comparison becomes dramatic.
 - vii) Conversion calculations on the internet are “lite” and do not consider all of the factors that might impact the decision. Three different sites may give you three different results. Factors such as varying withdrawal rates, increased income tax rates, spreading the conversion over time, different rates of return, estate taxes, income in respect of a decedent, will all have an impact on the outcome. Most important factors are use of outside funds to pay the tax at conversion, time, tax brackets, investment returns, and assumed market environment (note: investment returns are rarely level).
 - viii) Excellent analysis is found in recent articles by Robert Keebler and Stephen Bigge, “To convert or not to convert”, Journal of Retirement Planning, May-June, 2007, and Martin Silfen, “Roth retirement savings opportunities abound”, Journal of Retirement Planning, May-June, 2008, and Steven Trytten, “Show me the money,” Trusts and Estates, September, 2009.
- c. If the IRA owner is over 70 ½, the required distribution must be taken before the Roth conversion takes place.
 - d. Because IRC 408(a)(c)(3)(B) requires a qualified rollover contribution, a beneficiary (other than a surviving spouse) can not convert an inherited IRA to an inherited Roth IRA. However, IRS Notice 2008-30 allows a

direct rollover from a 401k plan into an inherited beneficiary's Roth IRA, Notice 2008:30, Q & A 7. Makes no-sense – that's the law!

- e. Conversions can only be done after the required distribution for the year is taken.
 - f. A Roth IRA will not necessarily be more effective in funding a Bypass Trust than a regular IRA because it is a beneficiary and must take out annual minimum required distributions. Note: unless a Roth beneficiary qualifies as a designated beneficiary (and distributions made over the appropriate life expectancy), distributions must be made in accordance with the 5 year rule that regular IRAs use if owner dies before 70 1/2, 1.408 A-6, Q & A 14(a).
 - g. If an IRA owner plans to leave assets to a charity at death, he may want to preserve that part of the IRA since it will never be taxed for income or estate purposes.
 - h. IRS is cracking down on abusive Roth IRA Strategies. IRS Notice 2004-8, 2004-4 IRB. The IRS is also especially interested in rollover IRAs. Engaging in ROBS (rollovers as business start ups).
 - i. While complicated, if the investments decline in value (or for any other reason) you can undo the conversion by October 15 of the year following the year of conversion. This is called re-characterization of a Roth conversion and is very complicated. Requires Form 8606 and a statement explaining the re-characterization. You can reconvert back to a Roth, but not in the same taxable year.
 - j. A Roth conversion from a 401 (k) plan that has employer stock with “net unrealized appreciation” and low basis does not receive any special treatment, IRS Notice 2009-75.
10. Planning Strategies
- a. All **beneficiary designations** should be regularly reviewed.
 - i) This is especially critical if an individual has numerous Bank CDs or mutual funds, all of which have their own beneficiary designation. Some mutual fund companies have separate beneficiary designations for each fund that an IRA owner might invest in that family, some don't. Vanguard recently notified its mutual fund owners that it would require similar beneficiaries for each fund that they owned with Vanguard (and lit a bonfire when it suggested that it would do so retroactively).
 - ii) This is even more important in 401(k) type plans in divorce situations in which Federal, State, and law applies. The U.S.

Supreme Court (Kennedy v. DuPont, 200 U.S. 321, (2009) ruled that despite a valid divorce decree, the ex-spouse (who remained the named beneficiary in the plan) should receive the plan's benefits!

