2020 Delaware Tax Institute

Concluding Thoughts on an Unusual Tax Year

Co-sponsored by Widener University Delaware Law School, Society of Financial Service Professionals—Delaware Chapter, and the Delaware State Bar Association

Presentations on 2020 Income Tax Developments/Care Act; Estate Planning and Gift Tax Update; Secure Act; Election Results: Continuation/Changes; State Tax Issues from Telecommuting.

Distinguished Speakers on December 9:
Eric Solomon and David A. Fruchtman,
Steptoe & Johnson LLP

Wed., December 2 and 9, 2020

8:30 a.m.–11:45 a.m.

Two-Day VIRTUAL Presentations Via ZOOM

Delaware Law

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Delaware Tax Institute
2020: Concluding Thoughts on an Unusual Tax Year

Co-sponsored by Widener University Delaware Law School, Society of Financial Service Professionals – Delaware Chapter, and the Delaware State Bar Association

Agenda for Wednesday, December 2, 2020

8:30-8:35 am **Welcome – John "Jack" P. Garnewski Jr., CPA/PFS, CFP, AEP**
Chairperson, Delaware Tax Institute
Family Office Solutions, LLC

8:35-10:00 am **Estate Planning Update**
Moderator:
W. Donald Sparks II, Esquire
Richards, Layton & Finger, PA

Panelists:
Daniel F. Hayward, Esquire
Gordon, Fournaris & Mammarella, P.A.

Jennifer E. Smith, Esquire
McCollom D'Emilio Smith Uebler LLC

10:15-11:45 am **Secure Act**
Moderator:
Jocelyn Margolin Borowsky, Esquire
Duane Morris LLP

Panelist:
Steven E. Trytten, Esquire
Henderson, Caverly, Pum & Trytten LLP

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2020 Delaware Tax Institute Planning Committee

Jocelyn Margolin Borowsky, Duane Morris; John "Jack" P. Garniewski Jr., Family Office Solutions, LLC; Bruce Grohsgal, Widener University Delaware Law School; Daniel F. Hayward, Gordon, Fournaris & Mammarella, P.A.; Carol G. Kroch, Wilmington Trust Company; Kathryn S. Schultz, Belfint Lyons & Shuman, P.A.; W. Donald Sparks II, Richards Layton & Finger, P.A.; Kenneth W. Stewart, Stephano Slack LLC; Leo E. Strine, The Financial House; Vincent C. Thomas, Young Conaway Stargatt & Taylor, LLP

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Course materials are available for download as a pdf at delawarelaw.widener.edu/delawaretax

BIOGRAPHIES

Jocelyn Margolin Borowsky, Esquire

Jocelyn Margolin Borowsky, a fellow of the American College of Trust and Estate Counsel ("ACTEC"), practices in the areas of estate planning, probate and estate and trust administration in Delaware, New Jersey, and Pennsylvania. A large part of her practice involves the review of a client's overall estate plan, preparation of wills and revocable trusts, and where appropriate, implementation of sophisticated trusts, such as lifetime spousal trusts, asset protection trusts, life insurance trusts and dynasty trusts. As an active Delaware practitioner, she routinely advises clients with respect to structuring new Delaware trusts or transferring existing trusts to Delaware both judicially and non-judicially. Her clients include out-of-state counsel seeking review or advice with respect to Delaware trusts, high net worth families, corporate executives and charitable organizations. She works with closely-held family businesses on issues involving strategic tax and business planning and the creation of private family foundations. She also handles tax controversy matters, including estate and gift tax audits by the Internal Revenue Service and state taxing authorities. She is AV® Preeminent™ Peer Review Rated by Martindale-Hubbell.

Ms. Borowsky is a 1992 graduate of the University of Pennsylvania Law School and a graduate of New York University School of Law (LL.M. in Taxation, 1997) and the University of Texas (B.A., with highest honors, 1988), where she was elected to Phi Beta Kappa.

Areas of Practice

- Wealth Planning
- Estate Planning
- Estate and Trust Administration

John "Jack" P. Garniewski Jr., CPA/PFS, CFP, AEP

As a Principal of Family Office Solutions, LLC, Jack leads seasoned professionals who are responsible for delivering advice and service to a national client base of multi-generational families and business owners.

Jack works directly with clients to help manage the multi-dimensional aspects of their family's financial affairs. Jack and his teams work closely with clients and their advisors to develop and support financial strategies that assist clients in meeting their current needs, while planning for long-term goals. For some of his clients, this also means serving as executive director, advisor, and confidant.

Jack has more than three decades of experience in providing advice and overseeing the execution of financially related solutions for wealthy families. This includes the strategic leadership and business management responsibilities associated with oversight of multiple family offices and other entities.

Jack holds an MBA in Taxation from Drexel University and earned his bachelor's degree from Villanova University. Jack is a Certified Public Accountant in Delaware and Pennsylvania. He serves as President to the NAEPC (National Association of Estate Planners and Councils). He frequently speaks at family office and other related professional conferences locally and nationwide.

Born and raised in New Castle, Delaware, Jack currently resides in Chester County, Pennsylvania.

Professor Bruce Grohsgal

Bruce Grohsgal is the Helen S. Balick Professor in Business Bankruptcy Law. He joined the Widener University Delaware Law School faculty in July 2014.

He previously practiced law for more than 30 years, most recently at the Wilmington, Delaware office of Pachulski Stang Ziehl & Jones, LLP. He has represented debtors, creditors' committees, and trustees in chapter 11 bankruptcy cases and litigation, including the debtors in Solyndra, Global Home Products/Anchor Hocking/Mirro/WearEver, Chi Chi's and Trans World Airlines, the creditors' committees in Freedom Communications (Orange County Register) and Jevic Transportation, the medical benefits retirees' committee in Allied Systems Holdings, Inc., and the chapter 11 trustee in Le-Nature's.

Professor Grohsgal is the Co-Editor-in-Chief of the Norton Journal of Bankruptcy Law and Practice, and is the Director of the Institute of Delaware Corporate and Business Law. He was a Senior Fellow at Americans for Financial Reform, Washington, D.C., from October 2012 to January 2013, while on Sabbatical from his former firm, and was the Chair of the Bankruptcy Section of the Delaware State Bar Association in 2008-2009. He has spoken on numerous bankruptcy topics, including "first day" hearings, the sale of a business and other assets in bankruptcy, unsecured creditors' committees, executive compensation, derivatives, repos and financial instruments in bankruptcy, and the discharge of student loans by individuals in bankruptcy.

He received his B.A. from Brandeis University in 1977 and his J.D. from Columbia Law School in 1980, where he was a Stone Scholar.

GORDON, FOURNARIS & MAMMARELLA, P.A.

Published on *Gordon, Fournaris & Mammarella, PA | Wilmington, Delaware Attorneys* (https://www.gfmlaw.com)

Home > Attorneys > Daniel F. Hayward

Daniel F. Hayward

Director
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DANIEL F. HAYWARD is a Director at the Wilmington law firm of Gordon, Fournaris & Mammarella, P.A. Daniel graduated with a Bachelor of Science degree in Chemical Engineering from the University of Delaware. He received his law degree from Villanova University School of Law in 2006, and received his LL.M. in Taxation from the Villanova University School of Law in 2015. He is a member of the Delaware Bar Association, and also a member of the Estates and Trusts Section, of which he served as Chair during 2015-2016. He is a Fellow of the American College of Trust and Estate Counsel.

Daniel's practice focuses on the unique aspects of Delaware trust law including directed trusts, dynasty trusts, asset protection trusts and all aspects of the validity, construction and administration of Delaware trusts. Daniel routinely petitions the Delaware Court of Chancery to represent interested parties in the reformation of trusts and to transfer the situs of certain trusts to the State of Delaware. He also drafts, reviews and comments on Delaware trust agreements for local and out of state clients and provides legal opinions on the validity of trusts under Delaware law, including Delaware dynasty trusts and Delaware self-settled asset protection trusts.

Daniel also represents and advises Delaware corporate and individual trustees regarding trust administration and the legal aspects of their fiduciary roles. His practice also frequently includes representation of Delaware trustees in fiduciary litigation matters, in particular actions in the

Delaware Court of Chancery seeking construction of trust provisions or instructions from the Court as to various matters of trust administration.

Daniel resides in Hockessin, Delaware with his wife Stephanie and their three children, Charlotte, Lila and Sebastian.

Areas of Practice:

Trusts and Estate Planning [2]
Fiduciary Litigation [3]
Taxation [4]

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[4] https://www.gfmlaw.com/areas-of-practice/taxation

Carol G. Kroch, Esquire

Carol is an Administrative Vice President at Wilmington Trust and the National Director of Philanthropic Planning. She has extensive experience working with individuals and nonprofit organizations in estate, trust, and charitable gift planning and in advising nonprofit corporations and trusts, including private foundations and public charities.

Carol was named by Private Asset Management Magazine in June 2016 and May 2015 as one of the 50 most influential women in private wealth. Prior to joining Wilmington Trust in 2005, Carol was senior counsel at The Robert Wood Johnson Foundation, the largest foundation in the United States devoted to health and health care. She was responsible for legal matters related to the Foundation's investment portfolio, including the negotiation of alternative investment vehicles. In addition, she had responsibility for tax, business, corporate governance, and grant-making matters. From 1978 to 1999, Carol was in private practice at Drinker Biddle & Reath LLP in Philadelphia and Cahill Gordon & Reindel LLP in New York.

Carol holds a JD from Boston College Law School, where she was a member of the Law Review and the Order of the Coif, and a bachelor's degree from Wellesley College. She is a Fellow of the American College of Trusts and Estates Counsel and a member of its Charitable Planning and Exempt Organizations Committee. Carol is the past co-chair of the Art and Collectibles Committee of the Section of Real Property Trust and Estate Law (RPTE) of the American Bar Association ("ABA"). She is a past RPTE Council member and served as the Supervisory Council member for the Charitable Planning and Organizations Group. She is also a member of the Exempt Organizations Committee of the ABA Tax Section. Carol was the ABA Advisor to the Drafting Committee of the Uniform Prudent Management of Institutional Funds Act and was an ABA Advisor for the Model Entity Transactions Act Drafting Committee. She is past chair of the Nemours A.I. duPont Hospital for Children Planned Giving Committee and is a member of the Children's Hospital of Philadelphia Legacy Advisors Group and the Barnes Foundation Professional Advisors Council.

Kathryn S. Schultz, CPA, AEP

Kathy Schultz is Director/Chair of Corporate & International Services at Belfint, Lyons & Shuman, P.A. and specializes in providing intricate tax planning and compliance services for individuals, businesses, guardianships, estates and trusts and makes her clients feel comfortable by taking the time to explain each situation in order for them to gain an understanding of their financial situation. She frequently works with a diverse network of professionals, including local attorneys, to ensure her clients' estate and trust tax matters are properly handled. Kathy is instrumental in the firm's International Services team which assists with tax compliance and accounting services for international businesses and individuals. Kathy also assists clients with corporate service matters for Delaware investment holding companies.

Kathy is often asked to present at client, professional and business groups and writes articles about recent tax law changes, domestic and international tax matters and estate and trust planning.

Professional Affiliations

- American Institute of Certified Public Accountants
- Delaware Society of Certified Public Accountants
- Delaware Tax Institute
  - ~ Board Member (2010 – Present)
- Estate Planning Council of Delaware
- PrimeGlobal – International Tax Special Interest Group
- World Trade Center of Delaware
- Wilmington Tax Group
- Delaware State Board of Accountancy – Past Chair

Education

- University of Delaware – Graduated Cum Laude with a Bachelor of Science Degree in Accounting

Community Service

- Philadelphia Chapter and Board Member of the Delaware Chapter of the National Speleological Society o Treasurer of Philadelphia Chapter (2009 – 2015)
- Volunteer for the Delaware Division of Fish and Wildlife for the Department of Natural Resources and Environmental Control

Awards & Recognition

- Recipient of the AICPA and DSCPA’s 2011 Women to Watch for Established Leaders award
- Recognized in “Delaware Today” as a 2012 and 2013 FIVE STAR Wealth Manager

MCCOLLOM D'EMILIO SMITH UEBLER LLC
ATTORNEYS AT LAW

Jennifer E. Smith

Jennifer E. Smith is a partner at McCollom D'Emilio Smith Uebler LLC, in Wilmington, DE. She focuses her practice on estate planning, estate and trust administration, tax planning, wealth preservation, and fiduciary litigation. She advises individuals, banks, and trust companies regarding trust modifications, terminations, mergers, decantings, nonjudicial settlements, and trust situs changes.

Ms. Smith is a published author and frequent speaker on issues and developments related to estate planning. She has presented at both national and state conferences on various topics, including directed trusts, trust migration and nonjudicial means of modification, recent developments to Delaware trust law, and estate planning techniques to achieve a step-up in basis.

Ms. Smith has been recognized by Chambers and Partners as a leading Private Wealth Attorney since 2018. She is also certified as an Accredited Estate Planner® designee by the National Association of Estate Planners & Councils.

Ms. Smith is admitted to practice in the states of Delaware and Pennsylvania, and in the United States District Court for the District of Delaware and the United States District Court for the Eastern District of Pennsylvania.

She received her B.A. from Emory University and her J.D. from the University of North Carolina at Chapel Hill School of Law. She also received an LL.M. in Taxation from Villanova University Charles Widger School of Law.

W. Donald Sparks II, Esquire

W. Donald Sparks II, Director of Richards, Layton & Finger, P.A., practices primarily in the areas of estate planning, estate administration, tax-exempt organizations and fiduciary litigation. He received his B.A. degree, *summa cum laude*, from Dartmouth College and his J.D. from Yale Law School where he served as a Senior Editor of the Yale Law Journal. He clerked for Judge Caleb Wright of the U. S. District Court for the District of Delaware. He is a fellow of the American College of Trust and Estate Counsel ("ACTEC"). He is a member of the Real Property and Trusts Section of the Pennsylvania Bar Association and the Tax and Estates and Trusts Sections of the American Bar and Delaware Bar Associations. He is a past chairman of the Delaware Bar Association Section of Taxation, a past Chairman of the Delaware Bar Association Estates and Trusts Section, and a past Chairman of the Estate Planning Council of Delaware, Inc. He is a frequent speaker and author on estates, trusts, and other tax-related topics having appeared for ACTEC, The University of Miami Estate Planning Institute, the Delaware Tax Institute and the Delaware Bankers Association Trust Conference. He has also served as a Board member and officer of numerous charitable organizations, including the Brandywine Conservancy & Museum of Art.

Kenneth W. Stewart, CPA

Caring and deeply committed to the firm clients for which he is responsible, Ken serves as a Tax Manager in the Wilmington office of Stephano Slack LLC. He assists clients with tax planning, consulting and advisory services for many situations, including: tax deferred exchange agreements; family income and asset shifting; taxation minimization; deferred compensation planning; education funding; individuals' asset acquisition and the attendant financing issues; charitable giving mechanisms; among others. A fan of straight talk and transparency, one of his mantras to clients is, "If you don't surprise me, I won't surprise you." Another passion of his is mentoring and empowering younger colleagues throughout his career to help them grow as professionals.

Ken is a CPA and earned his Bachelor of Business Administration from Wilmington College. In his spare time he volunteers with Immaculate Heart of Mary Church, helping deliver baked goods to a local soup kitchen and other tasks. His racquetball exercise has been replaced by training/chasing his energetic new English Springer Spaniel puppy while she treats his backyard as her personal race track. A devotee of this lovable breed, this is his third spaniel and he looks forward to (someday) walking her without a leash. In the meantime, they cheer on the 76ers together.

Leo E. Strine, CLU, ChFC, MSFS, MSM

Leo E. Strine is a Chartered Life Underwriter (CLU) and a Chartered Financial Consultant (ChFC), as well as a registered representative with Lincoln Financial Securities Corporation.

He has earned the degrees of Master of Science in Financial Services (MSFS) and Master of Science in Management (MSM) from The American College.

Leo has been in the financial services industry since 1975 and has held many leadership positions. He is past president and member of the National Association of Insurance and Financial Advisors – Delaware (NAIFA-DE) and its local association, NAIFA – NCC. He has served as past president of the Society of Financial Service Professionals (SFSP) Delaware Chapter and as past president of the Estate Planning Council of Delaware and is a member of the Wilmington Tax Group.

Leo is a PACE Emeritus member of the Professional Achievement in Continuing Education (PACE) program and has served on the national Board of Directors of the Society of Financial Service Professionals.

Leo has been a resident of Hockessin, Delaware since 1973.

Vincent C. Thomas, Esquire

When closely-held or public companies seek help in structuring transactions around tax, liability, business succession, and other corporate issues, they call on Vince Thomas to combine sophisticated counsel with sound and practical business judgment. As a partner with Young Conaway Stargatt & Taylor LLP, Vince's transactional skills, often in collaboration with the firm's bankruptcy group, are a unique and valuable complement to his long established practice representing institutional trustees and individuals in issues of Delaware trust and alternative entity law.

Adept at explaining intricate legal concepts in laymen's terms, Vince involves clients fully in the transaction process. In deals where a single word can have enormous future consequences, he meticulously presents his clients with every viable option, arming them with the substantive knowledge they need to make solid business decisions.

From the precise drafting of transaction documents to the complex tax planning and re-domestication of out-of-state trusts into Delaware, Vince immerses himself in the details and nuances, protecting his clients from unwarranted exposures as he guides their matters to successful resolution.

FOCUS:

- Counseling companies in complex business transactions, including, mergers, acquisitions, corporate restructurings, and financing transactions
- Counseling distressed companies on tax issues, Delaware corporate governance, and transactional matters
- Representing large businesses with general tax and transactional advice, including stock and asset purchase agreements, LLC agreements, partnership agreements, corporate charter documents and shareholders agreements.
- Combining tax, trust and transactional experience to advise distressed companies with liquidation structures

- Representing institutional trustees in all aspects of the administration of Delaware statutory and common law trusts, including, transfer of trust situs, trust reviews, tax planning, decanting, merger, and petitions in the Delaware Court of Chancery. This includes extensive experience with DING Trusts, Delaware asset protection trusts, Delaware dynasty trusts, Delaware statutory trusts, liquidating trusts, settlement trusts and other sophisticated tax planning structures.

Education

- Villanova University Charles Widger School of Law (LL.M.)
    - Tax
- Widener University Delaware Law School (J.D., *magna cum laude*)
    - (2nd in Class)
- University of Delaware (B.S.)

Bar Admissions

- Delaware

Distinctions

- American College of Trust and Estate Counsel, Member
- Named leading Delaware practitioner by *Chambers High Net Worth* since 2016
- Voted a top Delaware business attorney in the Delaware Today Magazine from 2015 through 2018
- Rated AV Preeminent by Martindale Hubble
- Recognized by *The Best Lawyers in America®*, Trusts and Estates, 2019

Memberships and Affiliations

- Served as the prestigious Wolcott Fellow for the Delaware Court of Chancery
- Served as a full time law clerk to Myron T. Steele, Chief Justice of the Delaware Supreme Court.

Clerkships

- Honorable Myron T. Steele, Supreme Court of the State of Delaware
- Honorable Stephen P. Lamb, Vice-Chancellor, Court of Chancery of the State of Delaware, Josiah Oliver Wolcott Fellowship Law Clerk

Steven E. Trytten, Esquire, CPA, MBA

Steven E. Trytten, Esquire, CPA, MBA, is a nationally recognized authority on tax, estate, and business succession planning, quoted in financial publications such as the Wall Street Journal, Forbes Magazine, Bloomberg Wealth Manager, Kiplinger's Retirement Report, and the Los Angeles Business Journal.

Steve lectures to tax and estate professionals across the country at programs such as American College of Trust and Estate Counsel ("ACTEC") national meetings, Heckerling Estate Planning Institute, ALI-CLE programs, Hawaii Tax Institute, NYU Tax Institute, Notre Dame Tax Institute, USC Tax Institute, CEB-UCLA Estate Planning Institute, Southern California Tax and Estate Planning Forum, AICPA programs, and NAELA Annual Institute. Recent publications include his papers for these events, as well as articles for Trusts & Estates Journal of Wealth Management and other publications for professionals engaged in tax and estate planning.

Steve is a Fellow of the American College of Trust and Estate Counsel ("ACTEC") and served as Chair of the ACTEC Employee Benefits Committee (3/2017 – 3/2020).

Steve is recognized in the 2020 Chambers & Partners High Net Worth Guide as a top attorney serving high net worth clients.

Steve has been recognized each year since 2003 as one of the top lawyers in the U.S. by virtue of his inclusion in the Best Lawyers of America©. He has also been voted by his peers in Los Angeles County as a "Super Lawyer" and was further recognized as one of the top 100 vote recipients county-wide among all practice areas in 2004.

Steve is a "Certified Specialist" in two areas: Taxation Law, and Estate Planning and Probate Law (certification by the Board of Legal Specialization of the State Bar of California).

Steve served on the Editorial Advisory Board, Retirement Benefits Section, for Trusts & Estates Journal of Wealth Management (2011 – 2016).

Steve served as Chair of the Committee on Estate and Gift Taxation, Taxation Section of the California State Bar (1996 – 1998). He is an active member of the American Bar Association, the State Bar of California, the Los Angeles County Bar Association, the American Institute of Certified Public Accountants, and the California Society of Certified Public Accountants.

Steve attended the University of Illinois where he received his undergraduate, MBA, and JD degrees. He was admitted to the Illinois Bar in 1978 and to the California Bar in 1983. He was licensed as an Illinois CPA in 1979.

COURSE MATERIALS

Estate Planning Update

Delaware Tax Institute

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Treasury Regulations

- Final Regulations issued in September 2020 relating to Section 67(g)
  - Clarified that certain expenses incurred by an estate or nongrantor trust are not affected by the suspension of miscellaneous itemized deductions for the tax years 2018 through 2025
    - Section 67(e) deductions are <u>not</u> suspended or eliminated by Section 67(g)
  - Also applies to specified excess deductions upon the termination of an estate or nongrantor trust
  - Further guidance is provided in the Regulations on determining the character and amount of excess deductions that are succeeded to by the beneficiaries

Revenue Procedures

- Rev. Proc. 2019-44
  - Inflation adjusted amounts for 2020 tax items
  - Unified credit against estate tax: $11,580,000
  - Gift tax annual exclusion: $15,000
  - Gift tax annual exclusion for gifts to non-US spouse: $157,000
- Rev. Proc. 2020-45
  - Unified credit against estate tax: $11,580,000
  - Gift tax annual exclusion: $15,000
  - Gift tax annual exclusion for gifts to non-US spouse: $159,000
- Rev. Proc. 2020-3 and Rev. Proc. 2020-7
  - Identify domestic and international areas, respectively, for which the IRS will not issue a letter ruling or determination letter

Revenue Procedures

- Revenue Procedure 2020-3 and Revenue Procedure 2020-7
    - Identify domestic and international areas, respectively, for which the IRS will not issue a letter ruling or determination letter
    - Certain items relating to tax consequences of "ING" trusts are excluded

Private Letter Rulings

- PLR 2020022002
  - The sale between a trust in which a beneficiary had a general power of appointment and a grantor trust (of which the same beneficiary was the grantor) was not recognized as a sale for federal income tax purposes
    - The beneficiary is treated as the owner of both trusts for income tax purposes
  - In this situation, the sale itself actually is what caused the first trust to become a grantor trust.
  - IRS relied on Rev. Rul. 85-13: grantor trusts are disregarded entities for income tax purposes
  - Also applied Rev. Rul. 2007-13: transfers between two grantor trusts, created by the same grantor, are disregarded for income tax purposes.

Private Letter Rulings

- PLR 201947004
  - Modification of a trust will not cause the trust to lose its grandfathered GST-exempt status, where the period of the trust was extended beyond its original date for termination
  - Modification was accomplished pursuant to a state statute where the grantor and all beneficiaries (current and contingent) entered into an agreement consenting to the modification
    - Delaware has similar statutes (NJSA statute, 12 Del. C. § 3338; Modification While Trustor is Living statite, 12 Del. C. § 3342)
  - Giving the beneficiary a general testamentary power of appointment so that the assets would be includible in the beneficiary's estate was critical in avoiding a negative GST tax consequence

California Legislative Proposal

- Resulted from a meeting of the California Franchise Tax Board in early November – "Legislative Proposal C"
- Taxation of "ING" trusts
  - Delaware is a state that allows for self-settled asset protection trusts in which the grantor of the trust can have a beneficial interest in the trust but still have the trust assets protected from the grantor's creditors as long as the funding of the trust did not constitute a fraudulent transfer
  - Also provides the ability to avoid or defer state income tax for certain states
- For CA residents creating a DING trust, currently it is possible to avoid or defer CA state capital gains/income tax (most often utilized when a sale or liquidation event is anticipated), as long as the trust is structured correctly
  - No CA source income
  - No CA resident fiduciaries (unclear whether this applies to the Distribution Committee members)
  - Any CA beneficiaries must be "contingent"

California Legislative Proposal

- Currently, California mostly confirm to the federal treatment of trusts for income tax purposes, including treating ING trusts as separate legal entities and taxpayers for income tax purposes.
- Proposed legislation would require that the net income from an ING trust's assets be included in the grantor's gross income and subject to CA income tax
  - Essentially, for state income tax purposes the trust is treated as a grantor trust and not a non-grantor trust
  - A very similar approach was taken by NY in 2015 when they passed legislation that effectively ended the use of ING trusts for state income tax purposes
- If passed, would be operative for taxable years beginning on or after January 1, 2022.

