

## SECURE ACT: DISASTER & RECOVERY STRATEGIES

### I. Pre-2020 Death of IRA Owner.

- A. If a beneficiary is still alive after 2020, beneficiary can continue to take distributions over his life expectancy. But when the beneficiary dies, his Successor beneficiaries will be subject to the 10 year rule.
- B. If a beneficiary dies before 2020, the Successor beneficiaries can continue payout for life expectancy of the original beneficiary.
- C. If the IRA owner is deceased, how can negative unplanned distribution under Secure Act be avoided?
  - 1) If individual is named as beneficiary, no methods to revise beneficiary designation form after IRA owner's death.
  - 2) If conduit trusts: considering changing conduit trust (which would require full payout within 10 years) to an accumulation trust (which allows trust to hold and distribute post-tax IRA funds according to customized trust language).
    - a) Decanting: does state law allow? (See chart)
    - b) Non-judicial reformation: does state law allow? (See chart)
    - c) Judicial reformation.
    - d) Does trust language allow amendment to irrevocable trust?

Sample language:

#### Amendment of Trust to Reflect Changes in Tax Law

If in the judgment of the executor or trustee, at any time after execution of this trust instrument, any statute, regulation, court decision, or administrative ruling imposes different or additional requirements on the trust, which may be contrary to the Settlor's intentions, the trustee may amend the terms of the trust to be consistent with the intended terms of the trust, pursuant to the state law in effect in the state that is the situs of the trust.

If particular state law does not allow any reformation options, does trust language allow the trustee to change the situs of the trust?

- e) Does trust language allow situs of trust to be changed?
- D. Tax effect: unchanged. The IRS should not care if an irrevocable trust is reformed to address changes in tax law, because the IRA distributions will still be taxable pursuant to

10 year rule at the highest tax rate (37%). The ultimate result is that post-tax trust investments may continue to be held in trust (subject to trust capital gains rate) or distributed to trust beneficiaries (subject to each beneficiary's applicable capital gains rate).

II. Post 2020 death of IRA owner options:

A. If IRA owner alive and competent, change the beneficiary designation form!

1. Are intended beneficiaries responsible? If yes, just name them individually.
2. Do any beneficiaries need creditor protection?
  - a) Does beneficiary live in one of the 9 states where inherited IRAs are protected from creditors? Alaska, Arizona, Florida, Idaho, Missouri, Nevada, North Carolina, Ohio and Texas.
  - b) Accumulation trust for 1 Beneficiary:
    - Do not name a charity as a possible beneficiary.
    - Don't confuse IRA distribution rules with trust distribution rules: The 10 year rule may require full distribution and taxation of IRA by the end of the 10<sup>th</sup> year after an IRA owner's death, but the trustee may have discretion to retain post-tax distributions in the trust to protect a beneficiary or payout income to the beneficiary, depending on the situation.
  - c) If trust for spouse, do not name any other beneficiaries. This would cause disqualification of the trust as "see-through" and mean no beneficiary at all. So the spouse could no longer use her life expectancy to defer distributions. The 10 year rule would kick in.

B. Options if IRA owner is incompetent:

1. Financial Power of Attorney: every state has a different financial power of attorney. Some forms specifically include the power to change a beneficiary designation form. This would allow the attorney-in-fact who has been entrusted with financial power over an incapacitated person to correct forms before death.
2. Decanting.
3. Non-judicial reformation.
4. Judicial reformation.

III. Grey Areas: Until we have a PLR or case law addressing some areas that are unclear, best to steer clear of these situations.

- A. How does “minors” EDB exception count if a trust names multiple children of the IRA owner?

Possible Answer: unclear. It could mean the “EDB” status only counts if there is one EDB beneficiary.

Possible Answer: Unclear. No one knows if the 10 year rule might apply if any one beneficiary dies, or the oldest beneficiary dies, or not until all the beneficiaries are deceased.

EXAMPLE: Marilyn has 2 minor sons and 1 disabled daughter. She names all 3 children as beneficiaries of a single accumulation trust. Marilyn dies when they are 7, 14 and disabled daughter is 20. Does each minor beneficiary get his life expectancy payout until he turns 18? Will disabled daughter be allowed to stretch distributions over her life expectancy, since she will be the sole remaining beneficiary?

IV. How can ROTH conversions benefit the beneficiaries?

- A. Partial conversions are allowed.
- B. If IRA owner dies and the IRA is a traditional IRA, if the spouse is the named beneficiary, she could rollover to her own IRA, and if her tax bracket allowed, she could convert to a ROTH and bite the bullet and pay the taxes. Accumulation trusts are a perfect vehicle for ROTH IRAs after paying upon the distributions, by the end of the 10 years the post-distribution funds can be retained in trust and be taxed at trust capital gains rate (20%) or the trusts could payout some or all earned income to beneficiaries (0% to 20% capital gains rate) on a case by case basis.

EXHIBIT "A"  
State Statutory Chart UTC and Decanting

State	Uniform Trust Code ("UTC")	Decanting
Alaska	No	§ 13.36.157
Alabama	Yes	§ 19-3D
Arizona	Yes	514-10819
Arkansas	Yes	§13.36.157-159
California	No	Probate Code §19502
Colorado	Yes	§15-16-901-930
Connecticut	Yes	No
Delaware	No, but statute similar 12 Del. C. §3338	12.3528
District of Columbia	Yes	No
Florida	Yes	§736.04117
Georgia	No, but statute HB121	§53-12-62
Hawaii	No	No
Idaho	No	No
Illinois	Yes	760ILCS; 5/16.4
Indiana	No	§30-4-3-36
Iowa	No, but statute §633A2203-2204	No
Kansas	Yes	No
Kentucky	Yes	§386.175
Louisiana	No	No
Maine	Yes	No
Massachusetts	Yes	No statute, but allowed in court case
Michigan	Yes	No
Minnesota	Yes	§502.851
Mississippi	Yes	No
Missouri	Yes	§456.5-419
Montana	Yes	No
Nebraska	Yes	No
Nevada	No	§163.556
New Hampshire	Yes	§564-B:4-418
New Jersey	Yes	No
New Mexico	Yes	§46-12-101-129
New York	No, but currently proposed changes to New York Tax Code – not yet	§10.6.6
North Carolina	Yes	§36C-8B
North Dakota	Yes	No
Ohio	Yes	§5808.18
Oklahoma	No	No
Oregon	Yes	No
Pennsylvania	Yes	No
Rhode Island	No	§18-4-31

South Carolina	Yes	§62-7-816A
South Dakota	No	§55-2-15
Tennessee	Yes	§35-15-816(b)(27)
Texas	No, but Prop C §112.054 may allow <u>some</u> reformatioens for scrivener's error	§112.017 to 112.087
Utah	Yes	No
Vermont	Yes	No
Virginia	Yes	§61.2-779.1-.25
Washington	No, but has TEDRA (Trust & Estate Dispute Resolution Act)	§11.107
West Virginia	Yes	No
Wisconsin	Yes	§701.0418
Wyoming	Yes	§4-10-816(a)