- iii) Improper beneficiary designations are the hidden land mines of this area. Many IRA owners have used "my trust" (which trust?), "my will", "heirs", "John" (the executor, but not indicating that it is in his capacity as executor of the estate), "as stated in my will", etc. These designations can ruin an otherwise well-designed estate plan and destroy families. Disclaimers and family settlement agreements are only a partial solution. Disclaimers to the estate (contingent beneficiary) in most prototype documents can still cause significant income tax problems especially if the owner dies before 70 ½.
 - iv) IRAs are contracts and unless left to "the Estate" or otherwise impacted by a state's community property law, the IRA contract and default beneficiary provision controls- not the will! Default provisions vary by custodian.
 - v) See **Addendum 3** for beneficiary form example. Steven Trytten provides excellent detailed and thoughtful examples in "Got Stretched-Out", Trusts & Estates, (July, 2009).
- b. IRAs and their long deferrals (45+ years after 70 ½) seem to work well for most families if there is sufficient liquidity in an estate to pay estate taxes. Those assumptions should be reviewed keeping in mind the various legislative proposals regarding income and estate taxes in Washington.
- i) While it is unlikely that the estate tax will be permanently done away with, individuals with estates under \$3,500,000 may not have to worry (or will they?).
 - ii) Those with IRAs or qualified plans with larger estates should consider how to pass their IRAs on to their beneficiaries intact by making arrangements through the use of insurance or other planning techniques so that the IRA is not invaded to pay estate taxes.
- c. Stretch, Legacy, Dynastic, Multi Generational IRAs are often trade-marked (?) and marketed as though they were Ron Ropeil's latest splicer and dicer. These are no more than the strategy described earlier in this outline whereby at the first spouse's death, the IRA goes to the surviving spouse who declares the IRA to be their own and then lists children or grandchildren as beneficiaries. Obviously if the estate is large enough it may make sense to leave the IRA to the grandchildren or great

grandchildren who have the longest lives (and very small required distributions), who may need funds for school and who will very likely be in the lowest tax brackets. Unfortunately with the expansion of the “kiddie tax” to age 24, this planning technique is not as effective as in past years. In larger Estates, watch out for the Generation Skipping Tax.

- i) Since more significant amounts can now be left for the next generation (**Addendum 5**), issues dealing with the ability and aptitude of the next generation to handle sizeable funds need to be revisited. Trusts and appropriate trustees responsible for the safety and the investment of the trust assets should be carefully considered
 - ii) If disclaimers might be used to pass funds to grandchildren, the beneficiary designation needs to be specific (perhaps, "to my children, if living, and if not, then to my descendants, per stirpes"). Failure to say anything may cause the intended share to pass via the default clause of the IRA, typically, the estate or, sometimes, per capita. Careful consideration should be given to Rev. Rul. 2005-36 dealing with disclaimers from IRAs.
 - iii) If a minor might receive funds, it is critical to provide for payment to a custodian under the Uniform Transfers to Minors Act. Consider the Sample Beneficiary Designation, in **Addendum 3**.
 - iv) If the basic estate plan is “to my spouse and if she does not survive, to my bypass trust” (to allow for a disclaimer to maximize the use of the estate tax exemption equivalent if there are not sufficient non-IRA assets), one interesting idea might be to use a double disclaimer. The spouse would disclaim personally and then disclaim to the IRA asset as a beneficiary of the bypass trust. The end result might be that the children, who are the beneficiaries of the bypass trust (assuming an outright distribution), would then take the disclaimed IRA or disclaimed portion of the IRA over the life expectancy of the oldest child. This gets the IRA out of the estate of the surviving spouse and the payout period is longer than that of the surviving spouse. To avoid potential IRD issues, Natalie Choate recommends formula rather than pecuniary disclaimers. See PLR 200522012 regarding a disclaimer thru a By Pass Trust.
- d. Planning in a community property state like Texas can be complex. The IRS recently provided some insight in their thought process if a revocable trust is the beneficiary of an IRA and is split into a standard A, B, C trusts at death of the IRAs owner, PLR 200928043.
 - e. One of the most significant issues with IRAs has to do with a client’s or a client’s beneficiary’s incapacity. While this might be anticipated for an older client, strokes, memory loss, Alzheimer’s and various types of physical disability can occur at any age.