California Legislative Proposal

- Where does this leave us when it comes to planning for CA clients?
- If state income taxation is client's primary concern, consider a completed gift trust
  - Non-grantor trust for descendants
  - SLANT
- Proposed legislation would not affect federal income tax treatment of DING trusts
  - "Stacking " QSBS gain exclusions

2020 Delaware Tax Institute
Trusts and Estates Recent Developments
Key Transfer Tax Cases

I. *Estate of Skeba v. United States*, 432 F.Supp.3d 461 (D.N.J. 2020)

Facts

The original estate tax return filing and tax payment date was March 10, 2014. Prior to the deadline, on March 6, the Estate requested a 6-month extension to file its tax return and to pay the estate tax. In connection with the request, the Estate made an estimated tax payment of $725,000. The IRS subsequently granted the Estate's requested extensions and extended the filing and payment deadlines to September 10, 2014.

On March 18, 2014 (8 days after the original March 10 filing and payment deadline, but nearly 6 months before the subsequently granted extended deadlines), the Estate made an additional estimated tax payment of $2,745,000 (for total estimated tax payments of $3,470,000).

The Estate, however, did not file the estate tax return by the September 10, 2014 extended filing deadline. Nor did the Estate request an additional extension.

On June 30, 2015, the Estate filed the estate tax return, and reported an estate tax of $2,528,838 and an overpayment of $941,162. The IRS agreed that there was an overpayment of $941,162, but assessed a late filing penalty under 26 U.S.C. § 6651 of $450,959.50, which was 25% of the unpaid amount of tax due on the **original March 10, 2014 filing date** of $1,803,838 (calculated as the tax due on March 10 of $2,528,838, less the $725,000 estimated payment made prior to the March 10 deadline).

The Estate subsequently filed a lawsuit to set aside the penalties assessed by the IRS.

The Statute

> Section 6651(a)(1) states that, in the case of a failure:
>
> (1) to file any return required under the authority of subchapter A of chapter 61 . . ., **on the date prescribed therefor** (**determined with regard to any extension of time for filing**), **unless it is shown that such failure is due to reasonable cause and not due to willful neglect**, there shall be added to the amount required to be shown as tax on such return 5 percent of the amount of such tax if the failure is for not more than 1 month, with an additional 5 percent for each additional month or fraction thereof during which such failure continues, not exceeding 25 percent in the aggregate[.]
>
> Section 6651(b)(1) states that, for purposes of Section 6651(a)(1):
>
> [T]he amount of tax required to be shown on the return shall be **reduced by the amount of any part of the tax which is paid on or before the date prescribed for payment of the tax** and by the amount of any credit against the tax which may be claimed on the return[.]

The Parties' Contentions

The Estate

First, the Estate argued that, when reading §§ 6651(a)(1) and (b)(1) together, the late filing penalty is calculated by using the formula set forth in subsection (a)(1), incorporating the "net amount due" on the "the date prescribed for payment" as set forth in subsection (b)(1). Because the estate tax was overpaid prior to the September 1, 2014 extended filing deadline, there was no net amount due on the September deadline; and hence, no penalty may be imposed.

Second, the Estate argued that it satisfied the exception within § 6651(a)(1) because the late filing resulted from a "reasonable cause not due to willful neglect."

The IRS

The IRS argued that §§ 6651(a)(1) and (b) should be construed together with another statute, 26 U.S.C. § 6151 (relating to "Time and place for paying taxes shown on returns"), which states that the "date filed for payment of such tax shall be deemed a reference to the last day fixed for such payment (determined **without** regard to any extension of time for paying the tax)." Because the Estate did not file its return by the "last day fixed" for payment (i.e., March 10, 2014), the penalty imposed by § 6651(a)(1) applied to the amount of the unpaid tax as of the original filing date, notwithstanding the fact that the tax was overpaid as of March 18, 2014.

The Court's Ruling and Analysis

The Court rejected the IRS's argument and stated that both §§ 6651(a)(1) and (a)(2) designate the specific day on which penalties will be assessed for the late filing and payment and that the "date prescribed" is to "be determined with regard to any extension of time for filing." Applying statutory construction rules, the Court stated that the language of the statute in dispute (§ 6651) should be given precedence over the more generic § 6151 statute.

Additionally, the Court determined that the Estate demonstrated reasonable cause for its filing delay under § 6651(a)(1), which was attributable to difficulty in obtaining appraisals for certain real property caused, in part, by the will contest litigation, which itself was delayed due to separate health issues experienced by the executor and the Estate's litigation counsel.

Caution

There is prior authority on this issue that reached the opposite conclusion, namely, that the 6651 penalty should be based on a percentage of the tax due on the original (not extended) payment due date. *See Estate of Ridenour v. U.S.*, 468 F. Supp.2d 941 (D.C. Ohio 2006); Rev. Rul. 81-237, 1981-2 C.B. 245. The Court in *Estate of Skeba* did not address these authorities. Given the inconsistent authority, taxpayers should try to file their tax returns within the extended filing deadlines, if any, and should pay estimated taxes within the original filing deadline, if possible.

II. *Grieve v. Commissioner*, T.C. Memo. 2020-28 (March 2, 2020)

Facts

In 2013, the taxpayer caused his revocable trust to transfer its 99.8% nonvoting ownership interest in an LLC, Rabbit 1, LLC ("Rabbit"), to a Grantor Retained Annuity Trust ("GRAT"). The GRAT was to pay the taxpayer annuity payments in the amount of $2,783,485 and $3,340,180, as determined as a percentage of the fair market value of the assets transferred to Rabbit.

Also in 2013, the taxpayer transferred his 99.8% nonvoting ownership interest in another LLC, Angus MacDonald, LLC ("Angus"), to an irrevocable trust for the benefit of his children, in exchange for a single-life private annuity that would pay the taxpayer an annual sum of $1,420,000.

On the taxpayer's 2013 gift tax return, the taxpayer reported a taxable gift of $0 for the transfer to Rabbit and a taxable gift of $9,966,659 for the transfer to Angus. The amounts reported by the taxpayer were based, in part, on the valuation report provided by a valuation firm, which valued the transferred units based on the adjusted net asset value method under the market approach. The valuation firm applied lack of control discounts of 13.4% for Rabbit and 12.7% for Angus and lack of marketability discounts of 25% for each LLC. To determine these discounts, the valuation firm looked at studies of closed-end mutual funds and closely held equity interests, including restricted stock studies.

The IRS issued a notice of deficiency and asserted that the taxpayer understated the fair market value of the transferred units. The IRS increased the net value of the gifts from $9,966,659 to $17,819,139, based on its assessment that the FMV of the Rabbit units should be increased from $5,903,769 to $9,048,866 and the FMV of the Angus units should be increased from $20,890,934 to $31,884,403.

At trial, the taxpayer and the IRS presented valuation experts, each of whom prepared his own valuation of the LLCs. The taxpayer's valuation expert performed a different analysis than the valuation firm, which resulted in slightly lower values than those reported on the gift tax return. The expert used a combination of a market approach and income approach (as opposed to the valuation firm, which only performed a market approach) to derive values.

The IRS's expert took a different approach. His valuations were based upon the premise that the reasonable buyer of a 99.8% interest could be expected to seek to maximize his or her economic interest by consolidating ownership through the purchase of the 0.2% interest. The IRS expert also contends that a willing buyer would consider the likelihood of purchasing the 0.2% interest.

The Court's Ruling and Analysis

The Tax Court rejected the IRS expert's valuation that a buyer of the 99.8% class B interest would start by seeking to buy the 0.2% class A controlling interest. The IRS's expert's analysis was premised on speculation and relied on additional action that was not reasonably probable to occur because the owner of the class A voting units (the taxpayer's daughter) testified that she had no intention of selling her units. The Court further stated that, "[t]o determine the fair market values of the class B units we look at the willing buyer and willing seller of the class B units, and not the willing buyer and willing seller of the class A units."

The Court, however, determined that the values for the LLCs used in the gift tax return were the appropriate values. Specifically, the Court stated it was "not convinced that the higher discount for lack of control for Rabbit and lower values in the Frazier reports should be substituted for the values that the parties stipulated and the discounts petitioner provided in the VCG reports."

III. *Estate of Howard V. Moore v. Commissioner*, T.C Memo. 2020-40

Facts

The case begins with this introduction, which sets the stage for the Court's opinion:

> Howard Moore was born into rural poverty but over a long life built a thriving and very lucrative farm in Arizona. In September 2004 he began negotiating its sale, but his health went bad. He was released from the hospital and entered hospice care by the end of that year.
>
> Then he began to plan his estate.

Mr. Moore and his attorney developed a complex estate plan to attempt to reduce taxes payable by his estate. Four days after Mr. Moore was released from the hospital, he established five trusts and one family limited partnership ("FLP"). Mr. Moore transferred his interest in the farm to his revocable living trust (the "Living Trust"), which shortly thereafter transferred the farm to the FLP in exchange for a 95% interest in the FLP. Prior to transferring the farm to the FLP, Mr. Moore negotiated for the sale of the farm to his neighbor, and the sale occurred five days after the transfer to the FLP. Mr. Moore continued to operate and live on the farm after the sale.

Mr. Moore subsequently caused the Living Trust to transfer to an irrevocable trust for his children (the "Irrevocable Trust") $500,000, and a couple weeks later transfer its interest in the FLP in exchange for $500,000 in cash and a $4.8 million note (which represented a 53% discount of the FLP interest).

The Irrevocable Trust contained a provision that stated, upon Mr. Moore's death, the trustee shall "distribute an amount equal to the value of any asset of this trust which is includible in my gross estate for federal estate tax purposes" to the Living Trust to be distributed in accordance with its terms. In the years following Mr. Moore's death, the Irrevocable Trust transferred several hundreds of thousands of dollars each year (received from the FLP) to the Living Trust. At trial, Mr. Moore's estate and the IRS agreed that the only way the clause becomes operative was by an IRS examination that resulted in the inclusion of additional property in the gross estate.

The IRS issued a notice of deficiency of nearly $6.4 million to the estate, and subsequently issued a gift tax notice of deficiency of more than $1.3 million.

The Court's Ruling and Analysis

A. Gross Estate Inclusion under Section 2036

1. The transfer was not bona fide

The Court held that the transfer from the Living Trust to the FLP was not a bona fide sale because there were no nontax reasons for the sale. Having reached this conclusion, the Court noted that it did not need to address whether the sale was for adequate and full consideration.

The Estate argued that there were nontax reasons for the forming of, and the transfer of the farm to, the FLP. Namely, Mr. Moore wanted to "bring his family together so that they could learn how to manage the business without him" and for creditor protection purposes.

The Court rejected both arguments. There was no evidence to suggest Mr. Moore intended to, or ever did, allow his children the opportunity to manage the business. Mr. Moore negotiated the sale of the farm prior to the transfer to the FLP, and the sale occurred five days after the transfer. The cash from the sale was then invested and managed by a financial advisor, not the children, who had no say over the management or sale of the FLP assets. Further, Mr. Moore's children could not identify any potential creditors or threats of litigation and there was no evidence that they or Mr. Moore had legitimate concerns of potential creditor claims.

2. Mr. Moore retained possession and enjoyment of the Farm after the sale

The court also held that Mr. Moore retained "possession or enjoyment" of the assets transferred to the FLP. Specifically, Mr. Moore had "an implied agreement to retain possession or enjoyment of the farm property upon the transfer of four-fifths of Moore Farms to the FLP and even after the sale of the entire farm." In making this finding, the Court considered the following factors: Mr. Moore continued occupancy of property after its transfer to an entity; Mr. Moore used the FLP's assets (not his own) to pay his personal expenses; and Mr. Moore continued to control the use and disposition of the FLP's assets and only gave "nominal power" to his children, who did not make any decisions with respect to the assets.

3. The Section 2043 Calculation

To determine the value included in the gross estate, the Court analyzed the calculation set forth in Section 2043, which was addressed for the first time in *Powell*. As part of the calculation, the Court found that two sets of purported loans were actually gifts.

With respect to the first set of loans, Mr. Moore directed the FLP to transfer $500,000 to each of his four children in return for a five-year note bearing interest at a rate of 3.6% from each of the children. The Court agreed with the IRS's assertion that these transfers were gifts and not loans, because the notes had no amortization schedule, no payments were made, and no efforts were made to collect on the notes. Thus, any additional resulting gift tax paid on the gifts was to be included in the gross estate under §2035(b) because the gifts had been made within three years of Mr. Moore's death.

With respect to the second loan, the FLP purportedly loaned the Living Trust $2 million, as reported by the Estate on the estate tax return. The Court, however, found that there was no evidence to support the Estate's assertion that the transfer was a loan because there was no promissory note, no interest charged or paid, no collateral, no maturity date, no payments made, and no demand for payments.

B. Denial of Gross Estate Deductions

The Court also denied deductions for charitable distributions to the Charitable Trust and attorney's fees.

1. Future Charitable Contribution Deductions

The Estate sought an increase in charitable deductions that resulted from an increase in the value of the Estate. The Court denied these deduction increases for two reasons.

First, the Court denied the deduction based on the language of the relevant provision of the Irrevocable Trust, which referred to a deduction in "an amount equal to the value of any asset *of this trust* which is includible in my gross estate." The additional amount included in the gross estate was an amount equal to the value of the farm transferred to the FLP, but the Irrevocable Trust did now own the farm; rather, it owed a limited partnership interest in the FLP.

Second, the Court denied the deduction because charitable deductions cannot depend on actions of Mr. Moore's beneficiary or executor, and the charitable deduction must be ascertainable at a decedent's date of death. Effectively, for the charitable transfer to apply under the terms of the Irrevocable Trust, the IRS would have to successfully challenge the value of the estate. As such, whether the charitable transfer would be made from the Irrevocable Trust could not be determined at the time of Mr. Moore's death. The Court distinguished this case from other prior cases where the Court could determine that charitable transfers would be made at the time of the decedent's death, but the amount of the charitable distributions was not then determinable.

2. "Administrative" attorney's fees

The Court also denied the Estate's deduction for "administrative" attorney's fees, which was a flat fee of $475,000 paid to the attorney that designed and effectuated the estate plan. The Court denied the deduction because there was no evidence that the "fees were necessarily incurred in the administration of the estate." There were no claims against the estate and all of Mr. Moore's property was in the Living Trust "so it's unclear what administration [the attorney] is responsible for." The Court was not presented with detailed billing statements to describe the worked performed or the time spent.

IV. *Nelson v. Commissioner*, T.C. Memo. 2020-81

Facts

Mrs. Nelson owned a 93.88% limited partner interest in a family limited partnership, Longspar Partners, Ltd. (the "FLP"). The FLP owned approximately 27% of the outstanding common stock of Warren Equipment Co., which itself had seven operating subsidiaries. As part of Mrs. Nelson's family succession planning, Mrs. Nelson formed the Nelson 2008 Descendant's Trust (the "Trust"), which was created on December 23, 2008 for the benefit of her husband and their four daughters.

On December 31, 2008, Mrs. Nelson made a gift to the Trust of a limited partner interest in the FLP, which was valued by an appraisal at $2,096,000. The gift assignment instrument stated:

> [Mrs. Nelson] desires to make a gift and to assign to [the Trust] her right, title, and interest in a limited partner interest having a fair market value of TWO MILLION NINETY-SIX THOUSAND AND NO/100THS DOLLARS ($2,096,000.00) as of December 31, 2008, as determined by a qualified appraiser within ninety (90) days of the effective date of this Assignment.

Three days later, on January 2, 2009, Mrs. Nelson sold a limited partner interest in the FLP in exchange for a promissory note for $20,000,000. The sale instrument stated:

> [Mrs. Nelson] desires to sell and assign to [the Trust] her right, title, and interest in a limited partner interest having a fair market value of TWENTY MILLION AND NO/100THS DOLLARS ($20,000,000.00) as of January 2, 2009, as determined by qualified appraiser within one hundred eighty (180) days of the effective date of this Assignment.

Mrs. Nelson engaged a valuation professional to appraise the value of Warren Equipment Co. stock owned by the FLP. That value was then used by another valuation professional to appraise the limited partner interests of the FLP, which resulted in a value of $341,000 for each 1% limited partner interest. Based on this value, Mrs. Nelson determined the gift equated to a 6.14% limited partner interest in the FLP and the sale equated to a 58.65% limited partner interest in the FLP.

Mrs. Nelson and her husband each filed gift tax returns for 2008 reporting the gift of the 6.14% limited partner interest in the FLP as a split gift, with each spouse reporting a gift of $1,048,000. The Nelsons also filed 2009 gift tax returns, but they did not report or disclose the sale of the FLP interest.

The IRS determined that the value of each of their gifts should be increased from $1,048,000 to $1,761,009, and that they each had made a split gift of $6,803,519 in 2009 based on the IRS's determination that the value of the FLP interest transferred was $33,607,038, not $20 million.

The Court's Ruling and Analysis

A. Value of Transferred Interests

At trial, the Nelsons argued that the gift and sale assignment instruments transferred specific dollar amounts (i.e., $2,096,000 and $20 million), rather than fixed percentages, of the FLP interests. The IRS argued that the Nelsons transferred specific percentages of the FLP interests (i.e., 6.14% and 58.65%).

The Court agreed with the IRS. Based on the plain language of the gift and sale assignment instruments, Mrs. Nelson transferred FLP interests worth specified dollar amounts "as determined by qualified appraiser within" 90 and 180 days after the gift and sale assignments. That is, the formula clauses tied the percentages of the FLP interests to a dollar value that was subsequently to be determined by an appraiser. The Court differentiated this case from other cases where the assignment instruments contained qualifying language whereby the value is determined for federal estate tax purposes. Thus, the Court determined that Mrs. Nelson gifted a 6.14% FLP interest to the Trust and sold a 58.65% FLP interest to the Trust.

B. Value

1. WEC

At trial, the parties agreed WEC's common equity was worth $363.7 million on a controlling basis before discounts. The Nelsons' expert opined that the Court should apply a 20% lack of control discount and 30% lack of marketability discount. The IRS's expert agreed that a 30% lack of marketability discount was appropriate but opined that there should be no lack of control discount because the analysis of the underlying values of the subsidiaries resulted in noncontrolling interest values. The Court stated that the Nelsons' expert's failure to differentiate controlling interests and noncontrolling interests in valuing WEC's subsidiaries did not render the values noncontrolling. Because the separate values of the subsidiaries reflected "at least some elements of control," the Court concluded that "some discount should apply in valuing a minority interest in WEC common stock." Ultimately, the Court applied a 15% lack of control discount.

2. FLP

The Nelsons' expert concluded that a 15% lack of control discount applied based on an analysis of comparable closed-end funds. The IRS's expert concluded that there were no closed-end funds that were comparable to the FLP. He further opined that there would be almost no possibility of a lack of control disadvantage for a minority owner of [the FLP] except 'under certain circumstances, the precise nature of which cannot be exactly determined with reference to empirical/market data.'" He applied a 5% discount "to account for that remote possibility," which he reduced by another 2% because of the low probability that the FLP "would undertake any significant change in its operating profile," resulting in a 3% lack of control discount. The Court stated that none of the closed-end funds were comparable, and ultimately concluded that "the possibility of a lack of control disadvantage for a minority owner is remote" and applied a 5% lack of control discount.

The Nelsons' expert relied on certain studies of sales of restricted stock and sales of private, pre-IPO stock in applying a 30% discount. The IRS's expert similarly examined several studies of sales of restricted stock and pre-IPO stock, but involving more recent data, and also used "quantitative models that looked at the role of liquidity premiums in calculating the value of a forgone put option on the basis of the Black-Scholes model." Applying that analysis, he concluded that the approximate range of discounts was 20% to 35%, and used 25% "because 25% was approximately equal to the mid-point of these two ranges."

The court determined that prior cases had disregarded the studies that had been used by the taxpayers' expert and that the IRS's expert's analysis was more thorough. The court stated that "[w]hile the IRS's expert's] contention is reasonable, he provides no support for his conclusion that 25% is appropriate other than his claim that 25% was equal to the median of the ranges (we note that 28% is the median)." The court therefore used a 28% lack of marketability discount.

Applying the adjusted discount rates and values, the Court determined that the total gift tax deficiency was $2,016,564, which was only approximately 30% of the additional value the IRS sought to apply.

V. *Estate of Bolles v. Commissioner*, T.C. Memo. 2020-71, 119 T.C.M. (CCH) 1502 (June 1, 2020)

Facts

Mary Bolles made numerous transfers of money to each of her five children from the Bolles Trust. She kept a record of her advances and repayments from each child, treated the advances as loans, but forgave up to the annual gift tax exclusion each year.

Between 1985 and 2007, Ms. Bolles made significant additional advances totaling $1,063,333 to one of her sons, Peter, who was architect. Peter's architecture career initially seemed promising, and during his early career, it seemed that Peter would be able to repay the amounts advanced to him by Mary. However, his architecture firm, which had begun to have financial difficulties by the early 1980s, eventually closed. Although Peter continued to be gainfully employed, he did not repay Mary after 1988.

Ms. Bolles created a revocable trust on October 27, 1989 (the "1989 Trust") that specifically excluded Peter from any distributions of her estate upon her death. She subsequently amended the revocable trust to permit Peter to share in her estate but only after accounting for "loans" made to him plus accrued interest. Peter signed an acknowledgement that $771,628 plus accrued interest would be subtracted from Peter's share of the estate at Ms. Bolles' death.

Although Ms. Bolles was aware of Peter's financial troubles, she continued to advance him money, recording the sums as loans and keeping track of the interest. However, she did not require Peter to repay the money and continued to provide financial help to him despite her awareness of his difficulties.

Upon Ms. Bolles's death in 2010, the IRS assessed the estate with a deficiency of $1.15 million on the basis that Ms. Bolles's advances to Peter were gifts. Ms. Bolles's estate asserted that the advances were loans.

The Court's Ruling and Analysis

Both parties relied upon *Miller v. Commissioner*, T.C. Memo 1996-3, aff'd, 113 F.3d 1241 (9th Cir. 1997), which set forth the factors to be considered when determining whether advances were loans or gifts. Those factors ask whether: (1) there was a promissory note or other evidence of indebtedness, (2) interest was charged, (3) there was security or collateral, (4) there was a fixed maturity date, (5) a demand for repayment was made, (6) actual repayment was made, (7) the transferee had the ability to repay, (8) records maintained by the transferor and/or the transferee reflect the transaction as a loan, and (9) the manner in which the transaction was reported for Federal tax purposes is consistent with a loan.

The Court concluded that the advances made to Peter through 1989 were loans, but all subsequent advances were gifts. The Court determined that Ms. Bolles intended the advances to be loans based on the fact that she recorded the advances to Peter as loans and kept records of the interest, despite the fact that there were no loan agreements, no attempts to force repayment, and no security. However, by the time she created the 1989 Trust, it was clear that Peter would not be able to repay the advances, hence the reason he was initially excluded as a beneficiary of the 1989 Trust. All advances after 1989 therefore were considered gifts to Peter. The Court also considered whether Ms. Bolles forgave any of the prior loans in 1989, but the Court determined that she did not forgive the loans but rather accepted they could not be repaid on the basis of Peter's financial distress.

Delaware Tax Institute

Estate and Gift Tax Update

Moderator:
W. Donald Sparks, II, Esquire

Panelists:
Daniel Hayward, Esquire
Jennifer E. Smith, Esquire

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DELAWARE TAX INSTITUTE
DECEMBER 2, 2020

W. Donald Sparks, II
RICHARDS, LAYTON & FINGER, P.A.

I. Currently Trending Estate Planning Opportunities

A. We are currently experiencing a "perfect storm" for estate planners, with clients facing both dramatic risks and opportunities in terms of wealth transfer planning caused in large part by the following underlying conditions:

1. A pandemic that has generated unprecedented political and economic volatility;
2. Historically low interest rates;
3. Reduced asset values in many parts of the economy;
4. Regime change and the possibility of major tax reform that could take effect as early as 2021; and
5. Historically high transfer tax exemptions and low transfer tax rates.

B. The following is a brief summary of <u>some</u> of the most important estate planning strategies currently available to address the risks and opportunities caused by the underlying conditions mentioned above:

1. Gifts to leverage available gift and GST exemptions (currently $11.58 Million), including gifts to Spousal Lifetime Access Trusts (SLATs);
2. Grantor Retained Annuity Trusts (GRATs), Charitable Lead Annuity Trusts (CLATs) and sales to Irrevocable Grantor Trusts (IGTs);
3. Intrafamily Loans;
4. Gain Harvesting;
5. Charitable Contributions; and
6. Roth Conversions.

C. In order to understand why the strategies listed above are so beneficial now, it is necessary to understand what regime change and possible major tax reform legislation could bring and to recognize that such legislation could be applied (perhaps retroactively) to transactions in 2021, thereby highlighting the importance of 2020 year end planning. The incoming Biden administration has put forward a number of tax policy proposals that, if enacted, would result in significant changes to income taxes, capital gains taxes, social security taxes, the itemized deduction tax benefit, and basis step-up rules. There is also the significant possibility that regime change could bring about reduced transfer tax exemptions and increased transfer tax rates. Here is a brief overview of some of the tax policy proposals mentioned above:

1. Income tax increases on taxpayers with <u>over</u> <u>$400,000</u> <u>of</u> <u>income</u>, including the restoration of the 39.6% top marginal income tax rate, capping the tax benefit

attributable to itemized deductions by limiting it to a 28% marginal rate, adding a Section 199A deduction phase-out, and expanding the 12.4% social security tax.

2. Capital gains taxes would be applied to capital gains over $1,000,000 at the top marginal income tax rate of 39.6%. Even more devastating, basis step-up at death would be eliminated. This would represent a "sea change" in wealth transfer planning and cause a major shift in gift and sale strategies.

3. Gift, Estate and GST Exemptions reduced from the current $11.58 Million to pre-2018 levels ($5.49 Million or perhaps even lower) and increased tax rates from the current 40% to higher historical levels (typically 55-60%).

D. Gifts to Leverage Available Gift and GST Exemptions

1. Take advantage of historically high exemption levels that may be threatened in 2021 and beyond.

2. Take advantage of reduced asset values in many parts of the economy.

3. Allow future appreciation in value to escape transfer taxation.

4. Allow use of current permitted valuation methodologies that permit discounts for lack of marketability and lack of control.

5. "Use it or lose it": If exemption levels are reduced in 2021, and gifts are not made in 2020 the ability to use the difference between the current and future exemption amount is lost.

6. Can be structured to take advantage of the current "disconnect" between the income and transfer tax systems by structuring irrevocable trusts to be grantor trusts for income tax purposes while also being completed gifts excluded from the grantor's taxable estate for federal estate-tax purposes.

7. The popularity of gifts to SLATs and Dynasty Trusts prior to year-end is explained in large part by the benefits listed above. One way to think of a SLAT is that it is really just a credit shelter trust funded during the grantor's lifetime rather than at death, thereby sheltering from transfer taxation the value of the assets and any future appreciation from the date of the gift.

E. GRATs, CLATs and sales to IGTs

1. These techniques are designed in part to take advantage of the current historically low interest rates (The November 2020 Section 7520 Rate is 0.4%!!!).

2. When rates are this low, it should be easy for the assets in the GRAT or CLAT to outperform the benchmark IRS-determined rate. The same is even more true

for sales to IGTs, where the interest rate on the promissory note given by the IGT to the grantor as part of the purchase and sale can use the applicable federal rate (even better than the Section 7520 Rate), depending on whether the loan is short term, mid-term, or long-term.

3. GRATs, CLATs and sale of IGTs are helpful for clients who have already used a substantial portion of their exemptions because these techniques leverage the use of remaining exemptions or, in the case of a sale to an IGT, largely avoid any use of remaining exemptions.

4. Unlike GRATs, sales to IGTs can be used for generation-skipping trusts with minimal use of GST exemptions (GRATs have an estate tax inclusion period (ETIP) that requires allocation of GST exemption at the expiration of the ETIP rather than at the creation of the trust).

5. These techniques allow future appreciation in value to escape transfer taxation and can take advantage of current low asset values and current valuation discount methodologies.

F. Intrafamily Loans

1. Take advantage of current low interest rates

2. Loans can be structured so that a Dynasty Trust gets cash in exchange for a promissory note with a long term and a low interest rate, with annual only interest payments and a balloon payment of principal at the end of the term, no income tax consequences if the trust is structured properly, and future appreciation in the assets purchased by the trust escaping transfer taxation.

3. Refinancing of existing intra-family loans to take advantage of current low interest rates has been on-going throughout 2020.

G. Gain Harvesting

1. If tax reform legislation brings capital gains taxation at the highest ordinary income tax rate (possibly 39.6%) for taxpayers with incomes above $1 Million, taxpayers may choose to incur capital gains tax at the current, much lower, rates rather than defer the recognition event to a later year when the tax will likely be higher.

2. Even more likely to trigger a sell off of assets would be the elimination of the basis step-up at death. So much of current estate planning depends on maintenance of the step-up in basis at death rule that it is hard to envision how a capital gains tax at death regime would work and how it would alter the current gift and estate tax rules. In fact, there are so many unanswered questions about this potential change, that planning for it is really almost impossible.

3. It is possible to repurchase the same or similar assets after the sale so that the taxpayer can continue the investment strategy but with a higher basis.

4. The tradeoff here is between lower tax rates and the loss of tax deferral. If you make assumptions about future tax rates, future growth in the value of the asset and the timeframe between the possible current and future sales, numbers can be run to determine which path makes more sense.

H. Charitable Contributions

1. Historically, the advice was to accelerate deductions and defer income. That advice makes no sense when possible tax reform will increase income tax rates.

2. IN 2020, the CARES act permits a charitable contribution of <u>cash</u> of up to 100% of AGI. However, this rule does not apply to contributions to Donor Advised Funds (DAFs) or Section 509(a)(3) supporting organizations.

3. Historically, the advice was to donate appreciated property rather than cash, with the taxpayer taking the deduction for the full fair market value of (rather than his/her basis in) the property and the charity avoiding gain recognition upon the subsequent sale of the asset. Charitable gift annuities and Charitable Remainder Trusts (CRTs) are often used as part of a taxpayer's capital gains bypass strategy.

4. Direct distributions from IRAs or qualified plans to charity, or Qualified Charitable Distributions (QCDs), are very popular in 2020. Current laws permits up to $100,000 per person annually and applies to individuals over age 70 ½. Moreover, a QCD can be used to reduce taxable income if used instead of an RMD. Finally, a QCD is not subject to the standard deduction or any AGI limitation.

5. The timing of charitable contributions can be critical when tax rates and deduction limitations are changing. For example, bunching charitable contributions into one tax year rather than two may save income tax.

I. Roth Conversions

1. Taxpayers are currently considering conversion of traditional IRAs to Roth IRAs for a number of obvious reasons: they expect significant future growth in the value of the assets in the IRA, they expect the current income tax rate would be lower than the future rate at the time of distributions, they have cash outside the IRA to cover the tax liability, and they have no immediate need for the funds going into the Roth IRA.

2. Conversions are trickier than you might think because of variables like the AMT, the phase-out of tax benefits, the 3.8% Medicare tax, the uncertainty surrounding future marginal tax rates and possible use of current tax benefits such as net operating losses, charitable deduction carry-forwards and so on against the tax generated by a distribution from a traditional IRA.

3. Most taxpayers who believe they will have less income and be subject to a lower top marginal rate in their retirement years have been reluctant to do Roth conversions, particularly when they are currently subject to the top marginal rate of 37%.

4. Again, the tradeoff is between lower tax rates (presumably now) and the loss of the tax deferral available to the traditional IRA (until the distribution of the RMD).

J. Conclusion

The uncertainty we are currently experiencing and the unpredictability of future tax reform make estate planning just about as difficult as it has ever been. None of the strategies mentioned now are perfect and planners need to be very clear with clients about the risks and opportunities involved. This is especially difficult when both planners and clients feel pressured to make decisions and implement them before year end. But we have to try, based on current conditions and the current law, and then make some reasonable assumptions about future conditions and future law, in the hope that the planning can be structured to be flexible enough to accommodate the unknown.

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ESTATE PLANNING FOR RETIREMENT PLANS AFTER SECURE ACT

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STEVEN E. TRYTTEN, Esq., CPA, MBA, is a nationally recognized authority on tax, estate, and business succession planning, quoted in financial publications such as the Wall Street Journal, Forbes Magazine, Bloomberg Wealth Manager, Kiplinger's Retirement Report, and the Los Angeles Business Journal.

STEVE lectures to tax and estate professionals across the country at programs such as American College of Trust and Estate Counsel ("ACTEC") national meetings, Heckerling Estate Planning Institute, ALI-CLE programs, Hawaii Tax Institute, NYU Tax Institute, Notre Dame Tax Institute, USC Tax Institute, CEB-UCLA Estate Planning Institute, Southern California Tax and Estate Planning Forum, AICPA programs, and NAELA Annual Institute. Recent publications include his papers for these events, as well as articles for Trusts & Estates Journal of Wealth Management and other publications for professionals engaged in tax and estate planning.

STEVE is a Fellow of the American College of Trust and Estate Counsel ("ACTEC") and served as Chair of the ACTEC Employee Benefits Committee (3/2017 – 3/2020).

STEVE is recognized in the 2020 Chambers & Partners High Net Worth Guide as a top attorney serving high net worth clients.

STEVE has been recognized each year since 2003 as one of the top lawyers in the U.S. by virtue of his inclusion in the *Best Lawyers of America©*. He has also been voted by his peers in Los Angeles County as a "Super Lawyer" and was further recognized as one of the top 100 vote recipients county-wide among all practice areas in 2004.

STEVE is a "Certified Specialist" in two areas: Taxation Law, and Estate Planning and Probate Law (certification by the Board of Legal Specialization of the State Bar of California).

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ESTATE PLANNING FOR RETIREMENT PLANS AFTER SECURE ACT

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ESTATE PLANNING FOR RETIREMENT PLANS AFTER SECURE ACT

By Steven E. Trytten, Esq., CPA, MBA

I. The "Trytten Financial Model" Case Studies – Methodology.

This section provides background on the philosophy and design of the "Trytten Financial Model." Dozens of case studies were run using this model during the period 2003 – 2010 and are identified as such. They are included in these materials as they are still relevant in understanding the economics of different planning strategies.

Additional case studies were run in 2020 to further develop understanding of the economics of different planning strategies under the new RMD rules added by the SECURE Act.[1]

The case studies run in 2010 reflect the tax law in effect on December 1, 2010 with respect to income tax, transfer tax, and RMD Rules. Specifically, the general income, estate, gift and generation-skipping tax rates, *etc.*, were calculated with the assumption that the Economic Growth and Tax Relief Reconciliation Act of 2001 ("EGTRRA") would sunset and that pre-EGTRRA law would return.

The case studies run in 2020 reflect the tax law in effect on August 1, 2020 with respect to income tax, transfer tax, and RMD Rules. Specifically, it is assumed that the temporary provisions of the Tax Act of 2017 will sunset as scheduled, generally on December 31, 2025.

A. How "Success" Is Defined In Financial Model – "After-Tax Assets."

It is impossible to evaluate the results of a Case Study without a benchmark of comparison, *i.e.*, a definition of "success." It is too easy to define success as minimizing taxes (and, prior to the Tax Reform Act of 1997, minimizing the excise tax on excess retirement plan accumulations, which carried the stigma of a penalty). Minimizing taxes does not always produce the best outcome. What most clients really want is to maximize the net worth that remains after taxes have been paid ("After-Tax Assets"). If a client wants to preserve the maximum After-Tax Assets for future generations, the transfer taxes (gift, estate, and generation skipping taxes) must be included in the equation. On the other hand, if a client's primary concern is her own financial security during retirement, the best definition of success may be one that takes only the client's lifetime income taxes into account. It is essential to discuss these issues with the client and reach a consensus in defining "success" for purposes of the client's distribution planning.

Either way, it is difficult to compare what is left for the client's family when different distribution strategies produce different amounts of retirement plan and "after-tax" assets over varying time horizons. Other commentators have struggled with this issue and reached surprisingly different conclusions, depending on how they chose to compare the apples to the oranges.

There is a way to compare retirement plan assets to "after-tax" assets on a true "apples to apples" basis, and this approach produces the most objective evaluation of different distribution strategies. This method of comparison involves an analysis for each distribution strategy that

[1] The Setting Every Community Up for Retirement Enhancement (SECURE) Act of 2019, Pub. L. 116–94, was signed into law by President Donald Trump on December 20, 2019, as part of the Further Consolidated Appropriations Act, 2020 (2020 United States federal budget).

forecasts the gradual payout of a retirement plan over the entire deferral period in a way that shows the total accumulation of after-tax net worth ("After-Tax Assets") at the end of the deferral period. The distribution strategy that produces the largest amount of After-Tax Assets at the end of the deferral period wins!

Prior to the SECURE Act, when a DB was designated the deferral period was the Participant's lifetime plus a period consisting of the DB's single life expectancy. SECURE Act adds a number of variations. Now, when an Eligible Designated Beneficiary ("EDB") is designated, the deferral period is the Participant's lifetime plus an EDB's lifetime plus 10 years.

"After-Tax Assets" is the measure of success in the extensive Excel spreadsheets your author built to produce these Case Studies. This particular measure of success includes transfer taxes, which is appropriate if the client's primary goal is to maximize the size of the Beneficiary's After-Tax Assets. The point in time that is used for comparing After-Tax Assets of various strategies is generally the end of the longest deferral period that arises in connection with each strategy. The After-Tax Assets the beneficiaries have accumulated by then under each of the different distribution strategies can be compared on an "apples to apples" basis. Relative percentages are shown for convenience, with the "100%" being arbitrarily assigned to the distribution strategy involving full distribution of the plan in the earliest year.

However, your author decided *not* to recognize capital gains tax on the beneficiary's non-retirement appreciated securities, on the theory that these securities would likely receive a cost basis "step up" at the beneficiary's death under current law.

B. How The Numbers Were Run; What The Numbers Represent.

The results of each Case Study were generated with a financial model in Excel with separate spreadsheets corresponding to each planning scenario. In addition, an extra scenario runs in the background to measure how big the Beneficiary's After-Tax Assets would have been had there not been a retirement plan at all. From a statistical point of view, this extra scenario serves as the "control" and provides a basis of comparison for the other scenarios.[2]

C. "After-Tax Assets" Defined.

The results shown for each scenario are isolated to show *only the additional portion of the beneficiary's After-Tax Assets that corresponds to the distributions received over the deferral period from the retirement plan ("Additional After-Tax Assets")*. However, all of the calculations (such as tax brackets, *etc.*) reflect the full amount of assets and income corresponding to each scenario.

D. Client's Investment Style.

The distribution planner must understand the client's investment style. Higher yields magnify the differences between distribution strategies. The relative yields inside and outside the retirement plan also impact the financial analysis.

For example, a real estate developer may know how to earn 25% on his money, but the investments may not be permissible inside his retirement plan. In that situation, he may do better investing outside his plan than investing in his plan, and long-term deferral strategies may not be appropriate for him.

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[2] The backup calculations for each scenario fill fifteen or more pages using a 6 point font. The backup calculations for a seven scenario Case Study fill 120 or more pages (seven scenarios plus the "control" scenario). The backup calculations for a seven scenario Case Study run at three different dates of death fills 360 or more pages.

Even when the same investment choices are available inside or outside the plan, some individuals apply different investment styles to their inside and outside assets. If one group of assets is expected to earn a different yield than the other group, different distribution strategies will produce different overall investment yields, making it harder to distinguish between the effect of the changed yield and the effect of the various tax rules. Thus, for analytical purposes, all of the Case Studies assume the same investment style and performance inside and outside the retirement plan.

Investments with the same overall yield can produce different results in the outside portfolio, depending on the portions of yield that are recognized as ordinary income, short-term capital gains, and long-term capital gains. For this reason, financial models that only allow the input of a single "yield" number are of limited value. The financial model used in these Case Studies requires completion of several input fields to determine the ordinary income portion of yield, the qualified dividend portion, the portion of the portfolio that is susceptible to growth, and the portfolio turnover for purposes of determining what portion of growth is recognized each year as capital gains.

Portfolio turnover has a significant effect on the outcome. An astute investor may be able to arrange her overall portfolio in a way that allows higher turnover assets to remain inside the retirement plan and lower turnover assets to remain outside. However, for analytical purposes portfolio turnover is assumed to be the same inside and outside the retirement plan.

The astute investor may also develop different asset allocation models for retirement and non-retirement investments. Although your author recognizes the value of different allocation models in the real world, for analytical purposes, your author's financial models assume the same asset allocation model for retirement and non-retirement investments. This avoids a statistical anomaly that could distort the results. For example, if a financial projection is run assuming that retirement assets are invested in higher yielding investments than non-retirement assets, it will be difficult to determine whether distribution strategies that produce the best results do so because of the benefit of tax-deferred compounding, or simply because money was left longer in the pot that is invested in higher yielding investments.

E. Level Yield versus Market Fluctuations.

Most of the case studies in these materials assume level yields in each year of the deferral period. However, real life returns vary from year to year, and these variations can significantly alter overall long-term returns. This issue is addressed in depth in Section VIII.

F. Investment Fees.

The financial model projects investment management fees, and allows them to be treated as either having been paid from inside the retirement plan, or paid from non-retirement assets. This issue is discussed in more detail in Section IX.

G. How Basis "Step Up" Is Incorporated in the Financial Model.

A great deal of thought went into applying the cost basis adjustment that arises at death under current law to outside investments.[3] This adjustment makes a big difference if the Beneficiary liquidates the entire portfolio. But if the Beneficiary invests using the same investment style over the years, only a portion of the portfolio is liquidated in any given year depending on the portfolio turnover.

[3] IRC § 1014.

The financial model incorporates sophisticated portfolio modeling to calculate the unrealized appreciation in the outside investments, identify the taxable capital gain each year arising from portfolio turnover, and adjust the cost basis at the Participant's death. Then, the financial model applies the cost basis adjustment to reduce the capital gains recognized by the Beneficiary in the years following death assuming the Beneficiary continues to follow the Participant's investment style.

In order to accommodate the portfolio modeling, investment performance is entered using three variables: (i) percentage yield consisting of ordinary income (i.e. taxable interest), (ii) qualified dividends, (iii) percentage yield consisting of overall growth and appreciation (recognized or unrecognized capital gains), and (iv) portfolio turnover, entered as the percentage of the portfolio that "turns over" in any given year.

H. Does Client Expect Beneficiaries To Continue Deferral.

It is essential for the planner and client to develop a clear expectation as to the likelihood of continuing deferral after death. The client knows his or her children best and can usually provide a reliable prediction. When deferral is a significant objective of the client's estate plan, it may be helpful to communicate this to the children while the client is alive.

Even if the children are not expected to continue deferral, a lifetime minimum distribution strategy is likely to provide superior results due to the benefit of tax-deferred compounding over the Participant's remaining lifetime.

II. 2008 Case Studies: Jones & Son (Base Case) & Rogers & Daughter (High Net Worth Base Case).

For more details on the philosophy and methodology of the case studies in this outline, please refer to Section I.

A. Fact Pattern – Jones & Son 2008.

Mr. Jones visits his planner in the year 2008. He is 75 years old (born January 1, 1933), and is widowed with one child, age 34 (born January 1, 1974). Mr. Jones wants to leave his entire estate to his child. Mr. Jones is worried there won't be much left for his child after estate and income taxes, and wants to know how his child fares under various distribution strategies. Mr. Jones's estate consists of:

IRA	$ 1,000,000
Liquid Investments	$ 1,500,000
Residence	$ 500,000

- All investments earn 8% annual return, consisting of 1.5% ordinary income and 6.5% growth. Portfolio turnover is 20% per year.
- Investments incur a 1% asset management fee; thus the "net" rate of return is 7%.
- Mr. Jones receives a $72,000 pension each year, $15,000 of social security (indexed for inflation), and has living expenses of $48,000 per year (indexed for inflation).
- Annual inflation will be 1.5% throughout the projection period.
- Mr. Jones has not made any prior taxable gifts.
- The projections assume that Mr. Jones will die at age 84 (December 31, 2017). Given the child's age (age 43 in the year of Mr. Jones's death), the potential period of deferral for the child will continue through the year 2057. Thus, this case study evaluates a fifty year deferral period, from 2008 – 2057, with potential deferral based on Uniform Lifetime Table factors derived from the IRA owner's life expectancy during the first ten years, and based on single life table factors derived from the child's life expectancy for the forty years remaining.
- Mr. Jones's child earns $50,000 per year (indexed) and has living expenses of $32,000 per year (indexed). When the child reaches age 65 he will receive social security benefits of $8,000 per year (in 2008 dollars, indexed for inflation).
- Income and estate tax laws are assumed to reflect what would happen if the provisions of EGTRRA sunset as scheduled, and no other changes to the tax law are enacted. The financial model includes provisions for alternative minimum tax, taxation of a portion of social security, Income with Respect to Decedent (I.R.D.), deduction, 3% phase-out ("haircut") of itemized deductions, limitations on charitable deductions, compressed rate brackets for trusts, *etc.* The IRD deduction will be utilized on the earliest dollars distributed, as discussed earlier.
- IRA distributions to trusts are taxed at the trust's level (and IRD deductions deducted at the trust's level) until the IRD deduction is fully utilized. Note that it may be necessary for the trust to accumulate (*i.e.,* not make any distributions) to accomplish this.

B. Planning Strategies Evaluated – Jones & Son 2008.

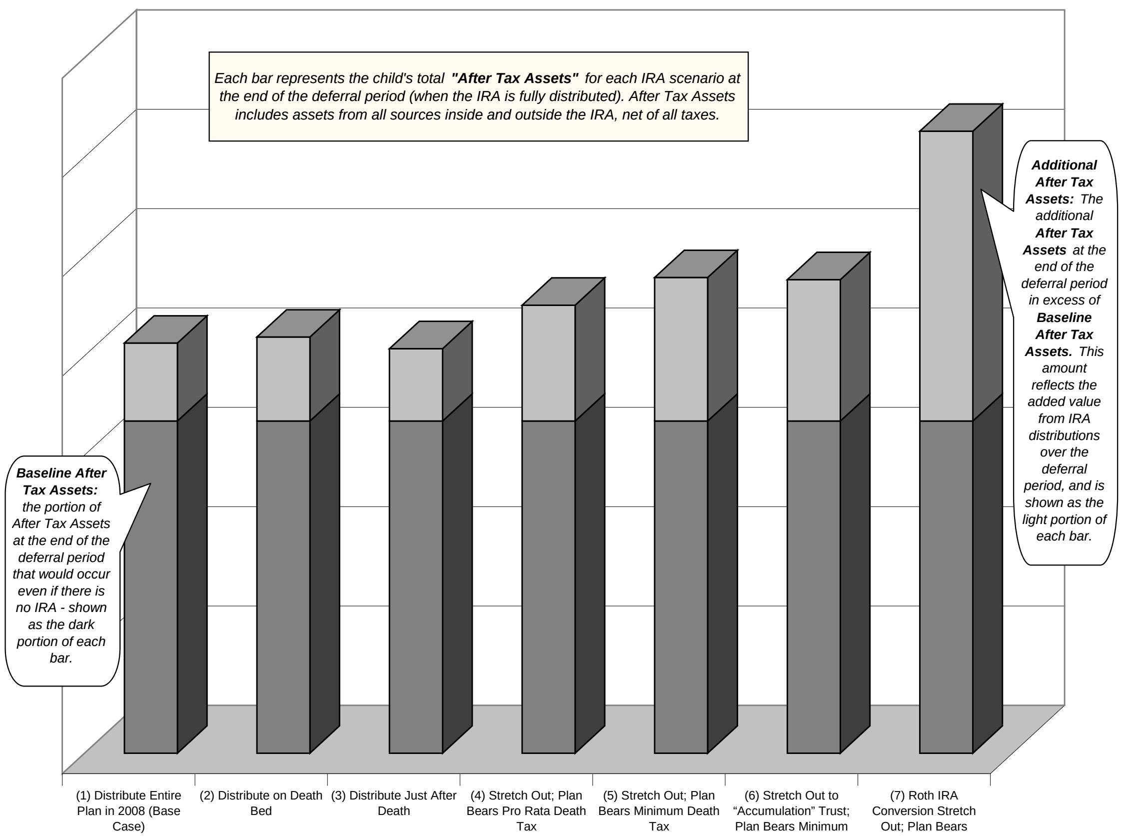
Strategy	Explanation
(1) Distribute Entire Plan in 2008	*For Comparison Purposes Only* - Mr. Jones takes full distribution of his IRA balance during the current year of 2008, which becomes the basis of comparison for the other strategies.
(2) Distribute on Death Bed	Mr. Jones takes minimum distributions until the year of his death, and takes full distribution of his IRA immediately prior to his death.
(3) Distribute Just After Death	Mr. Jones takes minimum distributions during his life. Immediately after his death, his child takes full distribution of the IRA.
(4) Stretch Out; IRA Bears Pro Rata Death Tax	Mr. Jones takes minimum distributions during his life. After Mr. Jones's death, his child continues minimum distributions during the child's life. However, an IRA withdrawal is made shortly after Mr. Jones' death to pay the IRA's pro rata share of death taxes. Child pays the income tax on the IRA withdrawal from non-IRA assets first, and if insufficient, from the IRA.
(5) Stretch Out; IRA Bears Minimum Death Tax	Mr. Jones takes minimum distributions during his life. After Mr. Jones's death, his child continues minimum distributions during the child's life. Unlike Strategy (4), death taxes are paid from non-IRA assets first, and are only apportioned to the IRA to the extent that other assets are insufficient to pay them.
(6) Stretch Out to "Accumulation" Trust; IRA Bears Minimum Death Tax	Same as Strategy (5), except that the IRA is designated to an "accumulation" trust that qualifies for stretch-out using the child's life expectancy, but accumulates IRA distributions and pays income tax inside the trust. This is *not* a "conduit" trust, and drafting this type of trust may require careful attention to special drafting issues covered later in these materials.
(7) Roth IRA Conversion Stretch Out; IRA Bears Minimum Death Tax	Same as Strategy (5), except that Mr. Jones converts the entire IRA to a Roth IRA in 2008, and pays all income taxes arising from the conversion from non-retirement assets. (For illustration purposes, the financial model assumes that Mr. Jones qualifies to make the Roth IRA conversion in 2008, even though in reality he would not have qualified, as his "adjusted" AGI for 2008 exceeded the $100,000 income ceiling then in effect.)