- i) Durable Power of Attorney should authorize a selection or change in distribution election, investments and the trustee/custodian. Whether that should extend to the selection or change of beneficiary should be positively elected or negated. Sample Power, **Addendum 4**.
- ii) Importantly, the Durable Power of Attorney should be pre-approved by the trustee/custodian. Kathy Kristof, in “IRAs Can Be A Relative Nightmare”, The Dallas Morning News, September 24, 2000, page 6H, wrote concerning a problem that an individual had in getting Fidelity to accept a Durable Power of Attorney, valid under Texas Law, for his IRA. A recent check with Fidelity indicates that the issue remains today in 2009 unless you use their Power of Attorney.
- iii) Recently the IRA allowed the transfer of an “inherited IRA” to a special needs trust to a beneficiary with a disability, PLR 200620025. This ruling is very significant in that it seems to allow lifetime transfers of an IRA to a grantor trust.
- f. While the new regulations offer great opportunity for sophisticated planning, several major mutual funds and brokerage firms will not allow non-standard beneficiary designations or “attachments” to their beneficiary designation forms.
- g. If federal estate taxes are paid because of the inclusion of the IRA in the estate, beneficiaries need to remember to take the income tax deduction for their pro-rata share of estate taxes paid (income in respect of descendant deduction).

11. Charitable Gifts –During Lifetime

- a. These are permitted during an IRA owner’s lifetime but **can be done for the tax years 2008 and 2009 only, Emergency Economic Stabilization Act of 2008**.
 - i) Allowed for IRA owners “over age 70 1/2”.
 - ii) Qualified Charitable Distribution (QCD) must be made directly from the IRA to the charitable organization (any qualified charity, but does not include donor advised funds, a supporting organization, a private foundation or a split interest charitable trust). Check must be made out to the charity, not endorsed over to the charity. QCDs can satisfy outstanding pledges without causing a prohibited transaction.

- iii) QCD will not be included in the taxpayer's income and is not deductible on the taxpayers return.
 - iv) The QCD will count toward the IRA owner's required minimum distribution from his IRA.
 - v) The percentage distributions as to type of charity are ignored.
 - vi) Distributions reduce basis only if they are otherwise considered income (doesn't work for a Roth, but then why would you).
 - vii) Limited to \$100,000 per year. (Husband and wife are treated separately).
 - viii) For an IRA that has both deductible and non-deductible components, the distribution will be considered as coming from the deductible component and does not reduce the fraction attributed to the non-deductible part (that's good).
 - ix) Only for distributions from IRAs and inactive SEP and Simple IRAs, not qualified plans or active SEPs or SIMPLE IRAs.
- b. Owners of inherited IRAs also qualify if they are over 70 ½ (Treasury Notice 2007-7).
 - c. IRA distributions add to a taxpayer's gross income. Higher income for retirees can disadvantage them in several ways, from causing higher taxation of social security benefits to reducing the deductibility of Schedule A deductions. For retirees who cannot itemize, this new law indirectly allows them a charitable deduction. Thus, to the extent that an IRA owner makes charitable deductions, to the extent that it is administratively feasible, charitable contributions should come from the IRA. While this type of charitable giving works for many taxpayers it may not work for all. Sometimes it may still make sense to contribute low basis stock.

12. Charitable Bequests – At Death

If an individual is charitably inclined, he might consider eliminating such bequests from his will and having the IRA pass directly to the charity. The IRA will pass to the charity income and estate tax free. The other beneficiaries benefit because they receive other assets that do not bring an income tax burden.

- a. A private foundation can also be used as a charitable beneficiary, PLR 200003056, 9939039, 9818009, but special care must be taken if funding is to occur by disclaimer. The disclaimer must be insulated from any grants making decisions as to those funds. Plan proceeds are net

investment income, not subject to 2% excise tax, PLR 9839028. See also PLR 200003055.

- b. A charitable remainder trust in which children (and possibly grandchildren) are beneficiaries for their lifetime might be considered as an option, PLRs 9901023, 9634019, 9253038, and 9237020. While potentially a very attractive planning option, it should only be done with great care and complete understanding of the entire process and the tax brackets of all of the parties involved.
- c. The rules are complicated and the challenge is the understanding of the client. When clients are uncomfortable dealing with a simple IRA form, to take them into the land of charitable remainder trust and to lock children into a payout whereby they cannot access principal, has drawbacks in terms of practical application to real life situations. Children can receive an annual payment of generally 5% to 10% of the trust, PLR 8419005. This depends on the ages of the children. The younger the children or grandchildren the lower is the permissible payout and the estate tax deduction.

13. Combining IRAs

- a. All IRAs, except Roth IRAs and Inherited IRAs, can be combined. This includes SEP IRAs, Simple IRAs (in existence more than 2 years) and Non-Deductible IRAs. Rollovers can be made from all Qualified Plans including Profit Sharing, Pension and 403(b) plans.
- b. IRAs are aggregated for taking distributions, 1.408-8, A 9. If an individual has three IRAs, of which he is the owner (not the beneficiary) he calculates them together for determining the required distribution, but can satisfy the distribution rules by taking from one IRA.
- c. Qualified plans, IRAs, Roth IRAs, 403(b) and other plans cannot be combined with each other for distribution purposes, 1.401(a)(9)-8, A 1.
- d. IRAs held by an individual in different capacities, i.e. as owner and as beneficiary (inherited IRAs), cannot be combined, 1.408-8, A 9, nor can their distributions be combined. In addition different inherited IRAs and their distributions cannot be combined. A distribution from a Roth IRA cannot be used to satisfy the required distribution from a regular IRA.

14. Odds and Ends

- a. IRAs are not entitled to a valuation discount for federal estate taxes based on their embedded Federal income tax liability, PLR200247001, Estate of Smith vs. US, U. S. District Court for Texas, 391 F. 3rd 621(2004); Estate of Kahn v. Commissioner, 125 T. C. No. 11 (2005).

- b. In an estate tax situation, it is not clear for alternative valuation date purposes (6 months after death) whether you look at the entire value of the IRA (“bundled approach”) or the individual investments (“unbundled approach”).
 - c. Chose your IRA Trustee well if it is an important part of your estate. Chris Hoyt, professor, University of Missouri – Kansas City School of Law, reports in “The Trouble with IRA Administration” Trusts and Estates, October, 2003, that 73% of Estate Planning Attorneys had problems with IRA Trustees/Custodians who refused to implement or to properly administer estate planning directives after the death of an IRA owner. Even now in 2009, this continues to be a problem.
 - d. Beneficiaries of an IRA, once the original owner has died, have the right to change custodians. Unfortunately, some custodians may refuse to allow a transfer. An excellent article regarding rights of beneficiaries in this regard by Michael Jones, “Transferring IRAs,” appeared in Trusts & Estates, pp.38-45, April, 2006.
 - e. If an inherited IRA is to be transferred to a new custodian it must be directly done in a trustee to trustee transfer. Rollovers with 60 days rollover period are not allowed, PLR 200513032, IRC 408(d)(3)(c).
 - f. In Texas, in a taxable estate situation, an IRA owner must carefully consider whether he/she wants the estate to pay the associated federal estate taxes or whether the beneficiaries should pay their pro rata share. If it is not clear, it appears that under a recent court ruling the beneficiaries will pay their pro rata share, Patrick v. Patrick, 182 S.W. 3d 433 (Tex. App.- Austin 2005).
15. Investments with Issues for IRAs!
- a. Equity Indexed Annuities, with high commissions to brokers, surrender charges as high as 10%, and annual fees that average 3.5%, will soon be regulated by SEC. This is a very complicated, not well understood product. Not a free lunch!
 - b. Some of the new ETFs (Exchange Traded Funds) have been in the form of trusts and partnerships ie., Power Shares DB Commodity Index (DBC) or US Oil (USO). These and almost all pipeline partnerships will issue to the IRA a K-1 which may show unrelated business income. If this exceeds \$1,000 in a year, the IRA will have to apply for its own Tax payer ID, file a corporate tax return and pay taxes at the corporate rate (an unwelcome surprise!).
 - c. Real estate and other alternative investments can be permissible for an IRA. But the traps are many, “unrelated business income”, “prohibited

transactions”, required annual valuations, and conversion of capital gain income into ordinary income are the most serious.