C. RMD Divisors

Jones & Son: "Base Case"				
Calendar Year	***Distribution Year***	***Participant's Age***	***Beneficiary's Age***	***MRD Divisor***
2008	6	75	34	22.9
2009	7	76	35	22.0
2010	8	77	36	21.2
2011	9	78	37	20.3
2012	10	79	38	19.5
2013	11	80	39	18.7
2014	12	81	40	17.9
2015	13	82	41	17.1
2016	14	83	42	16.3
2017	15	84	43	15.5
2018	16		44	39.8
2019	17		45	38.8
2020	18		46	37.8
2021	19		47	36.8
2022	20		48	35.8
2023	21		49	34.8
2024	22		50	33.8
2025	23		51	32.8
2026	24		52	31.8
2027	25		53	30.8
2028	26		54	29.8
2029	27		55	28.8
2030	28		56	27.8
2031	29		57	26.8
2032	30		58	25.8
2033	31		59	24.8
2034	32		60	23.8
2035	33		61	22.8
2036	34		62	21.8
2037	35		63	20.8
2038	36		64	19.8
2039	37		65	18.8
2040	38		66	17.8
2041	39		67	16.8
2042	40		68	15.8
2043	41		69	14.8
2044	42		70	13.8
2045	43		71	12.8
2046	44		72	11.8
2047	45		73	10.8
2048	46		74	9.8
2049	47		75	8.8
2050	48		76	7.8
2051	49		77	6.8
2052	50		78	5.8
2053	51		79	4.8
2054	52		80	3.8
2055	53		81	2.8
2056	54		82	1.8
2057	55		83	1.0

D. Case Study Results – Jones & Son 2008.

Jones & Son: "Base Case"							
IRA Beginning Balance:	*$1,000,000*						
Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age, Year After Death:*	*44*		
IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	1,562,651	1,693,572	1,461,368	2,334,136	2,890,501	2,848,487	5,830,516
% Comparison of "Additional After Tax Assets"	100%	108%	94%	149%	185%	182%	373%



E. What the Jones & Son Case Study Tells Us (2008).

The bar graph above shows the total amount remaining at the end of the deferral period for each strategy (fifty years after each strategy was put into motion). The dark portion of each bar is a "baseline" amount that would have been there had there been no IRA at all (the same for each strategy) The light portion of each bar is the additional amount that reflects the outcome, net of all taxes and expenses, of each IRA distribution strategy.

The table above shows these outcomes in numerical terms. The next-to-bottom line shows the dollar amount (in 2008 dollars) that each IRA distribution strategy produces (the light portions of the bars in the bar graph). The bottom line of the table compares these dollar amounts in percentage terms. As mentioned earlier, the first strategy of "non-deferral" is arbitrarily set to 100% as the basis of comparison to the other strategies.

- The "Distribute on Death Bed" strategy outperforms the "Distribute Just After Death" strategy by roughly 14%. This shows that it is more efficient to pay income tax first with pre-estate tax dollars, than to pay income tax second with after-estate tax dollars, even after considering the I.R.D. deduction for estate tax.
- The "Stretch Out; IRA Bears Pro Rata Death Tax" strategy shows substantial benefit from stretch out of 49%, but the "Stretch Out; IRA Bears Minimum Death Tax" strategy shows a much greater benefit of 85%. This tells us that stretch-out is valuable, and it also tells us that it is costly to take IRA distributions to pay death taxes. If possible, death taxes should be paid from non-IRA assets. This may require special planning or drafting in some cases.
- The "Stretch-Out to Accumulation Trust; IRA Bears Minimum Death Tax" strategy provides an 82% benefit, showing that the cost of taking IRA distributions at the compressed income tax rates that apply to trusts has a minor impact in this case. In fact, if the individual beneficiary is in the highest income tax bracket, paying income tax at the trust level will not increase income tax, and might even reduce it, depending on the interplay of the alternative minimum tax and the various limitations on deductions.
- The "Roth IRA Conversion Stretch-Out; Roth IRA Bears Minimum Death Tax" strategy shows the power of the Roth IRA Conversion when all of the moving parts discussed earlier are at work together – a 273% increase.

F. High Net Worth Variation – Rogers & Daughter 2008.

Ms. Rogers is a very successful businesswoman, with one child, a daughter. She visits her planner in the year 2008. Her facts are the same as in the Jones & Son case study (*e.g.* she and her daughter are the same respective ages as Jones and his son), except as follows:

IRA	$ 5,000,000
Liquid Investments	$ 50,000,000
Residence	$ 10,000,000

- Ms. Rogers earns annual income of $1,000,000.
- Ms. Rogers' daughter earns annual income of $500,000.

G. Case Study Results – Rogers & Daughter 2008.

Rogers & Daughter: "Base Case"							
IRA Beginning Balance:	*$5,000,000*						
Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age, Year After Death:*	*44*		
IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	8,223,451	8,856,710	6,762,317	10,209,714	14,363,465	13,692,279	29,367,880
% Comparison of "Additional After Tax Assets"	100%	108%	82%	124%	175%	167%	357%

H. What the Rogers & Daughter Case Study Tells Us (2008).

In broad terms, the relative performance of the various strategies is similar to the performance in the Jones Case Study. Higher income taxes mute the performance of the stretch-out strategies a little. Higher death taxes magnify the problems that arise with the "Distribution Just After Death" and "Stretch-Out; IRA Bears Pro Rata Death Tax" strategies. The Roth IRA Conversion is still an excellent choice, even though its performance has dropped a little.

III. 2020 Case Studies: Jones & Son (Base Case) & Rogers & Daughter (High Net Worth Base Case)

For more details on the philosophy and methodology of the case studies in this outline, please refer to Section I.

The Jones & Son 2020 Case Study uses fact assumptions designed to be as comparable as possible to the Jones & Son 2008 Case Study. The assumptions in 2008 were intended to reflect a "typical" client, if there is such a thing. Some of these asset, income, and expense amounts were increased to reflect what a "typical" client might look like in 2020.

The Jones & Son 2020 Case Study assumes the beneficiary dies at the single table life expectancy (i.e., age 83). This approach makes the 2020 Case Study most comparable to the 2008 Case Study, even though this results in a deferral period that is 10 years longer when the SECURE Act rules are applied (i.e., 60 years instead of 50 years).

A. Fact Pattern – Jones & Son 2020.

Mr. Jones visits his planner in the year 2021. He is 75 years old (born January 1, 1946), and is widowed with one adult, disabled child, age 34 (born January 1, 1987). Mr. Jones wants to leave his entire estate to his child. Mr. Jones is worried there won't be much left for his child after estate and income taxes, and wants to know how his child fares under various distribution strategies. Mr. Jones's estate consists of:

IRA	$ 2,000,000
Liquid Investments	$ 3,000,000
Residence	$ 1,000,000

- All investments earn 8% annual return, consisting of 0.5% ordinary income, 1.0% qualified dividend income, and 6.5% growth. Portfolio turnover is 20% per year.
- Investments incur a 1% asset management fee. Thus, the "net" rate of return is 7%.
- Mr. Jones receives a $72,000 pension each year, $20,000 of social security (indexed for inflation), and has living expenses of $60,000 per year (indexed for inflation).
- Annual inflation will be 1.5% throughout the projection period.
- Mr. Jones has not made any prior taxable gifts.
- The projections assume that Mr. Jones will die at age 84 (December 31, 2030). Since the child is disabled, he is an EDB under the SECURE Act and is allowed to use the life expectancy method while alive, and a 10 year distribution period applies thereafter. Given the child's age (age 43 in the year of Mr. Jones's death), the deferral period associated with the child will continue for the child's lifetime plus another 10 years. The child is assumed to die at age 83 (2070) and the deferral period ends 10 years later, in 2080. Thus, this case study evaluates a fifty year deferral period, from 2021 – 2070, with potential deferral based on Uniform Lifetime Table factors derived from the IRA owner's life expectancy during the first ten years, then based on single life table factors derived from the child's life expectancy for the child's remaining lifetime of 40 years, and then a 10 year distribution period (distributions during the 10 year distribution period are assumed to all be taken at the end of the 10^{th} year.)

• Mr. Jones's child earns $65,000 per year (indexed) and has living expenses of $35,000 per year (indexed). When the child reaches age 65 he will receive social security benefits of $10,000 per year (in 2021 dollars, indexed for inflation). (No social security disability benefit is assumed, although most disabled EDBs would likely qualify for this benefit.)

• Income and estate tax laws are assumed to reflect what would happen if the temporary provisions of the 2017 Tax Act expire as scheduled, and no other changes to the tax law are enacted. The financial model includes provisions for qualified dividends, net investment income tax, alternative minimum tax, taxation of a portion of social security, Income with Respect to Decedent (I.R.D.), deduction, 3% phase-out ("haircut") of itemized deductions, limitations on charitable deductions, compressed rate brackets for trusts, *etc.* The IRD deduction will be utilized on the earliest dollars distributed.

• If a trust is indicated to receive IRA distributions, it is assumed to qualify as a "see-through trust" that can use the child's life expectancy method. IRA distributions to the trust are taxed at the trust's level (and IRD deductions deducted at the trust's level). For analytical purposes, it is assumed that all IRA distributions are accumulated in the trust and not distributed, as this best illustrates any differential in the trust's income tax rates.

B. Case Study Results – Jones & Son 2020.

Jones & Son 2020: "Base Case for EDB"							
IRA Beginning Balance:	*$2,000,000*						
Deferral Period Begins:	*2021*	*Ends:*	*2070*	*# of Years:*	*50*		
IRA Owner Dies:	*2030*	*IRA Owner's Age at Death:*	*84*	*Child's Age 1 Year Later:*	*44*		
IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2021 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out for EDB; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out for EDB; Plan Bears Minimum Death Tax*	*(6) Stretch Out to EDB in Accumulation Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out for EDB; Plan Bears Minimum Death Tax*
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	2,749,373	3,210,662	3,216,023	4,446,143	4,578,782	4,702,073	8,478,764
% Comparison of "Additional After Tax Assets"	100%	117%	117%	162%	167%	171%	308%

C. What the 2020 Jones & Son Case Study Tells Us.

• Even after SECURE Act, each deferral strategy produces a similar benefit as the strategy would have produced prior to the SECURE Act – because the DB is an EDB who is allowed to use the life expectancy method.

• The results are a little lower than the 2008 Case Study, primarily due to the SALT limitation on deducting state and local income taxes.

• The accumulation trust outperforms the outright designation because it adds a second "SALT limitation" and it is a little more efficient with the IRD deduction.

D. High Net Worth Variation – Rogers & Daughter 2020.

Ms. Rogers is a very successful businesswoman, with one adult, disabled child, a daughter. She visits her planner in the year 2020. Her facts are the same as in the Jones & Son 2020 case study (*e.g.* she and her daughter are the same respective ages as Jones and his son), except as follows:

IRA	$ 5,000,000
Liquid Investments	$ 50,000,000
Residence	$ 10,000,000

- Ms. Rogers earns annual income of $1,000,000.
- Ms. Rogers' daughter earns annual income of $500,000.

E. Case Study Results – Rogers & Daughter 2020.

Rogers & Daughter: "Hi Net Worth Base Case for EDB"							
IRA Beginning Balance:	*$5,000,000*						
Deferral Period Begins:	*2021*	*Ends:*	*2070*	*# of Years:*	*50*		
IRA Owner Dies:	*2030*	*IRA Owner's Age at Death:*	*84*	*Child's Age 1 Year Later:*	*44*		
IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2021 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out for EDB; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out for EDB; Plan Bears Minimum Death Tax*	*(6) Stretch Out to EDB in Accumulation Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out for EDB; Plan Bears Minimum Death Tax*
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	5,079,186	6,387,474	5,974,509	8,768,504	10,439,554	9,792,812	19,818,499
% Comparison of "Additional After Tax Assets"	100%	126%	118%	173%	206%	193%	390%

F. What the 2020 Rogers & Daughter Case Study Tells Us.

- Even after SECURE Act, each deferral strategy produces a similar benefit as the strategy would have produced prior to the SECURE Act – because the DB is an EDB who is allowed to use the life expectancy method.

- The results for deferral strategies are a little higher than the 2020 Jones & Son Case Study. By comparison, the results for these strategies in the 2008 Rogers & Daughters Case Study were lower than in the 2008 Jones & Son Case Study.

- The accumulation trust underperforms the outright designation.

IV. 2020 Case Study: Smith & Children – SECURE Act Variations

For more details on the philosophy and methodology of the case studies in this outline, please refer to Section I.

The Smith & Children 2020 Case Study uses the same fact assumptions as the Jones & Son 2020 Case Study, except:

- Mr. Smith is age 66 (born in 1955), and dies in 2024 at age 69.
- Mr. Smith's child is age 7 (born in 2014).
- Mr. Smith is evaluating different trust designs for his child. He asks for a comparison of the potential deferral under the SECURE Act for his child depending on whether the trust is treated as:
  - A Non-DB,
  - A DB,
  - A minor EDB who switches to 10 year rule at age 21,
  - An EDB who dies 5 years before table life expectancy, or
  - An EDB who dies at table life expectancy.

A. Case Study Results – Smith & Children 2020.

Smith & Children 2020: "SECURE Act Variations"							
IRA Beginning Balance:	***$2,000,000***						
Deferral Period Begins:	***2021***	***Ends:***	***2102***	***# of Years:***	***82***		
IRA Owner Dies:	***2024***	***IRA Owner's Age at Death:***	***69***	***Child's Age 1 Year Later:***	***11***		
IRA Distribution Strategy:	***(1) Distribute Entire Plan in 2021 (Base Case)***	***(2) Distribute Just After Death***	***(3) Designate non-DB***	***(4) Designate DB***	***(5) Stretch Out for Minor EDB***	***(6) Stretch Out for EDB Who Dies 5 Yr. Early***	***(7) Stretch Out for EDB***
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	**6,595,397**	**7,258,946**	**7,757,222**	**8,636,472**	**10,555,599**	**19,038,459**	**18,993,662**
% Comparison of "Additional After Tax Assets"	**100%**	**110%**	**118%**	**131%**	**160%**	**289%**	**288%**

B. What the 2020 Smith & Children Case Study Tells Us.

- Strategy 2 shows that Mr. Smith will be about 10% if he continues deferral during his lifetime than if he cashes out early.

- Strategy 3 shows that the 5 year rule for a non-DB (when IRA Owner dies before his RBD) adds another 8% of benefit.

- Strategy 4 shows that the 10 year rule allowed to DBs adds another 13% of benefit. The significance to Mr. Smith is that if he is debating between one trust design that qualifies as a non-DB and another design that qualifies as a DB, now he has a rough idea of the extra deferral benefit obtained from the design that qualifies as a DB.

- Strategy 5 shows that qualifying as a minor EDB is a significantly better outcome, even though the child must switch to the 10 year rule at age 21. Results will vary dramatically depending on the ages of Mr. Smith and his child at the time of death.

- Strategy 6 shows that full EDB status is still best, and actually produces slightly longer deferral if the EDB dies a few years before his or her table life expectancy.

- Strategy 7 shows the outcome of full EDB status if the EDB lives to or beyond table life expectancy.

V. Sensitivity Analysis – In General.

If anything can be guaranteed about a given financial illustration, it's that the illustration will be wrong. Reality always turns out different than our expectations. Financial modeling is not so much about predicting the future as it is about learning about how moving parts work.

The best way to really understand moving parts is to move them. The Jones and Rogers case studies required input of a large number of variables. The results can be very sensitive to many of these variables, and it's important for us to understand how each variable can affect the results.

To accomplish this, the following variations on the Jones and Rogers case studies were run to isolate the following variables through a wide range of values while keeping all other variables the same:

1) investment return (level return);

2) investment return (fluctuating returns);

3) portfolio turnover;

4) payment of investment fees from inside or outside IRA/Roth IRA;

5) estate tax rates and the unified credit amount;

6) income tax rates and changes to alternative minimum tax (AMT) or IRD deduction;

7) participant's mortality; and

8) beneficiary's age.

These alternative case studies are summarized in the eight Sections that follow.

In summary, these alternative case studies confirm that changes in these variables produce wide variations in results in absolute dollar terms. Changes in these variables can also widen or narrow the gap between the results of any two strategies.

But what is remarkable about this extensive group of alternative case studies is that the same strategies come out on top in almost every case. In other words, the relative performance of the various strategies is quite consistent across a wide range of scenarios.

In particular, the Roth IRA conversion strategy dramatically outperformed all other strategies in every case. In no scenario did another strategy come close to the performance of the Roth IRA Conversion.

The Roth IRA conversion strategy consistently produced performance of 300 percent to 400 percent relative to the non-deferral strategy in most cases. The variables that reduced relative performance the most were: (a) reduction or elimination of estate tax; and (b) an older beneficiary. In these scenarios, the Roth IRA conversion strategy still managed performance of roughly 250 percent to 300 percent relative to the non-deferral strategy. The lowest performances of all were:

> Permanent estate tax repeal (Roth IRA Conversion performance was "only" 251 percent for Jones and 244 percent for Rogers); and
>
> Older beneficiary who is age 63 at Roth IRA owner's death (Roth IRA conversion performance was "only" 242 percent for Jones and 232 percent for Rogers).

VI. Sensitivity Analysis – Investment Yield.

How sensitive is the financial model to different investment yield assumptions? This Section illustrates four yield scenarios for the Jones and Rogers case studies, with all other facts the same as in the "Base Case" scenarios presented in Section II. The yield assumptions are as follows:

Yield Assumption	Ordinary Income	Growth	Less: Management Fee	Net Return
Low (fixed income only)	5.5%	0.0%	(0.25%)	5.25%
Low (balanced allocation)	3.0%	3.0%	(0.75%)	5.25%
Medium (balanced allocation with higher weight in equities, same as Section II.)	1.5%	6.5%	(1%)	7%
High (equities only)	1.0%	10.0%	(1%)	10%

The following tables combine the results from the above four yield scenarios for the Jones and Rogers case studies. As you will see, the model is very sensitive to investment yield in terms of the absolute dollar results under the various distribution strategies that allow deferral. However, the relative percentage outcomes of the various deferral distribution strategies are generally similar.

Jones & Son: Sensitivity Analysis - Yield								
	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age, Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Low Yield (Fixed Income)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**589,329**	**647,601**	**570,743**	**928,744**	**1,119,249**	**1,079,924**	**2,419,487**
	% Comparison of "Additional After Tax Assets"	**100%**	**110%**	**97%**	**158%**	**190%**	**183%**	**411%**
Low Yield (Balanced)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**696,029**	**742,420**	**653,940**	**1,005,660**	**1,215,564**	**1,238,195**	**2,454,256**
	% Comparison of "Additional After Tax Assets"	**100%**	**107%**	**94%**	**144%**	**175%**	**178%**	**353%**
Medium Yield Balanced (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,570,409**	**1,691,805**	**1,458,086**	**2,332,483**	**2,890,236**	**2,846,983**	**5,834,943**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**149%**	**184%**	**181%**	**372%**
High Yield Equities	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**5,530,619**	**6,093,875**	**5,063,004**	**8,808,807**	**11,657,888**	**11,184,067**	**24,088,965**
	% Comparison of "Additional After Tax Assets"	**100%**	**110%**	**92%**	**159%**	**211%**	**202%**	**436%**

Rogers & Daughter: Sensitivity Analysis - Yield

	IRA Beginning Balance:	*$5,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Low Yield (Fixed Income)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**2,526,484**	**2,744,539**	**2,125,370**	**3,151,587**	**4,453,399**	**5,338,831**	**12,065,469**
	% Comparison of "Additional After Tax Assets"	**100%**	**109%**	**84%**	**125%**	**176%**	**211%**	**478%**
Low Yield (Balanced)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**3,678,556**	**3,748,550**	**2,836,989**	**3,649,138**	**4,699,806**	**5,529,009**	**11,897,923**
	% Comparison of "Additional After Tax Assets"	**100%**	**102%**	**77%**	**99%**	**128%**	**150%**	**323%**
Medium Yield Balanced (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,223,451**	**8,856,710**	**6,762,317**	**10,209,714**	**14,363,465**	**13,692,279**	**29,367,880**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**82%**	**124%**	**175%**	**167%**	**357%**
High Yield Equities	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**28,558,465**	**31,490,104**	**23,371,815**	**38,772,679**	**57,472,385**	**54,734,800**	**123,443,798**
	% Comparison of "Additional After Tax Assets"	**100%**	**110%**	**82%**	**136%**	**201%**	**192%**	**432%**

VII. Sensitivity Analysis – Portfolio Turnover.

How sensitive is the financial model to portfolio turnover? (Recall that turnover refers to the percentage of holdings in a portfolio that are bought or sold in a given year – thus a portfolio turnover of 20% suggests that an average of one-fifth of the portfolio is turned over in any given year.) The following table summarizes the results of six different portfolio turnover scenarios for the Jones and Rogers case studies, with all other facts the same as in the "Base Case" scenarios presented in Section II.

As you will see, portfolio turnover is an important variable, arguably as significant as investment yield when evaluating retirement distribution alternatives.

The "no turnover" scenario is particularly interesting, because it suggests that continuing a retirement plan structure is less profitable than maintaining an after-tax investment portfolio for the true "buy and hold" investor. The financial model is very sensitive to portfolio turnover in the range of 0% to 10%, and much less sensitive to portfolio turnover assumptions over 20%.

Jones & Son: Sensitivity Analysis - Portfolio Turnover								
	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
0% Turnover	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**2,869,520**	**2,823,500**	**2,319,477**	**2,506,011**	**2,680,685**	**2,819,094**	**4,027,498**
	% Comparison of "Additional After Tax Assets"	**100%**	**98%**	**81%**	**87%**	**93%**	**98%**	**140%**
5% Turnover	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**2,086,067**	**2,132,351**	**1,798,286**	**2,625,919**	**3,037,046**	**2,954,354**	**5,460,981**
	% Comparison of "Additional After Tax Assets"	**100%**	**102%**	**86%**	**126%**	**146%**	**142%**	**262%**
10% Turnover	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,801,877**	**1,891,722**	**1,615,356**	**2,486,808**	**2,997,841**	**2,925,201**	**5,744,882**
	% Comparison of "Additional After Tax Assets"	**100%**	**105%**	**90%**	**138%**	**166%**	**162%**	**319%**
15% Turnover	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,658,212**	**1,767,337**	**1,517,998**	**2,391,618**	**2,937,047**	**2,882,689**	**5,815,801**
	% Comparison of "Additional After Tax Assets"	**100%**	**107%**	**92%**	**144%**	**177%**	**174%**	**351%**
20% Turnover	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,570,409**	**1,691,805**	**1,458,086**	**2,332,483**	**2,890,236**	**2,846,983**	**5,834,943**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**149%**	**184%**	**181%**	**372%**
25% Turnover	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,510,732**	**1,641,235**	**1,417,626**	**2,292,745**	**2,856,003**	**2,818,705**	**5,837,429**
	% Comparison of "Additional After Tax Assets"	**100%**	**109%**	**94%**	**152%**	**189%**	**187%**	**386%**

Rogers & Daughter: Sensitivity Analysis - Portfolio Turnover								
	IRA Beginning Balance:	*$5,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	***(1) Distribute Entire Plan in 2008 (Base Case)***	***(2) Distribute on Death Bed***	***(3) Distribute Just After Death***	***(4) Stretch Out; Plan Bears Pro Rata Death Tax***	***(5) Stretch Out; Plan Bears Minimum Death Tax***	***(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax***	***(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax***
0% Turnover	***"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)***	**14,740,091**	**14,824,910**	**11,003,085**	**12,219,220**	**13,952,545**	**13,720,945**	**21,385,573**
	% Comparison of "Additional After Tax Assets"	**100%**	**101%**	**75%**	**83%**	**95%**	**93%**	**145%**
5% Turnover	***"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)***	**10,927,257**	**11,257,788**	**8,496,753**	**11,991,315**	**16,194,736**	**14,259,510**	**29,776,201**
	% Comparison of "Additional After Tax Assets"	**100%**	**103%**	**78%**	**110%**	**148%**	**130%**	**272%**
10% Turnover	***"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)***	**9,463,357**	**10,042,436**	**7,654,286**	**11,135,514**	**15,351,873**	**14,189,620**	**30,224,354**
	% Comparison of "Additional After Tax Assets"	**100%**	**106%**	**81%**	**118%**	**162%**	**150%**	**319%**
15% Turnover	***"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)***	**8,698,881**	**9,308,883**	**7,104,934**	**10,564,150**	**14,743,740**	**13,914,047**	**29,721,450**
	% Comparison of "Additional After Tax Assets"	**100%**	**107%**	**82%**	**121%**	**169%**	**160%**	**342%**
20% Turnover	***"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)***	**8,223,451**	**8,856,710**	**6,762,317**	**10,209,714**	**14,363,465**	**13,692,279**	**29,367,880**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**82%**	**124%**	**175%**	**167%**	**357%**
25% Turnover	***"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)***	**7,897,770**	**8,557,329**	**6,534,758**	**9,975,687**	**14,112,332**	**13,526,739**	**29,121,508**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**83%**	**126%**	**179%**	**171%**	**369%**

VIII. Sensitivity Analysis – Fluctuating Yield.

Up until this Section, the financial model has assumed a level yield in each year of the deferral period, even on equity investments.