- d. PLR 200507032 pointed out that fees for an IRA may be an itemized deduction if paid outside the IRA. With larger IRAs, higher income taxpayers often lose the benefits of “itemized deductions” and paying outside the IRA ultimately increases the size of the IRA with additional income taxes that have to be paid.
- e. U.S. Gold Coins are permissible, but there are only a few IRA custodians willing to hold. Custodian expenses and the bid/ask spread on purchases and sales are high.
- f. A search of the internet would suggest that there are about seven custodians who hold themselves out as handling all types of alternative assets. All but one are privately held trust companies. While these companies may not have been involved, plaintiff attorneys are creatively trying to involve one or more of them in some Ponzi schemes that have been uncovered recently, Diana Henriques “Questions for a custodian after scams hit IRAs,” New York Times, July 25, 2009.

16. Other Resources

- a. This outline as updated from time to time

www.texascapitalbank.com (go to Wealth Management & Trust Services)
- b. Natalie Choate, Esq. – Life and Death Planning for Retirement Benefits (2006)

www.ataxplan.com
- c. Quick access to many private letter rulings and planning thoughts on IRAs.

www.leimbergservices.com
- d. Journal of Retirement Planning (CCH)
- e. Ed Slott's IRA Advisor
- f. For assistance with IRA Private Letter Rulings: Robert Keebler, CPA – Virchow, Krause & Company, LPP, Green Bay, WI
- g. Texas community property issues: Eric Viehman, Esq. – Vinson & Elkins (Houston) and Al Golden, Ikard & Golden (Austin).
- h. Prohibited transactions with alternative investments: Luke Bailey, Strasburger & Price (Dallas).

ADDENDUM 1

Uniform Distribution Tables for IRA Owners – April 17, 2002 Proposed Regs. 1.401(a)(9)-5, Q&A 4

Age	Standard Life Expectancy	Required Distribution Percentage
70	27.4	3.65%
71	26.5	3.77%
72	25.6	3.91%
73	24.7	4.05%
74	23.8	4.20%
75	22.9	4.37%
76	22.0	4.55%
77	21.2	4.72%
78	20.3	4.93%
79	19.5	5.13%
80	18.7	5.35%
81	17.9	5.59%
82	17.1	5.85%
83	16.3	6.13%
84	15.5	6.45%
85	14.8	6.76%
86	14.1	7.09%
87	13.4	7.46%
88	12.7	7.87%
89	12.0	8.33%
90	11.4	8.77%
91	10.8	9.26%
92	10.2	9.80%
93	9.6	10.42%
94	9.1	10.99%
95	8.6	11.63%
96	8.1	12.35%
97	7.6	13.16%
98	7.1	14.08%
99	6.7	14.93%
100	6.3	15.87%