Financial planner and software developer **Guerdon T. Ely** of Ely Prudent Planning LLC[4] contributed additional coding to your author's financial model to allow a simulation of actual historical returns indicated by the Standard and Poor's "S&P 500" Index and the 5 Year Treasury Index for years 1927 through 2006. The S&P 500 Index had an average annual yield of 12.4% between 1927 and 2006, and the 5 Year Treasury Index averaged a 5.4% annual yield during the same period. A portfolio of 60% S&P 500 stocks and 40% five-year Treasury bonds would, theoretically, have averaged a 9.6% yield each year. If a 1% annual portfolio management fee applied, the portfolio's net average yield would have been 8.6%.

These enhancements illustrate the effect of varying returns based on historical data, and the author gratefully acknowledges **Guerdon T. Ely** for his valuable contributions in preparing this Section. Although the future is not likely to duplicate the past, these analyses are very helpful in gaining a general perspective on how market fluctuations affect distribution planning.

This Section illustrates four yield scenarios for the Jones and Rogers case studies, with all other facts the same as in the "Base Case" scenarios presented in Section II. The yield assumptions are as follows:

60% Equity/40% Fixed Income Portfolio in Varying Markets	Ordinary Income*	Growth	Less: Management Fee	"Average" Yield, Net of Fee
Poor Market Period (1929-1978)	2.3%	Varies	(1%)	6.50%
Median Market Period (1938-1987)	2.8%	Varies	(1%)	8.67%
Level Yield	2.8%	6.8%	(1%)	8.6%
Good Market Period (1950-1999)	2.8%	Varies	(1%)	10.43%

** The ordinary income yields are your author's estimates of the "ordinary income" portion of the overall yield reported under the historical indexes, which aggregate dividends, interest and growth.*

The two tables below compile the results from the four yield scenarios for the Jones and Rogers case studies, and confirm that market fluctuations have a significant effect on average yield. Perhaps the most telling comparison is the difference in total yield between the "median market" and "level yield" scenarios, even though each reflects the same average annual yield.

[4] Guerdon T. Ely is the founder of Ely Prudent Portfolios LLC, Chino, CA. For more information, visit: www.elyportfolios.com.

Jones & Son: Sensitivity Analysis - Market Fluctuations								
	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Poor Market	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	919,754	937,680	875,367	1,333,827	1,550,027	1,542,248	3,075,006
	% Comparison of "Additional After Tax Assets"	100%	102%	95%	145%	169%	168%	334%
Median Market	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	2,435,048	2,526,996	2,248,270	3,790,356	4,682,798	4,533,870	10,070,467
	% Comparison of "Additional After Tax Assets"	100%	104%	92%	156%	192%	186%	414%
Median Market Level Yield	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	2,713,008	2,979,360	2,523,097	4,433,637	5,750,808	5,633,177	12,348,299
	% Comparison of "Additional After Tax Assets"	100%	110%	93%	163%	212%	208%	455%
Good Market	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	4,940,558	5,555,127	4,772,176	7,996,981	10,237,215	10,173,831	21,890,296
	% Comparison of "Additional After Tax Assets"	100%	112%	97%	162%	207%	206%	443%

Rogers & Daughter: Sensitivity Analysis - Market Fluctuations								
	IRA Beginning Balance:	*$5,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Poor Market	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	4,539,617	4,633,399	3,830,509	5,586,420	7,556,528	7,198,598	15,217,912
	% Comparison of "Additional After Tax Assets"	100%	102%	84%	123%	166%	159%	335%
Median Market	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	12,312,290	12,602,806	9,884,144	16,045,077	23,312,886	22,005,180	50,372,325
	% Comparison of "Additional After Tax Assets"	100%	102%	80%	130%	189%	179%	409%
Median Market Level Yield	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	13,893,009	15,099,828	11,276,569	19,180,315	29,001,536	27,423,624	61,503,176
	% Comparison of "Additional After Tax Assets"	100%	109%	81%	138%	209%	197%	443%
Good Market	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	25,190,978	28,440,975	22,108,648	35,720,068	51,870,376	48,904,650	107,027,319
	% Comparison of "Additional After Tax Assets"	100%	113%	88%	142%	206%	194%	425%

IX. Sensitivity Analysis – Investment Fees.

How much difference does it make if investment management fees on retirement plan assets are paid from non-retirement plan assets?

Recurring administrative or overhead fees (such as Trustee's fees, annual management fees, so-called "wrap" fees, and the like) that arise with respect to the assets of an IRA may be paid by the individual IRA owner, without being considered an additional contribution to the IRA, and may be claimed by the individual as a miscellaneous itemized deduction.[5] Comparable rules apply to plans and plan sponsors, and a recent private letter ruling ruled favorably with respect to the individual owner of a Roth IRA.[6] This rule does not extend to specific expenses chargeable to plan assets, such as brokerage commissions,[7] but may extend to the entire management or "wrap" fee, even if transaction costs are bundled into the fee.[8]

Your author is concerned that investment management fees arising from Roth IRA assets may not be deductible, even if paid by the individual Roth IRA owner, because Code Section 265 bars a deduction for expenses relating to income that is "wholly exempt" from income tax. A Roth IRA may not necessarily be "wholly exempt" from income tax during the initial five-year period, but once the five-year period expires, the Roth IRA would appear to fall into the category of "wholly exempt." Your author's financial model assumes Roth IRA fees are not deductible.

Investment fees are miscellaneous itemized deductions, generally deductible only to the extent that they exceed 2% of the taxpayer's adjusted gross income for the year. The deduction is effectively negated if the taxpayer is in the Alternative Minimum Tax.

The following table compiles the results from eight investment fee scenarios for the Jones and Rogers case studies. The first scenario shows the results if investment fees are paid "ratably" (*i.e.*, the IRA pays its own investment fees out of IRA assets) throughout the deferral period. The second through seventh scenarios show different strategies that involve paying all investment fees from non-IRA assets at the start of the deferral period and continuing until a certain point in time, and then "switching" to paying the fees ratably from that point forward. The last scenario shows the outcome if investment fees are paid from non-IRA assets during the entire deferral period. Otherwise, the factual assumptions are the same for Jones and Rogers as in the "Base Case" scenarios presented in Section II. All of these tables were prepared using your author's financial model.

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[5] Rev. Rul. 84-146, 1984-2 C.B. 61; PLRs 1984-32-109, 1983-29-049, and 1988-30-061.

[6] PLR 2005-07-021, which did not address whether fees paid by the Roth IRA owner are deductible.

[7] PLR 1988-30-061.

[8] PLR 2005-07-021.

Jones & Son: Sensitivity Analysis - Investment Fees								
	IRA Beginning Balance:	$1,000,000						
	Deferral Period Begins:	2008	Ends:	2057	# of Years:	50		
	IRA Owner Dies:	2017	IRA Owner's Age at Death:	84	Child's Age Yr. After Death:	44		
	IRA Distribution Strategy:	(1) Distribute Entire Plan in 2008 (Base Case)	(2) Distribute on Death Bed	(3) Distribute Just After Death	(4) Stretch Out; Plan Bears Pro Rata Death Tax	(5) Stretch Out; Plan Bears Minimum Death Tax	(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax	(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax
Pay Investment Fees Ratably From IRA and Outside Assets (Base Case)	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,570,409	1,691,805	1,458,086	2,332,483	2,890,236	2,846,983	5,834,943
	% Comparison of "Additional After Tax Assets"	100%	108%	93%	149%	184%	181%	372%
Pay Fees From Outside Assets 1st Five Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,644,503	1,398,299	2,318,425	2,901,363	2,859,059	6,013,719
	% Comparison of "Additional After Tax Assets"	100%	105%	90%	149%	186%	183%	385%
Pay Fees From Outside Assets 1st Ten Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,602,258	1,338,434	2,307,103	2,916,960	2,876,439	6,333,504
	% Comparison of "Additional After Tax Assets"	100%	103%	86%	148%	187%	184%	406%
Pay Fees From Outside Assets 1st Fifteen Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,602,258	1,309,272	2,300,974	2,909,626	2,922,630	6,512,533
	% Comparison of "Additional After Tax Assets"	100%	103%	84%	147%	186%	187%	417%
Pay Fees From Outside Assets 1st Twenty Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,602,258	1,309,272	2,287,564	2,886,144	2,964,333	6,666,536
	% Comparison of "Additional After Tax Assets"	100%	103%	84%	147%	185%	190%	427%
Pay Fees From Outside Assets 1st Twenty-Five Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,602,258	1,309,272	2,265,210	2,849,632	2,997,021	6,788,161
	% Comparison of "Additional After Tax Assets"	100%	103%	84%	145%	183%	192%	435%
Pay Fees From Outside Assets 1st Thirty Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,602,258	1,309,272	2,236,244	2,804,039	3,001,233	6,876,199
	% Comparison of "Additional After Tax Assets"	100%	103%	84%	143%	180%	192%	441%
Pay Fees From Outside Assets Thrpoughout Deferral Period	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	1,560,345	1,602,258	1,309,272	2,137,751	2,646,286	2,842,117	6,978,497
	% Comparison of "Additional After Tax Assets"	100%	103%	84%	137%	170%	182%	447%

Rogers & Daughter: Sensitivity Analysis - Investment Fees								
	IRA Beginning Balance:	$5,000,000						
	Deferral Period Begins:	2008	Ends:	2057	# of Years:	50		
	IRA Owner Dies:	2017	IRA Owner's Age at Death:	84	Child's Age Yr. After Death:	44		
	IRA Distribution Strategy:	(1) Distribute Entire Plan in 2008 (Base Case)	(2) Distribute on Death Bed	(3) Distribute Just After Death	(4) Stretch Out; Plan Bears Pro Rata Death Tax	(5) Stretch Out; Plan Bears Minimum Death Tax	(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax	(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax
Pay Investment Fees Ratably From IRA and Outside Assets (Base Case)	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,223,451	8,856,710	6,762,317	10,209,714	14,363,465	13,692,279	29,367,880
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	124%	175%	167%	357%
Pay Fees From Outside Assets 1st Five Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,610,020	6,413,083	10,032,301	14,409,022	13,707,926	30,283,960
	% Comparison of "Additional After Tax Assets"	100%	105%	78%	122%	175%	167%	369%
Pay Fees From Outside Assets 1st Ten Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,386,792	6,040,091	9,841,767	14,455,253	13,721,114	31,233,325
	% Comparison of "Additional After Tax Assets"	100%	102%	74%	120%	176%	167%	380%
Pay Fees From Outside Assets 1st Fifteen Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,386,792	5,961,141	9,795,750	14,428,139	13,838,450	32,149,724
	% Comparison of "Additional After Tax Assets"	100%	102%	73%	119%	176%	168%	391%
Pay Fees From Outside Assets 1st Twenty Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,386,792	5,961,141	9,745,326	14,319,780	13,756,740	32,915,918
	% Comparison of "Additional After Tax Assets"	100%	102%	73%	119%	174%	167%	401%
Pay Fees From Outside Assets 1st Twenty-Five Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,386,792	5,961,141	9,666,261	14,149,358	13,528,493	33,502,688
	% Comparison of "Additional After Tax Assets"	100%	102%	73%	118%	172%	165%	408%
Pay Fees From Outside Assets 1st Thirty Years Only	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,386,792	5,961,141	9,565,891	13,933,014	13,258,241	33,927,224
	% Comparison of "Additional After Tax Assets"	100%	102%	73%	116%	170%	161%	413%
Pay Fees From Outside Assets Thrpoughout Deferral Period	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,214,736	8,386,792	5,961,141	9,206,100	13,157,509	12,554,192	34,431,464
	% Comparison of "Additional After Tax Assets"	100%	102%	73%	112%	160%	153%	419%

Strategy for IRA Beneficiaries. Under current income tax laws, the individual beneficiary of an IRA may lose some or all of the benefit of miscellaneous itemized deductions over the years. Because the effect of paying these amounts with non-IRA assets is to increase the size of the IRA, this means that someday, distributions from the IRA will be larger, and will be fully taxable at ordinary rates. If these distributions will begin far enough into the future, paying the expenses with non-IRA assets makes sense. How far into the future is enough? The case studies suggest that the beneficiary should stop paying these expenses with non-IRA assets at roughly 10 to 15 years into the deferral period. Of course, these results will vary with each case.

Accumulation Trust as IRA Beneficiary. When an accumulation trust is named as IRA beneficiary and will be accumulating, there may be a greater benefit from paying investment fees from the trust's non-retirement assets, as shown in the case studies. This benefit occurs because the trust, as a separate taxpayer, has its own AGI floor that is lower than if all income is reported by the individual beneficiary. The trust is also not subject to the 3% haircut on itemized deductions under Code Section 68, and the trust has its own AMT exemption. Nevertheless, there is still a point in time when the payments being made by non-retirement trust assets should be reduced or eliminated. The "Jones & Son" case studies suggest that this point in time occurs at roughly 25 to 30 years into the deferral period. The "Rogers & Daughter" case study shows a more moderate benefit for the accumulating trust, which disappears at a point in time roughly 15 years into the deferral period. Results will vary from year to year, and from case to case.

Strategy for Roth IRA Beneficiaries. Because distributions from Roth IRAs will not be taxable when received, the best strategy for all Roth IRA beneficiaries is to pay all expenses from non-Roth IRA assets throughout the entire deferral period.

X. Sensitivity Analysis – Estate Taxes.

What impact do estate taxes have on the financial projections? Federal and state estate taxes have the obvious consequence of reducing the overall asset base for the beneficiary. Another factor is that the beneficiary’s IRD deduction under IRC Section 691(c) is calculated based only on federal estate tax, and excludes state estate tax. The following table compiles the results for four estate tax scenarios for the Jones and Rogers case studies, with factual assumptions otherwise the same as the “Base Case” in Section II. The last two scenarios incorporate the carryover basis that is part of the EGTRRA rules for 2010, and assume that the $1 million election to “step up” cost basis is applied half to investment assets and half to the personal residence.

As you will see, estate taxes have a significant effect on the overall wealth transferred to the beneficiary, but do not significantly change the relative performance of the various distribution strategies, with one exception. The benefits of the Roth IRA conversion are moderated somewhat in a “no estate tax” environment, although it is still the most favorable strategy.

Jones & Son: Sensitivity Analysis - Estate Taxes

	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to “Accumulation” Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Pre-EGTRRA Estate Tax, Federal and State (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	1,570,409	1,691,805	1,458,086	2,332,483	2,890,236	2,846,983	5,834,943
	% Comparison of "Additional After Tax Assets"	100%	108%	93%	149%	184%	181%	372%
Estate Tax Reform Based on EGTRRA 2009 Rules, Plus State "Sponge Tax" Based on 2001 Rules	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	2,533,613	2,666,336	2,399,032	3,637,511	3,852,318	3,755,675	6,811,266
	% Comparison of "Additional After Tax Assets"	100%	105%	95%	144%	152%	148%	269%
Estate Tax Repeal Based on EGTRRA 2010 Rules, Plus State "Sponge Tax" Based on 2001 Rules	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	2,973,833	3,344,711	3,183,106	4,844,785	4,938,603	4,815,960	7,914,556
	% Comparison of "Additional After Tax Assets"	100%	112%	107%	163%	166%	162%	266%
Estate Tax Repeal Based on EGTRRA 2010 Rules, No State Estate Tax	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	3,339,103	3,738,796	3,799,294	5,535,257	5,535,257	5,413,225	8,371,856
	% Comparison of "Additional After Tax Assets"	100%	112%	114%	166%	166%	162%	251%

Rogers & Daughter: Sensitivity Analysis - Estate Taxes								
	IRA Beginning Balance:	$5,000,000						
	Deferral Period Begins:	2008	Ends:	2057	# of Years:	50		
	IRA Owner Dies:	2017	IRA Owner's Age at Death:	84	Child's Age Yr. After Death:	44		
	IRA Distribution Strategy:	(1) Distribute Entire Plan in 2008 (Base Case)	(2) Distribute on Death Bed	(3) Distribute Just After Death	(4) Stretch Out; Plan Bears Pro Rata Death Tax	(5) Stretch Out; Plan Bears Minimum Death Tax	(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax	(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax
Pre-EGTRRA Estate Tax, Federal and State (Base Case)	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,223,451	8,856,710	6,762,317	10,209,714	14,363,465	13,692,279	29,367,880
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	124%	175%	167%	357%
Estate Tax Reform Based on EGTRRA 2009 Rules, Plus State "Sponge Tax" Based on 2001 Rules	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	8,442,753	9,092,899	7,047,662	10,718,341	14,656,480	13,980,996	29,643,454
	% Comparison of "Additional After Tax Assets"	100%	108%	83%	127%	174%	166%	351%
Estate Tax Repeal Based on EGTRRA 2010 Rules, Plus State "Sponge Tax" Based on 2001 Rules	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	14,408,990	16,134,532	14,801,155	22,375,275	23,452,235	22,622,778	38,735,585
	% Comparison of "Additional After Tax Assets"	100%	112%	103%	155%	163%	157%	269%
Estate Tax Repeal Based on EGTRRA 2010 Rules, No State Estate Tax	"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)	17,333,535	19,283,535	19,681,091	28,038,008	28,038,008	27,211,438	42,263,202
	% Comparison of "Additional After Tax Assets"	100%	111%	114%	162%	162%	157%	244%

XI. Sensitivity Analysis – Income Taxes.

What impact do income taxes have on the financial projections? The income tax rules are complex. The Alternative Minimum Tax has a significant impact. An increase in income tax rates would also produce a significant impact. The following table compiles the results of ten scenarios isolating different income tax rules for the Jones and Rogers case studies. Except as mentioned, the factual assumptions are the same as the "Base Case" in Section II.

The 2% floor on itemized deductions, combined with AMT, wipes out a large amount of deduction for investment management fees. The scenario that assumes that the 2% floor and AMT are repealed and pays investment fees from non-IRA assets produces a more favorable result than when the fees are paid ratably, which confirms the problem discussed in Section IX. about losing deductions too close in time to the ultimate distribution of IRA funds. The second scenario shows the importance of the IRD deduction under IRC Section 691(c).

The "repeal of AMT" scenario is particularly interesting. This scenario shows a lower dollar value for several distribution strategies than in the "Base Case." How is it possible that eliminating the AMT tax could do anything but increase the dollar value? Remember, the dollar values shown are the "incremental" values attributable to the retirement plan distributions over the deferral period, over the "baseline" value that would result if there was no retirement plan at all. Eliminating the AMT substantially increases the "baseline value," and highlights that the ordinary income from retirement plan distributions was actually helping mitigate AMT on the "baseline" assets. With AMT repealed, the tax effect of the retirement plan distributions is actually higher, relative to the "baseline" value.

Jones & Son: Sensitivity Analysis - Income Taxes								
	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Current Income Tax Law, Assuming EGTRRA Sunsets (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,570,409**	**1,691,805**	**1,458,086**	**2,332,483**	**2,890,236**	**2,846,983**	**5,834,943**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**149%**	**184%**	**181%**	**372%**
Base Case, Except I.R.D. Deduction Repealed	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,570,409**	**1,691,805**	**685,848**	**1,801,721**	**2,488,727**	**2,430,419**	**5,834,943**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**44%**	**115%**	**158%**	**155%**	**372%**
Base Case, Except Income Tax Rates on Ord. Inc. and Cap. Gn. (but not AMT) Increase by 5%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,439,252**	**1,572,783**	**1,315,819**	**2,244,890**	**2,744,112**	**2,499,089**	**5,597,210**
	% Comparison of "Additional After Tax Assets"	**100%**	**109%**	**91%**	**156%**	**191%**	**174%**	**389%**
Base Case, Except Income Tax Rates on Ord. Inc. and Cap. Gn. (but not AMT) Increase by 10%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,253,695**	**1,336,754**	**1,076,682**	**1,787,962**	**2,190,244**	**2,117,443**	**5,562,878**
	% Comparison of "Additional After Tax Assets"	**100%**	**107%**	**86%**	**143%**	**175%**	**169%**	**444%**
Base Case, Except Income Tax Rates on Ord. Inc. and Cap. Gn. (but not AMT) Increase by 15%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,003,401**	**1,078,262**	**835,698**	**1,527,408**	**1,909,652**	**1,853,519**	**5,728,459**
	% Comparison of "Additional After Tax Assets"	**100%**	**107%**	**83%**	**152%**	**190%**	**185%**	**571%**
Base Case, Except AMT Repealed	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,889,765**	**1,969,574**	**1,683,397**	**2,384,697**	**2,791,897**	**2,704,638**	**5,508,983**
	% Comparison of "Additional After Tax Assets"	**100%**	**104%**	**89%**	**126%**	**148%**	**143%**	**292%**
Base Case, Except AMT Repealed and Rates Increase by 5%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,547,453**	**1,630,292**	**1,355,988**	**2,070,864**	**2,480,238**	**2,398,298**	**5,534,544**
	% Comparison of "Additional After Tax Assets"	**100%**	**105%**	**88%**	**134%**	**160%**	**155%**	**358%**
Base Case, Except AMT Repealed and Rates Increase by 10%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,253,695**	**1,336,754**	**1,076,682**	**1,787,962**	**2,190,244**	**2,117,443**	**5,562,878**
	% Comparison of "Additional After Tax Assets"	**100%**	**107%**	**86%**	**143%**	**175%**	**169%**	**444%**
Base Case, Except AMT and 2% Floor Repealed	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,934,303**	**2,026,333**	**1,732,892**	**2,454,532**	**2,863,601**	**2,768,705**	**5,498,618**
	% Comparison of "Additional After Tax Assets"	**100%**	**105%**	**90%**	**127%**	**148%**	**143%**	**284%**
Base Case, Except AMT and 2% Floor Repealed, and Investment Fees Paid From Non-IRA Assets For Entire Period	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,932,411**	**1,994,107**	**1,649,685**	**2,469,028**	**2,927,089**	**2,892,651**	**7,087,730**
	% Comparison of "Additional After Tax Assets"	**100%**	**103%**	**85%**	**128%**	**151%**	**150%**	**367%**

Rogers & Daughter: Sensitivity Analysis - Income Taxes								
	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*44*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Current Income Tax Law, Assuming EGTRRA Sunsets (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	1,523,396	1,505,895	1,059,379	1,703,992	2,376,687	2,386,701	5,374,325
	% Comparison of "Additional After Tax Assets"	100%	99%	70%	112%	156%	157%	353%
Base Case, Except I.R.D. Deduction Repealed	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	8,223,451	8,856,710	3,306,953	7,554,774	12,645,633	11,838,924	29,367,880
	% Comparison of "Additional After Tax Assets"	100%	108%	40%	92%	154%	144%	357%
Base Case, Except Income Tax Rates on Ord. Inc. and Cap. Gn. (but not AMT) Increase by 5%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	7,374,856	7,548,758	5,239,768	7,514,926	10,002,357	11,172,864	28,207,987
	% Comparison of "Additional After Tax Assets"	100%	102%	71%	102%	136%	151%	382%
Base Case, Except Income Tax Rates on Ord. Inc. and Cap. Gn. (but not AMT) Increase by 10%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	6,090,410	6,188,262	3,941,842	5,708,997	8,055,195	9,587,768	28,660,607
	% Comparison of "Additional After Tax Assets"	100%	102%	65%	94%	132%	157%	471%
Base Case, Except Income Tax Rates on Ord. Inc. and Cap. Gn. (but not AMT) Increase by 15%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	4,877,292	4,958,430	2,815,223	4,512,274	6,716,866	8,280,119	28,872,621
	% Comparison of "Additional After Tax Assets"	100%	102%	58%	93%	138%	170%	592%
Base Case, Except AMT Repealed	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	9,182,552	9,239,117	6,809,936	8,541,938	10,995,898	12,505,532	28,167,605
	% Comparison of "Additional After Tax Assets"	100%	101%	74%	93%	120%	136%	307%
Base Case, Except AMT Repealed and Rates Increase by 5%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	7,517,600	7,602,819	5,260,685	7,041,624	9,473,719	10,987,468	28,431,289
	% Comparison of "Additional After Tax Assets"	100%	101%	70%	94%	126%	146%	378%
Base Case, Except AMT Repealed and Rates Increase by 10%	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	6,090,410	6,188,262	3,941,842	5,708,997	8,055,195	9,587,768	28,660,607
	% Comparison of "Additional After Tax Assets"	100%	102%	65%	94%	132%	157%	471%
Base Case, Except AMT and 2% Floor Repealed	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	9,507,596	9,558,650	7,173,388	8,866,581	11,290,763	12,755,398	28,071,766
	% Comparison of "Additional After Tax Assets"	100%	101%	75%	93%	119%	134%	295%
Base Case, Except AMT and 2% Floor Repealed, and Investment Fees Paid From Non-IRA Assets For Entire Period	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	9,498,227	9,470,017	6,749,086	8,848,517	11,867,234	13,462,706	37,928,785
	% Comparison of "Additional After Tax Assets"	100%	100%	71%	93%	125%	142%	399%

XII. Sensitivity Analysis – Participant's Mortality.

What impact does the Participant's mortality have on the financial projections? The following scenarios correspond to the Jones and Rogers case studies, with factual assumptions otherwise the same as the "Base Case" in Section II.