ADDENDUM 2

Single Life Expectancies

Table V of Reg 1.72.9 as required by 1.401 (a)(9)-5,Q&A 6

Age	Standard Life Expectancy	Required Distribution Percentage	Age	Standard Life Expectancy	Required Distribution Percentage
20	63.0	1.59%	50	34.2	2.92%
21	62.1	1.61%	51	33.3	3.00%
22	61.1	1.64%	52	32.3	3.10%
23	60.1	1.66%	53	31.4	3.18%
24	59.1	1.69%	54	30.5	3.28%
25	58.2	1.72%	55	29.6	3.38%
26	57.2	1.75%	56	28.7	3.48%
27	56.2	1.78%	57	27.9	3.58%
28	55.3	1.81%	58	27.0	3.70%
29	54.3	1.84%	59	26.1	3.83%
30	53.3	1.88%	60	25.2	3.97%
31	52.4	1.91%	61	24.4	4.10%
32	51.4	1.95%	62	23.5	4.26%
33	50.4	1.98%	63	22.7	4.41%
34	49.4	2.02%	64	21.8	4.59%
35	48.5	2.06%	65	21.0	4.76%
36	47.5	2.11%	66	20.2	4.95%
37	46.5	2.15%	67	19.4	5.15%
38	45.6	2.19%	68	18.6	5.38%
39	44.6	2.24%	69	17.8	5.62%
40	43.6	2.29%	70	17.0	5.88%
41	42.7	2.34%	71	16.3	6.13%
42	41.7	2.40%	72	15.5	6.45%
43	40.7	2.46%	73	14.8	6.76%
44	39.8	2.51%	74	14.1	7.09%
45	38.8	2.58%	75	13.4	7.46%
46	37.9	2.64%	76	12.7	7.87%
47	37.0	2.70%	77	12.1	8.26%
48	36.0	2.78%	78	11.4	8.77%
49	35.1	2.85%	79	10.8	9.26%
			80	10.2	9.80%

ADDENDUM 3

INDIVIDUAL RETIREMENT ACCOUNT BENEFICIARY DESIGNATION

Name of IRA Account Holder: _____

SSN of Account Holder: _____

PRIMARY BENEFICIARY:

100% to my spouse, _____, if same shall survive me;

SSN: _____; Date of Birth: _____

CONTINGENT BENEFICIARIES:

Name	Share	Date of Birth	Social Security Number
_____, my _____, if he/she shall survive me, or, if he/she shall not survive me, to his/her then-living issue, <u>per stirpes</u>	____ %	_____	_____
_____, my _____, if he/she shall survive me, or, if he/she shall not survive me, to his/her then-living issue, <u>per stirpes</u>	____ %	_____	_____
_____, my _____, if he/she shall survive me, or, if he/she shall not survive me, to his/her then-living issue, <u>per stirpes</u>	____ %	_____	_____
_____, my _____, if he/she shall survive me, or, if he/she shall not survive me, to his/her then-living issue, <u>per stirpes</u>	____ %	_____	_____

Each beneficiary entitled to a share of the account shall have the power, exercisable by him/her alone and in all events, unconditionally, to withdraw any or all of his/her share of the account at any time(s) and by will to appoint any undistributed portion of such share still on hand when he/she dies to any person or entity he/she chooses, including his/her estate. Should a beneficiary die without having withdrawn or appointed his/her entire share of such account, then all such remaining funds shall be distributed to such of his/her issue who survive the beneficiary, per stirpes and not per capita, or if none, to such of my issue who shall survive such beneficiary, per stirpes and not per capita.

The trustee/custodian may distribute the share allocable to a minor to a custodian under the Texas Uniform Transfers to Minors Act or other similar statute, who shall be designated by the Executor of my estate. If, in the opinion of the trustee/custodian, the beneficiary is incapacitated, the trustee/custodian may also distribute (a) to the beneficiary directly; (b) to the guardian or conservator of the beneficiary's estate; (c) by expending the distribution, without the interposition of a guardian or conservator, for the health, support, maintenance, or education of the beneficiary; or (d) by reimbursing the person who is actually taking care of the beneficiary, even though the person is not the legal guardian or conservator, for expenditures made by the person on behalf of the beneficiary.

The Trustee/Custodian shall provide to my Executor, Administrator or Personal Representative any information such representative shall request in connection with the performance of such representative's duties (including the preparation of any tax return) regarding the benefits, the IRA, and the beneficiaries, including information as to matters prior to such representative's appointment, and including copies of IRA documents and returns, 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 hereunder, shall be deemed to have consented to the release of information to my representative as provided in the preceding sentence.