The following charts confirm that an "early" death results in more overall deferral for taxable IRA accounts, and that a "late" death results in more overall deferral for Roth IRA accounts, which makes sense because no lifetime distributions are required from a Roth IRA.

Jones & Son: Sensitivity Analysis - Participant's Mortality

	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*Varies*	*IRA Owner's Age at Death:*	*Varies*	*Child's Age Yr. After Death:*	*Varies*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Participant Dies in 2011	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,592,409**	**1,530,437**	**1,251,995**	**2,651,425**	**3,366,362**	**3,361,208**	**5,797,514**
	% Comparison of "Additional After Tax Assets"	**100%**	**96%**	**79%**	**167%**	**211%**	**211%**	**364%**
Participant Dies in 2014	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,567,407**	**1,589,439**	**1,338,883**	**2,455,771**	**3,105,295**	**3,077,384**	**5,802,250**
	% Comparison of "Additional After Tax Assets"	**100%**	**101%**	**85%**	**157%**	**198%**	**196%**	**370%**
Participant Dies in 2017 (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,570,409**	**1,691,805**	**1,458,086**	**2,332,483**	**2,890,236**	**2,846,983**	**5,834,943**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**149%**	**184%**	**181%**	**372%**
Participant Dies in 2020	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,583,862**	**1,807,303**	**1,598,989**	**2,267,106**	**2,724,230**	**2,670,075**	**5,880,040**
	% Comparison of "Additional After Tax Assets"	**100%**	**114%**	**101%**	**143%**	**172%**	**169%**	**371%**
Participant Dies in 2023	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,645,604**	**1,978,417**	**1,794,247**	**2,309,323**	**2,679,105**	**2,618,454**	**6,407,312**
	% Comparison of "Additional After Tax Assets"	**100%**	**120%**	**109%**	**140%**	**163%**	**159%**	**389%**
Participant Dies in 2026	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,652,055**	**2,078,922**	**1,929,012**	**2,291,851**	**2,556,930**	**2,507,754**	**6,687,617**
	% Comparison of "Additional After Tax Assets"	**100%**	**126%**	**117%**	**139%**	**155%**	**152%**	**405%**

Rogers & Daughter: Sensitivity Analysis - Participant's Mortality								
	IRA Beginning Balance:	*$5,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*2057*	*# of Years:*	*50*		
	IRA Owner Dies:	*Varies*	*IRA Owner's Age at Death:*	*Varies*	*Child's Age Yr. After Death:*	*Varies*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Participant Dies in 2011	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,021,188**	**7,587,350**	**4,950,247**	**9,991,176**	**16,193,333**	**15,378,448**	**28,853,522**
	% Comparison of "Additional After Tax Assets"	**100%**	**95%**	**62%**	**125%**	**202%**	**192%**	**360%**
Participant Dies in 2014	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,162,520**	**8,242,963**	**5,863,932**	**10,087,856**	**15,244,716**	**14,496,061**	**29,117,496**
	% Comparison of "Additional After Tax Assets"	**100%**	**101%**	**72%**	**124%**	**187%**	**178%**	**357%**
Participant Dies in 2017 (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,223,451**	**8,856,710**	**6,762,317**	**10,209,714**	**14,363,465**	**13,692,279**	**29,367,880**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**82%**	**124%**	**175%**	**167%**	**357%**
Participant Dies in 2020	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,249,658**	**9,429,016**	**7,639,406**	**10,370,436**	**13,588,283**	**13,004,946**	**29,641,881**
	% Comparison of "Additional After Tax Assets"	**100%**	**114%**	**93%**	**126%**	**165%**	**158%**	**359%**
Participant Dies in 2023	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,538,132**	**10,289,904**	**8,770,940**	**10,941,015**	**13,400,579**	**12,875,465**	**31,089,514**
	% Comparison of "Additional After Tax Assets"	**100%**	**121%**	**103%**	**128%**	**157%**	**151%**	**364%**
Participant Dies in 2026	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**8,542,558**	**10,779,287**	**9,593,179**	**11,166,197**	**12,825,967**	**12,402,483**	**31,313,519**
	% Comparison of "Additional After Tax Assets"	**100%**	**126%**	**112%**	**131%**	**150%**	**145%**	**367%**

XIII. Sensitivity Analysis – Beneficiary’s Age.

What impact does the Beneficiary’s age have on the financial projections? The following scenarios correspond to the Jones and Rogers Case Studies, with factual assumptions otherwise the same as the “Base Case” in Section II., including the assumption that the Beneficiary is not a “Skip Person” for Generation Skipping Transfer (GST) Tax purposes with respect to the IRA Owner.

The following chart confirms that there is a substantial increase in the value of deferral for a younger beneficiary, for both IRA and Roth IRA strategies.

Jones & Son: Sensitivity Analysis - Beneficiary's Age								
	IRA Beginning Balance:	*$1,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*Varies With Age of Beneficiary*	*# of Years:*	*Varies With Age of Beneficiary*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*Varies With Age of Beneficiary*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to “Accumulation” Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Beneficiary is Age 63 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**867,369**	**934,261**	**805,002**	**1,049,607**	**1,194,606**	**1,171,338**	**2,098,436**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**121%**	**138%**	**135%**	**242%**
Beneficiary is Age 53 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,165,450**	**1,255,523**	**1,082,104**	**1,561,589**	**1,853,061**	**1,823,005**	**3,518,857**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**134%**	**159%**	**156%**	**302%**
Beneficiary is Age 43 at IRA Owner's Death (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**1,570,409**	**1,691,805**	**1,458,086**	**2,332,483**	**2,890,236**	**2,846,983**	**5,834,943**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**149%**	**184%**	**181%**	**372%**
Beneficiary is Age 33 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**2,186,994**	**2,356,005**	**2,030,615**	**3,634,160**	**4,683,416**	**4,613,967**	**9,928,876**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**166%**	**214%**	**211%**	**454%**
Beneficiary is Age 23 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**3,044,797**	**3,280,100**	**2,827,082**	**5,689,491**	**7,583,870**	**7,481,948**	**16,713,931**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**187%**	**249%**	**246%**	**549%**
Beneficiary is Age 13 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**4,101,079**	**4,418,011**	**3,807,835**	**8,637,478**	**11,852,464**	**11,720,100**	**26,952,787**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**211%**	**289%**	**286%**	**657%**
Beneficiary is Age 3 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	**5,709,642**	**6,150,885**	**5,301,379**	**13,634,903**	**19,191,061**	**19,003,245**	**44,761,585**
	% Comparison of "Additional After Tax Assets"	**100%**	**108%**	**93%**	**239%**	**336%**	**333%**	**784%**

Rogers & Daughter: Sensitivity Analysis - Beneficiary's Age								
	IRA Beginning Balance:	*$5,000,000*						
	Deferral Period Begins:	*2008*	*Ends:*	*Varies With Age of Beneficiary*	*# of Years:*	*Varies With Age of Beneficiary*		
	IRA Owner Dies:	*2017*	*IRA Owner's Age at Death:*	*84*	*Child's Age Yr. After Death:*	*Varies With Age of Beneficiary*		
	IRA Distribution Strategy:	*(1) Distribute Entire Plan in 2008 (Base Case)*	*(2) Distribute on Death Bed*	*(3) Distribute Just After Death*	*(4) Stretch Out; Plan Bears Pro Rata Death Tax*	*(5) Stretch Out; Plan Bears Minimum Death Tax*	*(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax*	*(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax*
Beneficiary is Age 63 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	4,532,257	4,881,269	3,726,741	4,764,182	6,024,978	5,582,718	10,531,327
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	105%	133%	123%	232%
Beneficiary is Age 53 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	6,105,344	6,575,495	5,020,531	6,942,423	9,266,424	8,743,956	17,763,317
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	114%	152%	143%	291%
Beneficiary is Age 43 at IRA Owner's Death (Base Case)	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	8,223,451	8,856,710	6,762,317	10,209,714	14,363,465	13,692,279	29,367,880
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	124%	175%	167%	357%
Beneficiary is Age 33 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	11,448,940	12,330,581	9,414,707	15,685,721	23,222,353	22,298,016	49,869,791
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	137%	203%	195%	436%
Beneficiary is Age 23 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	15,939,551	17,166,999	13,107,433	24,238,112	37,594,653	36,305,811	83,858,465
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	152%	236%	228%	526%
Beneficiary is Age 13 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	21,469,197	23,122,463	17,654,579	36,357,817	58,780,563	57,086,274	135,056,626
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	169%	274%	266%	629%
Beneficiary is Age 3 at IRA Owner's Death	*"Additional After Tax Assets" at End of Deferral Period (in Today's Dollars)*	29,890,047	32,191,773	24,579,224	56,747,380	95,287,961	92,878,262	224,261,689
	% Comparison of "Additional After Tax Assets"	100%	108%	82%	190%	319%	311%	750%

XIV. Case Study: Mr. Gramps & Multi-Generational Planning.

A. Fact Pattern.

This case study was prepared in 2003, and subsequent tax law changes and market cycles are not reflected. Nevertheless, your author believes this case study is still effective for illustrating the economics of different planning strategies.

Mr. Gramps's situation is similar to Mr. Jones (discussed earlier), except Mr. Gramps has one child, age 30, and one grandchild, age 4. Mr. Gramps wants to see the impact of various planning approaches that utilizes his generation skipping tax exemption. His estate is as follows:

IRA	$ 500,000
Liquid Investments	$ 1,000,000
Residence	$ 500,000

The assumptions are generally the same as the Mr. Jones Case Studies,[9] with the following additional or changed facts:

- Mr. Gramps has not made any prior taxable gifts or GST exemption allocations. Mr. Gramps is assumed to die at age 82, and his child is also assumed to die at age 82.
- The GST exemption amount in the year of Mr. Gramps' death will be $1,360,000, roughly what indexing would provide under pre-2001 law.
- Mr. Gramps's child earns $40,000 per year (indexed) and has cash outflow of $30,000 per year (indexed). When the child reaches age 65 he will receive social security benefits of $8,000 per year (in 2003 dollars, indexed for inflation).
- Beginning at age 21, Mr. Gramps's grandchild will earn $40,000 per year (indexed) and will have cash outflow of $30,000 per year (indexed). When the grandchild reaches age 65 he will receive social security benefits of $8,000 per year (in 2003 dollars, indexed for inflation).
- 2003 income tax rules remain in effect (indexed for inflation), *e.g.*, alternative minimum tax, taxation of a portion of social security, "I.R.D." deduction, 3% phase-out ("haircut") of itemized deductions, limitations on charitable deductions, compressed rate brackets for trusts, *etc.* The IRD deduction will be utilized on the earliest dollars distributed, as discussed earlier.

[9] This case study is not identical, having been run five years earlier with slightly different fact assumptions, including a higher investment return of 10%. Your author has not updated this case study yet, but believes that it is a valid illustration of the issues relating to multi-generational planning with retirement assets.

B. Planning Strategies Evaluated.

Strategy	Explanation
(1) Distribute in 2003	Mr. Gramps takes full distribution during the year 2003.
(2) Distribute on Death Bed	Mr. Gramps takes minimum distributions until death and takes full distribution just prior to death.
(3) Stretch-Out to Child	Mr. Gramps designates his child who takes minimum distributions. Death taxes are apportioned to other assets.
(4) Stretch-Out; $1.36M Investments to GC	Same, except Mr. Gramps directs investment assets to grandchild in amount of then-indexed GST exemption ($1,360,000).
(5) Stretch-Out; $1.36M IRA to GC	Same, except Mr. Gramps designates portion of IRA to grandchild equal to the then-indexed GST exemption; other assets pass to his child. Both child and grandchild take RMDs.
(6) Stretch-Out; Entire IRA to GC (incurs GST tax)	Same, except Mr. Gramps designates the entire IRA to his grandchild, and pays GST tax at death; other assets pass to his child.
(7) Stretch-Out; $1.36M Roth IRA to GC	Same as scenario (5) except that Mr. Gramps completes a conversion of his entire retirement plan to a Roth IRA in the year 2003 (paying income tax from non-IRA assets).
(8) Stretch-Out; Entire Roth IRA to GC (Incurs GST tax)	Same as scenario (6) except that Mr. Gramps completes a conversion of his entire retirement plan to a Roth IRA in the year 2003 (paying income tax from non-IRA assets).

C. Case Study Results.

Mr. Gramps: Multi-Generational Planning								
Retirement Plan in Yr 2003:	$ 500,000							
Deferral Period Ends:	2094							
Distribution Strategy:	(1) Distribute in 2003	(2) Distribute on Death Bed	(3) Stretch Out to Child	(4) Stretch Out; $1.36 M Investments to GC	(5) Stretch Out; $1.36 M IRA to GC	(6) Stretch Out; Entire IRA to GC (incurs GST tax)	(7) Stretch Out; $1.36 M Roth IRA to GC	(8) Stretch Out; Entire Roth IRA to GC (Incurs GST tax)
Value of Retirement Plan Assets At End of Deferral Period:	19,470,850	26,764,536	37,993,987	95,203,189	140,374,752	146,422,442	254,392,161	412,864,322
Value of Retirement Plan Assets At End of Deferral Period (In Today's Dollars):	6,187,279	8,505,003	12,073,401	30,252,846	44,607,075	46,528,858	80,838,542	131,196,455
% Comparison:	100%	137%	195%	489%	721%	752%	1307%	2120%

D. What This Case Study Tells Us.

The preceding chart shows us that:

- Strategy 4 produces a huge leap in performance (489 percent) over prior strategies, not because of any particular deferral strategy, but because it's the first strategy to incorporate multi-generational planning.

- Strategy 5 accomplishes an additional increase in performance (721 percent) that arises from using IRA assets to fund the GST exempt gift to grandchildren.

- Strategy 6 suggests, at least in the facts of this case study, that it's better to leave the entire IRA to grandchildren even if GST tax is incurred. (This case study assumes that the GST Tax is paid from other assets that would otherwise pass to the children.)

- Strategy 7 shows the phenomenal results possible when a Roth IRA Conversion is established with grandchildren as beneficiaries – performance is 1,307 percent!

- Strategy 8 suggests, at least in the facts of this case study, that it is dramatically better to leave the entire Roth IRA to grandchildren even if GST tax is incurred. (This case study assumes that the GST tax is paid from other assets that would otherwise pass to the children.)

XV. SAMPLE FORM: Chris and Carol Conduit Revocable Trust

DECLARATION ESTABLISHING THE

CHRIS AND CAROL CONDUIT REVOCABLE TRUST

HENDERSON CAVERLY PUM & TRYTTEN LLP
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DECLARATION ESTABLISHING THE
CHRIS AND CAROL CONDUIT REVOCABLE TRUST

CHRIS CONDUIT and CAROL CONDUIT (“Settlors” or collectively the “Trustee” as the context requires), hereby declare that they hold in trust, as Trustee, the property described as the trust estate.

1. Introductory Provisions.

2. Amendment, Revocation, and Personal Powers.

3. Distribution of Principal and Income During Lifetime of Both Settlors.

4. Division and Distribution at First Settlor’s Death.

5. Division and Distribution at Surviving Settlor’s Death.

5.1 Gift of Tangible Personal Property.

5.2 Distribution of Residual Property. Upon the death of the Surviving Settlor, the Trustee shall allocate and distribute the balance of the property passing pursuant to this Section 5 (“Residual Property”), including any items of Tangible Personal Property or proceeds therefrom added to the Residual Property pursuant to Section 5.1, as follows:

(a) If one or more of the Settlors’ descendants are then living, the Trustee shall divide the Residual Property in such manner as will create, in the aggregate, separate equal shares consisting of one share for each then living child of the Settlors and one share for each then deceased child of the Settlors who has descendants then living. Each share set aside for a deceased child of the Settlors who has descendants then living shall be further divided into shares for said descendants on the principle of representation. Each share so created for a child or more remote descendant of the Settlors shall be applied to create or augment a separate Descendant’s Trust to be held and distributed for his or her benefit as provided in Section 5.3 (each is referred to as the “Primary Beneficiary” of his or her Descendant’s Trust).

(b) If no descendants of the Settlors are then living, the Trustee shall instead allocate and distribute the Residual Property as provided in Section 5.4.

5.3 Descendant’s Trusts. The Descendant’s Trust for a Primary Beneficiary will be held, administered and distributed pursuant to this Section 5.3. Each such Descendant’s Trust created for the benefit of a Primary Beneficiary may be referred to as the “[*Name of Primary*

Beneficiary] Descendant's Trust." If the Descendant's Trust is divided into separate trusts pursuant to Section 10.1 or otherwise, all references in this instrument to such "Descendant's Trust" shall be deemed to refer to all such separate trusts unless otherwise indicated.

(a) **Distribution of Income and Principal**. Subject to Section 5.3(b), the income and principal of the Descendant's Trust shall be held, administered and distributed as follows:

(i) The Trustee, in the Trustee's discretion, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Trust as the Trustee, in the Trustee's discretion, may determine to be necessary for the Primary Beneficiary's health, education and support.

(ii) Additionally, the Trustee, other than an Interested Person, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Trust as such Trustee deems advisable, in such Trustee's sole discretion.

(iii) Any Officer authorized to make distributions under this Section 5.3(a) may consider the Primary Beneficiary's other income or resources known to such Officer, including resources held in other trusts for the benefit of the Primary Beneficiary, Conduit Distributions under Section 5.3(b)(i)(A), the Primary Beneficiary's ability to obtain gainful employment, the obligations of others to support the Primary Beneficiary, and any benefits of income tax deferral that can be accomplished by accumulating the Primary Beneficiary's Tax-Advantaged Account assets.

(iv) Any income not so distributed shall be added to principal.

(v) The Settlors intend that any Officer determining whether to make distributions to the Primary Beneficiary consider the Primary Beneficiary's interests to be the primary concern, and the interests of any other beneficiary as subordinate to this purpose.

(b) **DB Eligible Retirement Account Interests; Conduit Trust**. The Settlors intend that the Descendant's Trust qualify as a Conduit Trust in order to defer distributions from each DB Eligible Retirement Account Interest as much as possible. If the Descendant's Trust holds a DB Eligible Retirement Account Interest, the provisions of this Section 5.3(b) shall apply to that DB Eligible Retirement Account Interest.

(i) **Distributions of DB Eligible Retirement Account Interests**.

(A) The Trustee may not accumulate and must instead distribute to or apply for the benefit of the Primary Beneficiary all distributions the Trustee receives from each DB Eligible Retirement Account Interest (not just Minimum Required Distributions), net of any expenses or taxes properly chargeable to such distributions or the DB Eligible Retirement Account Interest itself, for so long as the Primary Beneficiary shall live. Amounts required to be distributed to or applied for the benefit of the Primary Beneficiary under this Section 5.3(b)(i)(A) are referred to as "Conduit Distributions."

(B) Notwithstanding any other provision of this instrument or any power granted to the Trustee by law, for so long as the Primary Beneficiary is living, the Trustee's power to take any distribution from a DB Eligible Retirement Account Interest in any year that exceeds the Minimum Required Distribution for that year may be exercised only by the Trustee other than: (i) the Primary Beneficiary; (ii) any individual who made a qualified disclaimer of any interest in that DB Eligible Retirement Account Interest; and (iii) any individual who owes a legal obligation of support to the Primary Beneficiary.

(ii) **Prohibition Against Certain Appointments, Amendments, Modifications, Decantings, or Terminations**. Notwithstanding any other provision of this instrument or of applicable law, any power to combine, divide, appoint, amend, modify, decant, or terminate the Descendant's Trust may not be exercised after the Determination Date applicable to a DB Eligible Retirement Account in which the trust has an interest in such a way that would cause any of the Conduit Distributions with respect to that DB Eligible Retirement Account interest under Section 5.3(b)(i)(A) to be delayed, to not be distributed, or to be distributed to or for the benefit of anyone other than the Primary Beneficiary during the Primary Beneficiary's lifetime. If a new share or trust arises from a combination, division, appointment, amendment, modification, or decanting of the Descendant's Trust that is permitted under this Section, the new trust shall be deemed to have satisfied the requirements of Section 5.3(b)(iii)(A)(2) with respect to the determination of its DB Eligible Retirement Account Interests.

(iii) **Definitions of Retirement Related Terms**.

(A) **DB Eligible Retirement Account Interest.** The term "DB Eligible Retirement Account Interest" means, with respect to a trust, any of the trust's Retirement Account interests that satisfy the following three conditions:

(1) The Retirement Account interest arose by reason of the death of the Participant of the Retirement Account;

(2) The trust was designated as death beneficiary of the Retirement Account interest or has a beneficial interest in another trust that is not a Conduit Trust with respect to the Retirement Account interest and that was designated as death beneficiary of the Retirement Account interest; and

(3) If it is assumed that the trust satisfies the necessary requirements to be a DB Trust with respect to the Retirement Account interest, even if it does not so qualify, and if it is assumed that the "Separate Account Rule" applies to the portion of the Retirement Account interest designated to the trust, even if in fact this rule does not apply, there is no other impediment, such as for example a restriction under the Retirement Account interest's governing documents or a change in the law, that would prevent the trust from qualifying for either the ten year rule or the life expectancy rule for determining Required Minimum Distributions for the Retirement Account after the Participant's death, as respectively provided in Code Sections 401(a)(H)(i) and (ii).

(B) **See-Through Trust**. The term “See-Through Trust” means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that will satisfy the requirements of Treasury Regulations Section 1.401(a)(9)-4 A-5 so that the beneficiaries of the trust with respect to the Retirement Account interest, and not the trust itself, will be treated as having been designated by the Participant as beneficiaries of the Retirement Account interest, assuming the trust has complied or will comply with the documentation requirement described in Treasury Regulations Section 1.401(a)(9)-4 A-5(b)(4).

(C) **Conduit Trust.** The term “Conduit Trust” means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that is a See-Through Trust with respect to that Retirement Account interest and that also satisfies the requirements described in Treasury Regulations Section 1.401(a)(9)-5 A-7(c)(3) Example 2 so that the trust’s sole current beneficiary with respect to the Retirement Account will be treated as the sole “Designated Beneficiary” of the Retirement Account interest for purposes of that regulation.

(D) **DB Trust.** The term “DB Trust” means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that is a See-Through Trust with respect to that Retirement Account interest and that has no Disqualified Recipients as beneficiaries other than those who may be disregarded under the Minimum Distribution Rules. For purposes of this determination, if a beneficiary of the trust is another trust, the beneficiaries of the other trust may be treated as if they are beneficiaries of the trust at issue, and not the other trust itself, in the manner provided in Treasury Regulations Section 1.401(a)(9)-4 A-5(d), assuming the other trust has complied or will comply with the documentation requirement described in Treasury Regulations Section 1.401(a)(9)-4 A-5(b)(4).

(E) **Qualified and Disqualified Recipient.** A person is a “Qualified Recipient” if the person is an individual. A person is a “Disqualified Recipient” if the person is not a Qualified Recipient.

(c) **Primary Beneficiary’s Powers of Appointment**. The Primary Beneficiary shall have the following powers of appointment over the Descendant’s Trust, each of which is exercisable in the manner provided in Section 10.2:

(i) **Special Power Over Descendant’s Trust**. Upon attaining 25 years of age, the Primary Beneficiary shall have the power to appoint the principal and any undistributed income of the Descendant’s Trust to pass upon his or her death in favor of any one or more appointees, other than the Primary Beneficiary’s creditors, estate, or the creditors of the Primary Beneficiary’s estate (said power is referred to as a “Special Power”). The Primary Beneficiary’s Special Power under this Section 5.3(c)(i) is intended not to cause any part of the trust to be included in the Primary Beneficiary’s gross estate for federal estate tax purposes and shall not be construed as a “general power of appointment” within the meaning of Code Section 2041(b)(1).

(ii) **General Power over Limited Portion of GST Non-Exempt Descendant’s Trust**. The Primary Beneficiary (regardless of age) of a GST Non-Exempt Descendant’s Trust shall also have the power to appoint the principal and any undistributed income of the Limited Portion (as hereinafter defined) of such trust to pass upon his or her death in favor of the creditors of his or her estate other than any taxing authority (said power is referred to as a "General Power"). The "Limited Portion" of such trust is that portion, if any, for which GST Tax would be payable by reason of the Primary Beneficiary's death if the Primary Beneficiary did not have the General Power under this Section 5.3(c)(ii) (after taking into account all exemptions, exclusions, deductions and credits other than any GST Tax exemption allocated to such trust by reason of the Primary Beneficiary's death), without regard to any exercise of a Special Power by the Primary Beneficiary under Section 5.3(c)(i). The Primary Beneficiary's General Power under this Section 5.3(c)(ii) is intended to cause the Limited Portion of such trust to be included in the Primary Beneficiary's gross estate for federal estate tax purposes rather than being subject to GST Tax, and shall constitute a "general power of appointment" within the meaning of Code Section 2041(b)(1).

(iii) **Trust Protector's Power to Alter Powers of Appointment**. Note that Section **Error! Reference source not found.** grants the Trust Protector certain powers to alter, eliminate or reinstate the powers of appointment granted to the Primary Beneficiary under this Section 5.3(c). *(The Settlors included these powers to allow tax planning flexibility.)*

(d) **Death of Primary Beneficiary**. Upon the Primary Beneficiary's death, the Trustee shall allocate and distribute the remaining assets of the Descendant's Trust (including such items of property as may pass generally to said trust by reason of the Primary Beneficiary's death) in such manner as the Primary Beneficiary shall have effectively appointed, if applicable, and shall divide the unappointed balance of the trust into shares on the principle of representation for the then living members of the class of descendants identified earliest in the following list with at least one class member then living:

1ST The deceased Primary Beneficiary's descendants.
2ND The descendants of the deceased Primary Beneficiary's closest lineal ancestor who was a descendant of the Settlors.
3RD The descendants of the Settlors.

Any share so established for an individual under this Section 5.3(d) shall be applied to create or augment a Descendant's Trust to be held and distributed for such individual as provided in this Section 5.3 (each of whom is referred to as the "Primary Beneficiary" of his or her Descendant's Trust).

If none of the individuals described under this Section 5.3(d) are then living, the Trustee shall allocate and distribute such property as provided in Section 5.4.

5.4 Alternate Distribution. Upon the occurrence of an event requiring distribution of any property pursuant to this Section 5.4 ("Remaining Property"), the Trustee shall allocate and distribute the Remaining Property as follows:

6. **Office of Trustee**. The provisions of this Section apply to the office of Trustee. *Please also refer to Section 8 for provisions applicable to all Officers, including the Trustee*.

6.1 **Initial Trustee and Successor Trustees**.

7. **Office of Trust Protector**. The provisions of this Section shall apply to the office of Trust Protector. *Please also refer to Section 8 for provisions applicable to all Officers, including the Trust Protector.*

7.1 **Establishment of Office of Trust Protector**.

7.2 **Appointment of Trust Protector**.

7.3 **Non-Fiduciary Capacity**.

7.4 **Resignation**.

7.5 **Compensation**.

7.6 **Powers and Duties of Trust Protector**. In addition to other powers specifically granted to the Trust Protector elsewhere in this instrument, the Trust Protector shall have the following powers, each of which may be exercised in the Trust Protector's sole discretion:

(a) **Powers Regarding Officers and Officer Powers**. The Trust Protector shall have the power:

(b) **Modification Powers**. The Trust Protector shall have the power:

(i) Subject to Section 5.3(b)(ii), to modify the terms of any trust arising hereunder that holds an interest in a Retirement Account prior to the Determination Date associated with that Retirement Account to the extent necessary to (i) cause a trust that is not a See-Through Trust with respect to the Retirement Account interest to qualify as a See-Through Trust with respect to that interest, or vice versa, (ii) to cause a trust that is not a DB Trust with respect to the Retirement Account interest to qualify as a DB Trust, or vice versa, and (iii) to cause a trust that is not a Conduit Trust with respect to the Retirement Account interest to qualify as a Conduit Trust, or vice versa. In particular, the Trust Protector may modify the terms of a trust arising hereunder to revise the meanings of Qualified Recipient and Disqualified Recipient to, for example, add an age limit to individuals who count as Qualified Recipients and provide that individuals older than such age limit are Disqualified Recipients.

(ii) To modify or terminate all or any part of a trust arising hereunder in any manner that the Trust Protector determines is appropriate to carry out the purposes of the trust for its intended beneficiaries, including (a) to protect a beneficiary, (b) to limit taxation, (c) to avoid jeopardizing S corporation status for any corporation seeking to maintain S corporation status as to which the trust is a shareholder, (d) to respond to a change in laws, economic condition or other circumstances, (e) to enhance the overall after-tax valuation of any

Tax-Advantaged Account in which the trust has an interest, or (f) to enable the trust to be an owner or permitted transferee of ownership interests in closely-held business or other business entities pursuant to the terms of any applicable contractual agreement governing such business entities.

(c) **Restrictions on Trust Protector Powers**.

8. Powers of the Trustee.

8.1 Powers Over Retirement Accounts. In addition to the powers granted to the Trustee by law or under other provisions of this instrument, and subject to any applicable limitations set forth in Section 5.3(b), the Trustee is authorized to exercise any power or right over a Retirement Account that is available to the Trustee as beneficiary or successor owner of such Retirement Account, including powers to (a) take distributions, make elections, or otherwise select payment options, (b) direct investments, and (c) direct tax-free rollovers from one Retirement Account to another (and to establish any new Retirement Account that is to receive the rollover, if applicable).

9. Payment of Debts, Expenses and Taxes. This Section 9 shall govern the payment of debts, expenses and taxes upon the death of either Settlor.

9.1 Payment of Debts and Expenses.

9.2 General Rule for Payment and Apportionment of Death Taxes. Except as provided in Section 9.3 or elsewhere in this instrument, any Death Taxes arising by reason of a Settlor's death may be paid by the Trustee and charged to, prorated among, or recovered in the manner provided by California and federal law in effect at the time of such Settlor's death (not to the exclusion of laws of other jurisdictions when applicable).

9.3 Exceptions and Clarifications to Payment of Debts, Expenses and Death Taxes. The following exceptions and clarifications shall modify the rules provided in Sections 9.1 and 9.2:

(a) **Gifts Indicated as Free of Death Tax**.

(b) **Tangible Personal Property**.

(c) **Tax-Advantaged Accounts or Other Assets Passing Outside Trust**. If the Trustee determines that all or any portion of a debt of a Settlor, expense of administration, or Death Tax is properly chargeable, by reason of a Settlor's death, to a beneficiary's interest in property not passing under any trust hereunder (including a Tax-Advantaged Account), the Trustee may in its sole discretion pay all or part of said amount by applying any combination the Trustee determines in its sole discretion of the following assets (and any such payment shall be credited against the amount chargeable to said interest in property not passing under any trust hereunder): (i) assets the beneficiary offers to provide for this purpose; or (ii) assets the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in a Settlor's estate) from assets passing under any one or more trusts hereunder to or for the benefit of the beneficiary as determined by the Trustee in its sole discretion. Each Settlor requests, but does not require, that the Trustee apply assets other than Tax-Advantaged Account assets to pay said amount when doing so reduces the need to take a distribution from a Tax-Advantaged Account earlier than would otherwise be necessary, thus enhancing the beneficiary's ability to benefit from income tax-deferred compounding. The Trustee's powers provided under this Section 9.3(c) are in addition to, and not in place of, other powers provided the Trustee under this or other instruments, or under applicable law.

(d) **Settlors' Retirement Accounts Passing Under Trust Instrument**. If the Trustee determines that all or any portion of a debt of a Settlor, expense of administration, or Death Tax is properly chargeable, by reason of a Settlor's death, to an interest in a Settlor's Retirement Account passing under any trust hereunder, the Trustee shall pay said amount using one or more of the following approaches as the Trustee determines in its sole discretion (and any such payment shall be credited against the amount chargeable to that Retirement Account interest): (i) assets from that Retirement Account interest if paid prior to the Determination Date (as hereinafter defined); (ii) other assets allocable to or for the benefit of substantially the same beneficiaries as that Retirement Account interest as the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in a Settlor's estate); or (iii) assets provided to the Trustee by some or all of those beneficiaries for this purpose. The Trustee may pay said amount using assets from that Retirement Account interest paid after the Determination Date only to the extent that payment with other assets is not possible, taking into account the overall purposes of the trust(s) involved. Each Settlor requests that the Trustee apply assets other than interests in a Settlor's Retirement Account to pay said amounts when doing so reduces the need to take a distribution from that Retirement Account interest earlier than would otherwise be necessary, thus enhancing the ability to benefit from income tax-deferred compounding.

10. General Administrative Provisions. The following general provisions shall apply to each trust created by this instrument.

10.1 Division Into Separate Trusts. The Trustee of a trust hereunder may divide the trust into two or more separate trusts having the same terms and conditions as the original trust in order to accomplish any purpose the Trustee determines is consistent with the purpose of the trust. For example, but not by way of limitation, a trust may be divided:

(a) To enable Tax-Advantaged Accounts to be segregated from other trust assets;

(b) To segregate one or more Retirement Account interests, including any accumulations therefrom, from other trust assets;

(c) To avoid holding GST Exempt and GST Non-Exempt assets together in the same trust; and

(d) To avoid jeopardizing the S corporation status of any corporation seeking to maintain S corporation status as to which the trust is a shareholder.

10.2 Trust as Beneficiary of Retirement Account. The Settlors intend that each trust hereunder that owns an interest in a Retirement Account benefit from the maximum extended deferral period under the Minimum Distribution Rules that is available based upon the terms of such trust. Accordingly, the following shall apply:

(a) The Trustee of a trust so designated shall, within the time limit prescribed under the Minimum Distribution Rules, deliver documentation required under said rules to the respective administrators and custodians of each Retirement Account.

(b) When the Trustee makes a distribution or an allocation of an interest in a Retirement Account to or for the benefit of a beneficiary of a trust hereunder, the Trustee is to assign all of the Trustee's interests in and powers over said Retirement Account interest (e.g., to direct investments and withdrawals) to said individual or trustee, as the case may be, and nothing under this instrument shall be interpreted as requiring the Trustee to arrange for the assets held in the Retirement Account to be withdrawn from said Retirement Account. The Settlors specifically intend that any such distribution or allocation of a Retirement Account shall be handled in a manner that (i) results in zero, or the minimum possible amount of income tax payable by either the trust, said individual, or said other trust, and (ii) results in no change, or the minimum possible amount of change, to the deferral period that applies to the Retirement Account.

(c) The administrators, custodians, or other fiduciaries of the respective Retirement Accounts shall incur no liability to the trust or to any of its beneficiaries for acting upon the written instruction of the Trustee pursuant to this Section 10.2.

11. Definitions. The following provisions apply to each trust established by this instrument:

11.1

11.2

11.3 Determination Date. The term "Determination Date" means, with respect to a deceased Participant's Retirement Account, the thirtieth day of September of the calendar year following the calendar year of the death of that Participant, or such other date as may be provided for determining post-death designated beneficiaries under the Minimum Distribution Rules (e.g., Treasury Regulations Section 1.401(a)(9)-4).

11.4

11.5

11.6 Minimum Distribution Rules. The term "Minimum Distribution Rules" means the incidental death benefit requirements of Code Section 401(a) and the minimum distribution rules of Code Section 401(a)(9) (or similar rules applicable to certain types of Retirement Accounts, including the rules of Code Sections 408(a)(6) and 408(b)(3) that apply to IRAs, and the special rules of Code Section 408A(c)(5) that apply to Roth IRAs).

11.7 Minimum Required Distribution. The term "Minimum Required Distribution" means a distribution from a Retirement Account or portion thereof that is counted towards satisfying the distribution requirements for said Retirement Account or portion thereof that apply under the Minimum Distribution Rules.

11.8 Participant. The term "Participant" means the employee, plan participant, or account owner of a Retirement Account as those terms are commonly used under the Minimum Distribution Rules.

11.9

11.10 Retirement Account. The term "Retirement Account" means a Tax-Advantaged Account that is subject to the Minimum Distribution Rules.

11.11 See-Through Trust. The term "See-Through Trust" has the meaning set forth in Section 5.3(b)(iii)(B).

11.12 Tax-Advantaged Account. The term "Tax-Advantaged Account" means any plan, contract, or other arrangement (other than a life insurance contract) that is allowed under the Internal Revenue Code to accumulate any part of its income in a tax-advantaged manner (e.g., income tax-deferred or income tax free) for the benefit of an owner, beneficiary, or successor, and includes a qualified or non-qualified annuity, a deferred compensation plan, or a retirement or individual retirement account arrangement established under Code Section 401, 403, 408, 408A, or 457. A plan account or arrangement that is otherwise a "Tax-Advantaged Account" and that owns one or more life insurance contracts among its assets is a "Tax-Advantaged Account." A plan, contract, or other arrangement that is reasonably believed to qualify for tax-advantaged treatment under the Internal Revenue Code is a "Tax-Advantaged Account" even if it is subsequently determined it did not so qualify.

[SIGNATURE PAGE FOLLOWS]

XVI. SAMPLE FORM: Alan and Alice Accumulation Revocable Trust

DECLARATION ESTABLISHING THE

ALAN AND ALICE ACCUMULATION REVOCABLE TRUST

HENDERSON CAVERLY PUM & TRYTTEN LLP
301 N. LAKE AVENUE, SUITE 203
PASADENA, CALIFORNIA 91101
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Sample Form – Accumulation

DECLARATION ESTABLISHING THE ALAN AND ALICE ACCUMULATION REVOCABLE TRUST

ALAN ACCUMULATION and ALICE ACCUMULATION ("Settlors" or collectively the "Trustee" as the context requires), hereby declare that they hold in trust, as Trustee, the property described as the trust estate.

12. Introductory Provisions.

13. Amendment, Revocation, and Personal Powers.

14. Distribution of Principal and Income During Lifetime of Both Settlors.

15. Division and Distribution at First Settlor's Death.

16. Division and Distribution at Surviving Settlor's Death.

16.1 [Reserved]

16.2 Gift of Tangible Personal Property.

16.3 Distribution of Residual Property. Upon the death of the Surviving Settlor, the Trustee shall allocate and distribute the balance of the property passing pursuant to this Section 5 ("Residual Property"), including any items of Tangible Personal Property or proceeds therefrom added to the Residual Property pursuant to Section 5.1, as follows:

(a) If one or more of the Settlors' descendants are then living, the Trustee shall divide the Residual Property in such manner as will create, in the aggregate, separate equal shares consisting of one share for each then living child of the Settlors and one share for each then deceased child of the Settlors who has descendants then living. Each share set aside for a deceased child of the Settlors who has descendants then living shall be further divided into shares for said descendants on the principle of representation. Each share so created for a child or more remote descendant of the Settlors shall be applied to create or augment a separate Descendant's Trust to be held and distributed for his or her benefit as provided in Section 5.3 (each is referred to as the "Primary Beneficiary" of his or her Descendant's Trust).

(b) If no descendants of the Settlors are then living, the Trustee shall instead allocate and distribute the Residual Property as provided in Section 5.4.

16.4 Descendant's Trusts. The Descendant's Trust for a Primary Beneficiary will be held, administered and distributed pursuant to this Section 5.34. Each such Descendant's Trust created for the benefit of a Primary Beneficiary may be referred to as the "[*Name of Primary Beneficiary*] Descendant's Trust." If the Descendant's Trust is divided into separate trusts pursuant to Section 10.1 or otherwise, all references in this instrument to such "Descendant's Trust" shall be deemed to refer to all such separate trusts unless otherwise indicated.

(a) **Distribution of Income and Principal**. Subject to Section 5.3(b), the income and principal of the Descendant's Trust shall be held, administered and distributed as follows:

(i) The Trustee, in the Trustee's discretion, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Trust as the Trustee, in the Trustee's discretion, may determine to be necessary for the Primary Beneficiary's health, education and support.

(ii) Additionally, the Trustee, other than an Interested Person, may distribute to or for the benefit of the Primary Beneficiary as much of the net income and, if insufficient, the principal of the Descendant's Trust as such Trustee deems advisable, in such Trustee's sole discretion.

(iii) Any Officer authorized to make distributions under this Section 16.4 may consider the Primary Beneficiary's other income or resources known to such Officer, including resources held in other trusts for the benefit of the Primary Beneficiary, the Primary Beneficiary's ability to obtain gainful employment, the obligations of others to support the Primary Beneficiary, and any benefits of income tax deferral that can be accomplished by accumulating the Primary Beneficiary's Tax-Advantaged Account assets.

(iv) Any income not so distributed shall be added to principal.

(v) The Settlors intend that any Officer determining whether to make distributions to the Primary Beneficiary consider the Primary Beneficiary's interests to be the primary concern, and the interests of any other beneficiary as subordinate to this purpose.

(b) **DB Eligible Retirement Account Interests; DB Trust**. The Settlors intend that the Descendant's Trust qualify as a DB Trust in order to defer distributions from each DB Eligible Retirement Account Interest as much as possible. (The Settlors do not necessarily intend that the Descendant's Trust qualify as a Conduit Trust, but they have provided the Trust Protector with the discretionary authority to so qualify the trust.) If the Descendant's Trust holds a DB Eligible Retirement Account

Interest, the provisions of this Section 5.4(b) shall apply to that DB Eligible Retirement Account Interest, including any distributions therefrom that are accumulated in the trust.

(i) **Distributions, Appointments, and Allocations of DB Eligible Retirement Account Interests**.

(A) No DB Eligible Retirement Account Interest, including any distributions therefrom that are accumulated in the trust, may be distributed to any Disqualified Recipient or to any trust other than a DB Trust, even if such distribution is otherwise authorized under Section 16.4 or any other provision of this instrument.

(B) No DB Eligible Retirement Account Interest, including any distributions therefrom that are accumulated in the trust, may be appointed to or for the benefit of any Disqualified Recipient, even if such appointment is otherwise authorized under Section 16.4(c), Section 16.4(d), or any other provision of this instrument.

(1) Any such appointments specified in an exercise of any power of appointment under Section 16.4(c) or Section 16.4(d) shall be ineffective, but do not necessarily cause the balance of such exercise to be an invalid exercise.

(2) The "Limited Portion" referred to in Section 16.5 shall not include any DB Eligible Retirement Account Interests, including any distributions therefrom that are accumulated in the trust.

(C) Any allocation or distribution of a DB Eligible Retirement Account Interest, including any distributions therefrom that are accumulated in the trust, arising under Section 16.5 shall be interpreted and carried out by excluding each Disqualified Recipient.

(D) The Trustee shall either account separately or maintain separate shares or trusts in order to keep track of the source and amount of each DB Eligible Retirement Account Interest, including any distributions therefrom that are accumulated in the trust.

(ii) **Prohibition Against Certain Appointments, Amendments, Modifications, Decantings, or Terminations**. Notwithstanding any other provision of this instrument or of applicable law, any power to combine, divide, appoint, amend, modify, decant, or terminate the Descendant's Trust may not be exercised (i) after the Determination Date applicable to a DB Eligible Retirement Account in which the trust has an interest in such a way that would cause any portion of that DB Eligible Retirement Account Interest, including any distributions therefrom that are accumulated in the trust, to be made available to or for the benefit of any Disqualified Recipient, and (ii) at any time before or after the Determination Date, if the Descendant's Trust qualifies as an Applicable Multi-Beneficiary Trust under Code Section 401(a)(9)(H)(v) with respect to a DB Eligible Retirement Account in which the trust has an interest in such a way that would cause such trust to fail to so qualify. If a new share or trust arises from a combination, division, appointment, amendment, modification, or decanting of the Descendant's Trust that is permitted under this Section, the new trust shall be deemed to have satisfied the requirements of Section 5.3(b)(iii)(A)(2) with respect to the determination of its DB Eligible Retirement Account Interests.

(iii) **Definitions of Retirement Related Terms**.

(A) **DB Eligible Retirement Account Interest.** The term "DB Eligible Retirement Account Interest" means, with respect to a trust, any of the trust's Retirement Account interests that satisfy the following three conditions:

(1) The Retirement Account interest arose by reason of the death of the Participant of the Retirement Account;

(2) The trust was designated as death beneficiary of the Retirement Account interest or has a beneficial interest in another trust that is not a Conduit Trust with respect to the Retirement Account interest and that was designated as death beneficiary of the Retirement Account interest; and

(3) If it is assumed that the trust satisfies the necessary requirements to be a DB Trust with respect to the Retirement Account interest, even if it does not so qualify, and if it is assumed that the "Separate Account Rule" applies to the portion of the Retirement Account interest designated to the trust, even if in fact this rule does not apply, there is no other impediment, such as for example a restriction under the Retirement Account interest's governing documents or a change in the law, that would prevent the trust from qualifying for either the ten year rule or the life expectancy rule for determining Required Minimum Distributions for the Retirement Account after the Participant's death, as respectively provided in Code Sections 401(a)(H)(i) and (ii).

(B) **See-Through Trust**. The term "See-Through Trust" means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that will satisfy the requirements of Treasury Regulations Section 1.401(a)(9)-4 A-5 so that the beneficiaries of the trust with respect to the Retirement Account interest, and not the trust itself, will be treated as having been designated by the Participant as beneficiaries of the Retirement Account interest, assuming the trust has complied or will comply with the documentation requirement described in Treasury Regulations Section 1.401(a)(9)-4 A-5(b)(4).

(C) **Conduit Trust.** The term "Conduit Trust" means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that is a See-Through Trust with respect to that Retirement Account interest and that also satisfies the requirements described in Treasury Regulations Section 1.401(a)(9)-5 A-7(c)(3) Example 2 so that the trust's sole current beneficiary with respect to the Retirement Account will be treated as the sole "Designated Beneficiary" of the Retirement Account interest for purposes of that regulation.

(D) **DB Trust.** The term "DB Trust" means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that is a See-Through Trust with respect to that Retirement Account interest and that has no Disqualified Recipients as beneficiaries other than those who may be disregarded under the Minimum Distribution Rules. For purposes of this determination, if a beneficiary of the trust is another trust, the beneficiaries of the other trust may be treated as if they are beneficiaries of the trust at issue, and not the other trust itself, in the manner provided in Treasury Regulations Section 1.401(a)(9)-4 A-5(d), assuming the other trust has complied or will comply with the documentation requirement described in Treasury Regulations Section 1.401(a)(9)-4 A-5(b)(4).

(E) **Qualified Recipient**. The term "Qualified Recipient" means a person who is an individual. ***[Alternate Language if Age Restriction is Intended:*** **… means a person who is an individual born on or after January 1, _____.*]***

(F) **Disqualified Recipient**. The term "Disqualified Recipient" means a person who is not a Qualified Recipient.

(c) **Lifetime Power to Withdraw GST Non-Exempt Retirement Assets With Consent of Trust Protector**. With respect to a GST Non-Exempt Descendant's Trust, the Primary Beneficiary may direct the Trustee of such trust to distribute to the Primary Beneficiary all or any portion of such trust's DB Eligible Retirement Account Interests subject to Section 16.4(b), including any distributions therefrom that are accumulated in the trust, with the advance, written consent of the Trust Protector, which the Trust Protector may grant or not grant in the Trust Protector's sole discretion. *Please refer to Section 18.6(b)(i), which grants the Trust Protector certain powers to modify or eliminate the withdrawal power granted under this Section.*

(d) **Powers of Appointment**. Subject to the limitations set forth in Section 16.4(b), the Primary Beneficiary shall have the following powers of appointment over the Descendant's Trust, each of which is exercisable in the manner provided in Section 10.2:

(i) **Special Power Over Descendant's Trust**. Upon attaining 25 years of age, the Primary Beneficiary shall have the power to appoint the principal and any undistributed income of the Descendant's Trust to pass upon his or her death in favor of any one or more appointees, other than the Primary Beneficiary's creditors, estate, or the creditors of the Primary Beneficiary's estate (said power is referred to as a "Special Power"). The Primary Beneficiary's Special Power under this Section 5.3(c)(i) is intended not to cause any part of the trust to be included in the Primary Beneficiary's gross estate for federal estate tax purposes and shall not be construed as a "general power of appointment" within the meaning of Code Section 2041(b)(1).

(ii) **General Power over Limited Portion of GST Non-Exempt Descendant's Trust**. The Primary Beneficiary (regardless of age) of a GST Non-Exempt Descendant's Trust shall also have the power to appoint the principal and any undistributed income of the Limited Portion (as hereinafter defined) of such trust to pass upon his or her death in favor of the creditors of his or her estate other than any taxing authority (said power is referred to as a “General Power”). The “Limited Portion” of such trust is that portion, if any, for which GST Tax would be payable by reason of the Primary Beneficiary’s death if the Primary Beneficiary did not have the General Power under this Section 5.3(c)(ii) (after taking into account all exemptions, exclusions, deductions and credits other than any GST Tax exemption allocated to such trust by reason of the Primary Beneficiary’s death), without regard to any exercise of a Special Power by the Primary Beneficiary under Section 5.3(c)(i). The Primary Beneficiary’s General Power under this Section 5.3(c)(ii) is intended to cause the Limited Portion of such trust to be included in the Primary Beneficiary’s gross estate for federal estate tax purposes rather than being subject to GST Tax, and shall constitute a “general power of appointment” within the meaning of Code Section 2041(b)(1).