Grantor hereby agrees to indemnify and hold harmless Texas Capital Bank, its officers, directors, agents and employees (collectively, the "Indemnitees") against and from any and all claims, demands, suits, judgments, costs, expenses, attorneys' fees and all losses and damages of every kind and character whatsoever arising out of or relating to payment of the account (or any portion thereof) to Grantor, pursuant to Grantor's instructions, or, after Grantor's death, in accordance with the terms and conditions of this beneficiary designation including without limitation claims asserted against the Indemnitees (or any of them) by a spouse or a former spouse of Grantor (or by the personal representative or beneficiaries of a deceased spouse or deceased former spouse of Grantor), and against any and all costs and expenses that Indemnitees (or any of them) may incur in the enforcement of such indemnification, including without limitation attorneys' fees. Grantor's obligations under this paragraph shall be binding upon his estate and shall inure to the benefit of the heirs, successors, personal representatives and assigns of the Indemnitees.

Because of the complexity of the rules involved in naming a beneficiary and the associated tax consequences, I acknowledge that I have been advised to consult with my tax and legal advisors before completing this beneficiary designation form.

Date

Printed Name of Grantor

Signature of Grantor

WITNESS:

Date

Printed Name of Witness

Signature of Witness

ADDENDUM 4

DURABLE POWER OF ATTORNEY CLAUSE

Retirement Plans. My agent may deal with pensions, annuities and other retirement plans and accounts of every type and nature including but not limited to qualified and non-qualified plans and individual retirement accounts and rollovers (any such plan or account being referred to herein as a “Retirement Account”) and with the trustees, custodians and administrators thereof, intending to include (without limitation) within the scope of the foregoing powers the power to establish Retirement Accounts for me, to make withdrawals there from even if such withdrawals would incur a tax or other penalty, and to make contributions thereto (including rollover contributions), in such amounts as my agent deems appropriate, and to exercise or decline from exercising any elections or options (including but not limited to payment or withdrawal elections or options) available to me with respect thereto; however, my agent shall not designate or change the designation of a beneficiary with respect to any existing Retirement Account; and, in the event my agent establishes a new Retirement Account for me, my agent shall cause the beneficiary designation of such Retirement Account to be consistent with that of the Retirement Account from which any assets are to be directly or indirectly rolled over or otherwise transferred, or if none will be so transferred, then consistent with the beneficiary designations I have made for all of my other Retirement Accounts; but if I have no other Retirement Accounts (or if the beneficiary designations are not the same for all of them), then the beneficiary shall be my spouse if living, otherwise my descendants *per stirpes*, or if none survive me, my Trust.

Notwithstanding the foregoing, my agent shall have no rights or powers to take any action hereunder that would increase the interest of my agent, or my agent’s estate or creditors of my agent or my agent’s estate, in any property of mine (or that would otherwise be exercisable in favor of any of them within the meaning of Sections 2041 and 2514 of the Code) unless, in the case of an existing Retirement Account with at least one other beneficiary, such action is consented to by all other beneficiaries who would have received the benefits but for the proposed change. This limitation shall not apply to any designations of any agent as a beneficiary in a fiduciary capacity, with no beneficial interest.

This language is a “work in progress”. This clause has been provided by David Adler, Adler & Adler, P.C., Dallas, and is for your consideration, and is for educational purposes and not as authority for important planning decisions. It is not intended as legal advice.

ADDENDUM 5

Distributions Over A Family Life Cycle – Married Couple Same Age

Beg. Balance	1,000,000	Rate of Return	6.00	ACCOUNT	ANNUAL	YEAR END
AGE	IRS Factor	Dist. %	BALANCE	DISTRIBUTION	BALANCE	
70	27.4	3.65%	1,000,000	36,496	1,023,504	
71	26.5	3.77%	1,023,504	38,623	1,046,291	
72	25.6	3.91%	1,046,291	40,871	1,068,198	
73	24.7	4.05%	1,068,198	43,247	1,089,043	
74	23.8	4.20%	1,089,043	45,758	1,108,627	
75	22.9	4.37%	1,108,627	48,412	1,126,733	
76	22.0	4.55%	1,126,733	51,215	1,143,122	
77	21.2	4.72%	1,143,122	53,921	1,157,789	
78	20.3	4.93%	1,157,789	57,034	1,170,222	
79	19.5	5.13%	1,170,222	60,011	1,180,424	
80	18.7	5.35%	1,180,424	63,124	1,188,125	
81	17.9	5.59%	1,188,125	66,376	1,193,037	
82	17.1	5.85%	1,193,037	69,768	1,194,851	
83	16.3	6.13%	1,194,851	73,304	1,193,238	
84	15.5	6.45%	1,193,238	76,983	1,187,849	
85	14.8	6.76%	1,187,849	80,260	1,178,860	
86	14.1	7.09%	1,178,860	83,607	1,165,985	
87	13.4	7.46%	1,165,985	87,014	1,148,930	
88	12.7	7.87%	1,148,930	90,467	1,127,399	
89	12.0	8.33%	1,127,399	93,950	1,101,093	
90	11.4	8.77%	1,101,093	96,587	1,070,571	
Both parents die						
Child -60						
	25.2	3.97%	1,070,571	42,483	1,092,323	
61	24.2	4.13%	1,092,323	45,137	1,112,725	
62	23.2	4.31%	1,112,725	47,962	1,131,526	
63	22.2	4.50%	1,131,526	50,970	1,148,448	
64	21.2	4.72%	1,148,448	54,172	1,163,183	
65	20.2	4.95%	1,163,183	57,583	1,175,390	
66	19.2	5.21%	1,175,390	61,218	1,184,695	
67	18.2	5.49%	1,184,695	65,093	1,190,684	
68	17.2	5.81%	1,190,684	69,226	1,192,899	
69	16.2	6.17%	1,192,899	73,636	1,190,837	
70	15.2	6.58%	1,190,837	78,345	1,183,943	
71	14.2	7.04%	1,183,943	83,376	1,171,603	
72	13.2	7.58%	1,171,603	88,758	1,153,142	
73	12.2	8.20%	1,153,142	94,520	1,127,811	
74	11.2	8.93%	1,127,811	100,697	1,094,782	
75	10.2	9.80%	1,094,782	107,332	1,053,137	
76	9.2	10.87%	1,053,137	114,471	1,001,854	
77	8.2	12.20%	1,001,854	122,177	939,788	
78	7.2	13.89%	939,788	130,526	865,649	
79	6.2	16.13%	865,649	139,621	777,967	
80	5.2	19.23%	777,967	149,609	675,036	
81	4.2	23.81%	675,036	160,723	554,815	
82	3.2	31.25%	554,815	173,380	414,725	
83	2.2	45.45%	414,725	188,511	251,097	
84	1.2	83.33%	251,097	209,247	56,915	
85	0.2		56,915	56,915		

ADDENDUM 6

Dear IRA Custodian,

As the owner of IRA account #123-456789 that is in the custody of your organization, I request that you transfer from that account the sum of \$1,000 to Favorite Public Charity, 123 Oak Street, Dallas, TX 75201. The Treasury Tax ID Number for Favorite Public Charity is 00-0000001. It is my understanding that my favorite Charity qualifies under Section 1201 or PPA of 2006 as a qualified public charity.

It is my intention to make a Qualified Charitable Distribution (QCD) to Favorite Public Charity from my IRA. Under the Congressional JCT Technical Explanation of PPA 2006, as amended, this QCD will fulfill part or all of my IRA required minimum distribution for this year.

This letter is authorization for you to make this QCD gift. However, if you require any further documents, please forward those to me for my signature.

Cordially yours,

IRA Owner

cc: Favorite Public Charity