(iii) **Trust Protector’s Power to Alter Powers of Appointment**. Note that Section **Error! Reference source not found.** grants the Trust Protector certain powers to alter, eliminate or reinstate the powers of appointment granted to the Primary Beneficiary under this Section 5.3(c). *(The Settlors included these powers to allow tax planning flexibility.)*

(e) **Death of Primary Beneficiary**. Upon the Primary Beneficiary’s death, the Trustee shall allocate and distribute the remaining assets of the Descendant’s Trust (including such items of property as may pass generally to said trust by reason of the Primary Beneficiary’s death) in such manner as the Primary Beneficiary shall have effectively appointed, if applicable, and shall divide the unappointed balance of the trust into shares on the principle of representation for the then living members of the class of descendants identified earliest in the following list with at least one class member then living:

1ST The deceased Primary Beneficiary’s descendants.
2ND The descendants of the deceased Primary Beneficiary’s closest lineal ancestor who was a descendant of the Settlors.
3RD The descendants of the Settlors.

Any share so established for an individual under this Section 5.3(d) shall be applied to create or augment a Descendant’s Trust to be held and distributed for such individual as provided in this Section 5.3 (each of whom is referred to as the “Primary Beneficiary” of his or her Descendant’s Trust).

If none of the individuals described under this Section 5.3(d) are then living, the Trustee shall allocate and distribute such property as provided in Section 5.4.

16.5 Alternate Distribution. Subject to the limitations set forth in Section 16.4(b),upon the occurrence of the event (the "Event") requiring distribution of any property pursuant to this Section 5.4 ("Remaining Property"), the Trustee shall distribute the Remaining Property as follows:

17. Office of Trustee. The provisions of this Section apply to the office of Trustee.

17.1 Initial Trustee and Successor Trustees.

18. Office of Trust Protector. The provisions of this Section shall apply to the office of Trust Protector. *Please also refer to Section 8 for provisions applicable to all Officers, including the Trust Protector.*

18.1 Establishment of Office of Trust Protector.

18.2 Appointment of Trust Protector.

18.3 Non-Fiduciary Capacity.

18.4 Resignation.

18.5 Compensation.

18.6 Powers and Duties of Trust Protector. In addition to other powers specifically granted to the Trust Protector elsewhere in this instrument, the Trust Protector shall have the following powers, each of which may be exercised in the Trust Protector's sole discretion:

(a) **Powers Regarding Officers and Officer Powers**. The Trust Protector shall have the power:

(b) **Modification Powers**. The Trust Protector shall have the power:

(i) The Trust Protector shall have the power to modify, eliminate, or reinstate the lifetime power of withdrawal granted to a Current Beneficiary under Section, 16.4(c).

(ii) Subject to Section 5.4(b)(ii), to modify the terms of any trust arising hereunder that holds an interest in a Retirement Account prior to the Determination Date associated with that Retirement Account to the extent necessary to (i) cause a trust that is not a See-Through Trust with respect to the Retirement Account interest to qualify as a See-Through Trust with respect to that interest, or vice versa, (ii) to cause a trust that is not a DB Trust with respect to the Retirement Account interest to qualify as a DB Trust, or vice versa, and (iii) to cause a trust that is not a Conduit Trust with respect to the Retirement Account interest to qualify as a Conduit Trust, or vice versa. In particular, the Trust Protector may modify the terms of a trust arising hereunder to revise the meanings of Qualified Recipient and Disqualified Recipient to, for example, add an age limit to individuals who count as Qualified Recipients and provide that individuals older than such age limit are Disqualified Recipients.

(c) **Restrictions on Trust Protector Powers**.

19. Powers of the Trustee.

19.1

19.2 .

19.3 Powers Over Retirement Accounts. In addition to the powers granted to the Trustee by law or under other provisions of this instrument and subject to any applicable limitations set forth in Section 5.4(b), the Trustee is authorized to exercise any power or right over a Retirement Account that is available to the Trustee as beneficiary or successor owner of such Retirement Account, including powers to (a) take distributions, make elections, or otherwise select payment options, (b) direct investments, and (c) direct tax-free rollovers from one Retirement Account to another (and to establish any new Retirement Account that is to receive the rollover, if applicable).

20. Payment of Debts, Expenses and Taxes. This Section 9 shall govern the payment of debts, expenses and taxes upon the death of either Settlor.

20.1 Payment of Debts and Expenses.

20.2 General Rule for Payment and Apportionment of Death Taxes. Except as provided in Section 9.3 or elsewhere in this instrument, any Death Taxes arising by reason of a Settlor’s death may be paid by the Trustee and charged to, prorated among, or recovered in the manner provided by California and federal law in effect at the time of such Settlor’s death (not to the exclusion of laws of other jurisdictions when applicable).

20.3 Exceptions and Clarifications to Payment of Debts, Expenses and Death Taxes. The following exceptions and clarifications shall modify the rules provided in Sections 9.1 and 9.2:

(a) **Gifts Indicated as Free of Death Tax**.

(b) **Tangible Personal Property**.

(c) **Tax-Advantaged Accounts or Other Assets Passing Outside Trust**. If the Trustee determines that all or any portion of a debt of a Settlor, expense of administration, or Death Tax is properly chargeable, by reason of a Settlor's death, to a beneficiary's interest in property not passing under any trust hereunder (including a Tax-Advantaged Account), the Trustee may in its sole discretion pay all or part of said amount by applying any combination the Trustee determines in its sole discretion of the following assets (and any such payment shall be credited against the amount chargeable to said interest in property not passing under any trust hereunder): (i) assets the beneficiary offers to provide for this purpose; or (ii) assets the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in a Settlor's estate) from assets passing under any one or more trusts hereunder to or for the benefit of the beneficiary as determined by the Trustee in its sole discretion. Each Settlor requests, but does not require, that the Trustee apply assets other than Tax-Advantaged Account assets to pay said amount when doing so reduces the need to take a distribution from a Tax-Advantaged Account earlier than would otherwise be necessary, thus enhancing the beneficiary's ability to benefit from income tax-deferred compounding. The Trustee's powers provided under this Section 9.3(c) are in addition to, and not in place of, other powers provided the Trustee under this or other instruments, or under applicable law.

(d) **Settlors' Retirement Accounts Passing Under Trust Instrument**. If the Trustee determines that all or any portion of a debt of a Settlor, expense of administration, or Death Tax is properly chargeable, by reason of a Settlor's death, to an interest in a Settlor's Retirement Account passing under any trust hereunder, the Trustee shall pay said amount using one or more of the following approaches as the Trustee determines in its sole discretion (and any such payment shall be credited against the amount chargeable to that Retirement Account interest): (i) assets from that Retirement Account interest if paid prior to the Determination Date (as hereinafter defined); (ii) other assets allocable to or for the benefit of substantially the same beneficiaries as that Retirement Account interest as the Trustee selects for this purpose (other than assets qualifying for the charitable or marital deductions from federal estate tax in a Settlor's estate); or (iii) assets provided to the Trustee by some or all of those beneficiaries for this purpose. The Trustee may pay said amount using assets from that Retirement Account interest paid after the Determination Date only to the extent that payment with other assets is not possible, taking into account the overall purposes of the trust(s) involved. Each Settlor requests that the Trustee apply assets other than interests in a Settlor's Retirement Account to pay said amounts when doing so reduces the need to take a distribution from that Retirement Account interest earlier than would otherwise be necessary, thus enhancing the ability to benefit from income tax-deferred compounding.

21. General Administrative Provisions. The following general provisions shall apply to each trust created by this instrument.

21.1 Delivery.

21.2 Notice to Minors and Others Unable to Act.

21.3 Trusts' Names.

21.4 Notice to Trustee.

21.5 Spendthrift.

21.6 Division Into Separate Trusts. The Trustee of a trust hereunder may divide the trust into two or more separate trusts having the same terms and conditions as the original trust in order to accomplish any purpose the Trustee determines is consistent with the purpose of the trust. For example, but not by way of limitation, a trust may be divided:

(a) To enable Tax-Advantaged Accounts to be segregated from other trust assets;

(b) To avoid holding one or more Retirement Account interests with other trust assets; provided, however, that distributions from a Retirement Account interest that are accumulated in the trust stay with that Retirement Account interest;

(c) To avoid holding GST Exempt and GST Non-Exempt assets together in the same trust; and

(d) To avoid jeopardizing the S corporation status of any corporation seeking to maintain S corporation status as to which the trust is a shareholder.

21.7 Trust as Beneficiary of Retirement Account. The Settlors intend that each trust hereunder that owns an interest in a Retirement Account benefit from the maximum extended deferral period under the Minimum Distribution Rules that is available based upon the terms of such trust. Accordingly, the following shall apply:

(a) The Trustee of a trust so designated shall, within the time limit prescribed under the Minimum Distribution Rules, deliver documentation required under said rules to the respective administrators and custodians of each Retirement Account.

(b) When the Trustee makes a distribution or an allocation of an interest in a Retirement Account to or for the benefit of a beneficiary of a trust hereunder, the Trustee is to assign all of the Trustee's interests in and powers over said Retirement Account interest (e.g., to direct investments and withdrawals) to said individual or trustee, as the case may be, and nothing under this instrument shall be interpreted as requiring the Trustee to arrange for the assets held in the Retirement Account to be withdrawn from said Retirement Account. The Settlors specifically intend that any such distribution or allocation of a Retirement Account shall be handled in a manner that (i) results in zero, or the minimum possible amount of income tax payable by either the trust, said individual, or said other trust, and (ii) results in no change, or the minimum possible amount of change, to the deferral period that applies to the Retirement Account.

(c) The administrators, custodians, or other fiduciaries of the respective Retirement Accounts shall incur no liability to the trust or to any of its beneficiaries for acting upon the written instruction of the Trustee pursuant to this Section 10.2.

22. Definitions. The following provisions apply to each trust established by this instrument:

22.1

22.2

22.3 Determination Date. The term "Determination Date" means, with respect to a deceased Participant's Retirement Account, the thirtieth day of September of the calendar year following the calendar year of the death of that Participant, or such other date as may be provided for determining post-death designated beneficiaries under the Minimum Distribution Rules (e.g., Treasury Regulations Section 1.401(a)(9)-4).

22.4

22.5 Minimum Distribution Rules. The term "Minimum Distribution Rules" means the incidental death benefit requirements of Code Section 401(a) and the minimum distribution rules of Code Section 401(a)(9) (or similar rules applicable to certain types of Retirement Accounts, including the rules of Code Sections 408(a)(6) and 408(b)(3) that apply to IRAs, and the special rules of Code Section 408A(c)(5) that apply to Roth IRAs).

22.6 Participant. The term "Participant" means the employee, plan participant, or account owner of a Retirement Account as those terms are commonly used under the Minimum Distribution Rules.

22.7

22.8 Retirement Account. The term "Retirement Account" means a Tax-Advantaged Account that is subject to the Minimum Distribution Rules.

22.9 See-Through Trust. The term "See-Through Trust" means, with respect to a Retirement Account interest that arose by reason of the death of the Participant, a trust that will satisfy the requirements of Treasury Regulations Section 1.401(a)(9)-4 A-5 so that the beneficiaries of the trust with respect to the Retirement Account interest, and not the trust itself, will be treated as having been designated by the Participant as beneficiaries of the Retirement Account interest, assuming the trust has complied or will comply with the documentation requirement described in Treasury Regulations Section 1.401(a)(9)-4 A-5(b)(4).

22.10 Tax-Advantaged Account. The term “Tax-Advantaged Account” means any plan, contract, or other arrangement (other than a life insurance contract) that is allowed under the Internal Revenue Code to accumulate any part of its income in a tax-advantaged manner (e.g., income tax-deferred or income tax free) for the benefit of an owner, beneficiary, or successor, and includes a qualified or non-qualified annuity, a deferred compensation plan, or a retirement or individual retirement account arrangement established under Code Section 401, 403, 408, 408A, or 457. A plan account or arrangement that is otherwise a “Tax-Advantaged Account” and that owns one or more life insurance contracts among its assets is a “Tax-Advantaged Account.” A plan, contract, or other arrangement that is reasonably believed to qualify for tax-advantaged treatment under the Internal Revenue Code is a “Tax-Advantaged Account” even if it is subsequently determined it did not so qualify.

[SIGNATURE PAGE FOLLOWS]

Delaware Tax Institute
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Estate Planning for Retirement Plans after SECURE Act

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SECURE Act

Impact on Required Minimum Distribution Rules

72 is the "New 70 ½"

- RBD: April 1st after year in which P
  - Attains 72 or
  - Later retirement if non-5% owner
- Effective: P attains age 70 ½ after 12/31/19
- Act, § 114

IRA Contributions

- Age 70 ½ limit on IRA contributions repealed
- Other requirements still apply:
  - Lesser of $6,000 or "compensation" (add $1,000 if age 50)
  - Phase-out if covered by employer-sponsored plan
- Effective: Years after 2019
- Act, § 107(a)

72 is **NOT** the "New 70 ½"

- Qualified Charitable Distributions ("QCDs")
- Age 70 ½ remains minimum age for QCDs
- $100k QCD income exclusion is reduced by:
  - Aggregate post-70 ½ deductible IRA contributions (not previously recaptured)
  - Effective: contributions/distributions after 2019
- Act, Section 107(b)

New post-death RMD Rules

- New rules grafted onto the existing rules
- Best way to understand the rules:
  - First master existing rules: Code, Regs, rulings, etc.
  - Next, refer to Act to see how new rules are grafted onto existing rules
  - Read carefully: Act § 401 amends IRC § 401(a)(9)
- ACTEC Task Force submitted Two-Part comments to Treasury in July, 2020:

https://www.actec.org/assets/1/6/7-14-20_ACTEC-Request_for_Guidance_from_Treasury_on_Section_401_of_the_SECURE_Act-Part_1.pdf

https://www.actec.org/assets/1/6/2020-07-29_ACTEC_Request_for_Guidance_from_Treasury_Regarding_Section_401_of_the_SECURE_Act,__Part_2.pdf

Designated Beneficiary ("DB")

- DB is a key concept under existing rules:
  - Is an **individual** who is
  - Designated as a beneficiary under the plan
  - Either by the terms of the plan or
  - By an affirmative election by the employee
  - Regs. § 1.401(a)(9)-4, A-1

Scope of New Post-Death RMD Rules

- Act § 401 generally applies to:
  - DBs of
  - Defined contribution plans and IRAs (including Roth IRAs)
- Non-DB rules did not change:
  - Still five-year rule if death prior to RBD, and
  - Still “ghost life expectancy” if death on or after RBD
- Spousal rollover rules did not change

DBs Use 10-year rule

- DBs use “10-year rule” instead of LE method
  - Like the 5-year rule, all due at end of period (not year by year)
  - Is end of period 12/31 (instead of date of death)?
  - If death on or after RBD, does “ghost life expectancy” still apply if longer?

Eligible Designated Beneficiaries

- Certain Eligible DBs (EDBs) use LE method:
  - P’s Spouse
  - P’s minor child
  - Disabled individual
  - Chronically ill individual
  - Individual less then 10 years younger than P
- EDB status determined at P’s death

EDBs Switch to 10-year period

- EDBs use LE method while living and switch to 10-year distribution period at death, except
- P’s minor child switches at majority (or death if earlier)
- EDB status determined at P’s death

What is Majority?

IRC § 401(a)(9)(F) invokes Treas. Reg. §1.401(a)(9)-6, A-15:

- "…(A) child may be treated as having not reached the age of majority if the child has not completed a specified course of education and is under the age of 26."
  - "Age of majority" is not defined, but presumably refers to applicable State law
  - "Specified course of education" is not defined
- "In addition, a child who is disabled within the meaning of section 72(m)(7) when the child reaches the age of majority may be treated as having not reached the age of majority so long as the child continues to be disabled."

See-Through Trust Rules

- If trust meets four threshold requirements
- Look through trust as if trust benes designated
- Treat benes as a group (no separate accounts)
- Use shortest life (or non-DB if there is one)
- Disregard “mere potential successors”
- Conduit trust: Disregard all but current bene

See-Through Trust Rules (con’d)

- Can Conduit Trust have more than one current bene?
  - Not safe: deviates from safe harbor in Regs.
- Remember: Conduit provision applies to all plan distributions, not just RMDs

When are New Post-Death RMD Rules Effective?

- Generally if P dies after December 31, 2019
- December 31, 2021 if government plan defined in IRC § 414(d)
- Somewhere in between if collective-bargained plan

The Fine Print…

- Retroactive “revenue raiser” hidden in the Effective Date provisions:
  - If P dies before effective date, and
  - P’s DB dies on or after effective date, then
  - LE method ceases and 10-year period applies
  - Questions of interpretation, especially for trusts with multiple beneficiaries

Economics of Stretch-Out Before and After SECURE Act

For DBs Before SECURE Act (run in 2008)

Jones & Son: "Base Case"							
IRA Beginning Balance:	$1,000,000						
Deferral Period Begins:	2008	Ends:	2057	# of Years:	50		
IRA Owner Dies:	2017	IRA Owner's Age at Death:	84	Child's Age, Year After Death:	44		
IRA Distribution Strategy:	(1) Distribute Entire Plan in 2008 (Base Case)	(2) Distribute on Death Bed	(3) Distribute Just After Death	(4) Stretch Out; Plan Bears Pro Rata Death Tax	(5) Stretch Out; Plan Bears Minimum Death Tax	(6) Stretch Out to "Accumulation" Trust; Plan Bears Minimum Death Tax	(7) Roth IRA Conversion Stretch Out; Plan Bears Minimum Death Tax
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	1,562,821	1,692,979	1,459,904	2,333,117	2,890,582	2,847,579	5,828,970
% Comparison of "Additional After Tax Assets"	100%	108%	93%	149%	185%	182%	373%

For EDBs After SECURE Act (run in 2020)

Jones & Son 2020: "Base Case for EDB"							
IRA Beginning Balance:		$2,000,000					
Deferral Period Begins:		2021	Ends:	2070	# of Years:	50	
IRA Owner Dies:		2030	IRA Owner's Age at Death:	84	Child's Age 1 Year Later:	44	
IRA Distribution Strategy:	(1) Distribute Entire Plan in 2021 (Base Case)	(2) Distribute on Death Bed	(3) Distribute Just After Death	(4) Stretch Out for EDB; Plan Bears Pro Rata Death Tax	(5) Stretch Out for EDB; Plan Bears Minimum Death Tax	(6) Stretch Out to EDB in Accumulation Trust; Plan Bears Minimum Death Tax	(7) Roth IRA Conversion Stretch Out for EDB; Plan Bears Minimum Death Tax
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	2,749,373	3,210,662	3,216,023	4,446,143	4,578,782	4,702,073	8,478,764
% Comparison of "Additional After Tax Assets"	100%	117%	117%	162%	167%	171%	308%

Compare EDB’s Date of Death (2020)

Jones & Son 2020: Vary EDB's Date of Death - Backload Distributions in 10 Year Period							
IRA Beginning Balance:	$2,000,000						
Deferral Period Begins:	2021	Ends:	2079	# of Years:	59		
IRA Owner Dies:	2030	IRA Owner's Age at Death:	84	Child's Age 1 Year Later:	44		
IRA Distribution Strategy:	(1) Distribute Entire Plan in 2021 (Base Case)	(2) Stretch Out for EDB; EDB dies at age 58	(3) Stretch Out for EDB; EDB dies at age 63	(4) Stretch Out for EDB; EDB dies at age 68	(5) Stretch Out for EDB; EDB dies at age 73	(6) Stretch Out for EDB; EDB dies at age 78	(7) Stretch Out for EDB; EDB dies at age 83
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	3,309,466	5,043,744	5,325,571	5,528,444	5,653,328	5,683,816	5,542,773
% Comparison of "Additional After Tax Assets"	100%	152%	161%	167%	171%	172%	167%

Different Rules for non-DB, DB, and EDB (2020)

Jones & Son 2020: SECURE Act Variations - Backload Pmts Over 10 Yr Period							
IRA Beginning Balance:	$2,000,000						
Deferral Period Begins:	2021	Ends:	2100	# of Years:	80		
IRA Owner Dies:	2030	IRA Owner's Age at Death:	84	Child's Age 1 Year Later:	14		
IRA Distribution Strategy:	(1) Distribute Entire Plan in 2021 (Base Case)	(2) Non DB, "Ghost" LE	(3) DB but not EDB	(4) Minor EDB, Majority at 18	(5) Minor EDB, Majority at 26	(6) Stretch Out to EDB, EDB dies at age 83	(7) Roth IRA Conversion for EDB, EDB dies at age 83
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	5,139,505	6,368,379	6,576,331	6,957,599	7,795,455	12,405,345	28,233,570
% Comparison of "Additional After Tax Assets"	100%	124%	128%	135%	152%	241%	549%

Lower Yield: Non-DB, DB, and EDB (2020)

Jones & Son 2020: SECURE Act Variations - Backload 10 Yr Pmts - Lower Yield							
IRA Beginning Balance:	$2,000,000						
Deferral Period Begins:	2021	Ends:	2100	# of Years:	80		
IRA Owner Dies:	2030	IRA Owner's Age at Death:	84	Child's Age 1 Year Later:	14		
IRA Distribution Strategy:	(1) Distribute Entire Plan in 2021 (Base Case)	(2) Non DB, "Ghost" LE	(3) DB but not EDB	(4) Minor EDB, Majority at 18	(5) Minor EDB, Majority at 26	(6) Stretch Out to EDB, EDB dies at age 83	(7) Roth IRA Conversion for EDB, EDB dies at age 83
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	889,203	984,658	1,024,446	1,070,871	1,127,353	1,301,742	2,187,458
% Comparison of "Additional After Tax Assets"	100%	111%	115%	120%	127%	146%	246%

Roth IRAs/Low Yield: Non-DB, DB, and EDB (2020)

Jones & Son 2020: SECURE Act Variations - Backload 10 Yr Pmts - Lower Yield - Roth IRAs							
IRA Beginning Balance:	$2,000,000						
Deferral Period Begins:	2021	Ends:	2100	# of Years:	80		
IRA Owner Dies:	2030	IRA Owner's Age at Death:	84	Child's Age 1 Year Later:	14		
IRA Distribution Strategy:	(1) Distribute Entire Plan in 2021 (Base Case)	(2) Non DB, "Ghost" LE	(3) DB but not EDB	(4) Minor EDB, Majority at 18	(5) Minor EDB, Majority at 26	(6) Stretch Out to EDB, EDB dies at age 83	(7) Roth IRA Conversion for EDB, EDB dies at age 83
"Additional After Tax Assets" at End of Deferral Period for Each IRA Scenario (in Today's Dollars)	889,203	1,079,629	1,213,926	1,329,454	1,517,882	2,187,458	2,187,458
% Comparison of "Additional After Tax Assets"	100%	121%	137%	150%	171%	246%	246%

Planning for Healthy Children

Planning for Paula’s Adult Child

- Paula is a single parent
- With one healthy, adult child, Pauline
- Paula owns IRA and other assets, total $3 mm
- Paula wants advice how to designate IRA for Pauline, and
- Which options prevent Pauline from “receiving too much, too soon”

Paula’s Options

1. Designate outright: 10-year rule
    - 10-year rule applies for RMDs
    - Distributions taxed at individual tax rates
    - No limit on recipients at Pauline’s death

Paula’s Options (con’d)

2. Designate conduit trust:
   - Qualify as STT – Pauline is sole DB
   - Other trust benes can be non-DBs
   - 10-year rule applies for RMDs
   - Distributions taxed at individual rates
   - No limit on recipients of power of appointment

Paula’s Options (con’d)

3. Designate accumulation trust:
   - Qualify as STT and limit trust benes to DBs
   - Older DBs not a problem
   - Distributions/accumulations per Paula’s wishes
   - 10-year rule for RMDs
   - Distributions taxed at compressed trust rates if accumulated, or individual rates if distributed
   - Limit power of appointment recipients to DBs

Paula's Options (con'd)

4. Designate Non-DB accumulation trust:
   – Maybe Paula wants term that won't qualify as DB
   – For example, allow charitable recipients of LPOA
   – Benefit of DB status not always worth the effort (10-year rule vs. 5-year rule/"ghost LE")
   – But if no DBs at death, post-mortem modification won't be possible for RMD purposes

Paula’s Options (con’d)

- Can Paula “beat” the new 10-year rule?
  - Not likely.
  - The Act made her IRA less valuable to Pauline.

Paula’s Options (con’d)

6. Designate a Charitable Remainder Trust
   - CRT is non-DB; IRA pays out quickly
   - CRT pays no tax on IRA distributions
   - CRT distributions to Pauline simulate stretch
   - Pauline pays tax at individual rates
   - Remainder passes to charity at Pauline’s death

Paula's Options (con'd)

- Considerations of Charitable Remainder Trust
  - Distributions can be annuity, unitrust, or net income unitrust with or without makeup
  - Once set, distributions are rigid and cannot be adjusted even if Pauline is in need
  - Actuarial value of remainder must be at least 10%
  - Complicated to draft and administer

Paula’s Options (con’d)

- CRT Takeaways:
  - Don’t think of CRT as a way to “beat” the Act
  - But CRT could be great option if client has charitable intent, Pauline is young, and other assets also available to provide financial flexibility for Pauline

Planning for Don’s Three Adult Children

- Same facts as Paula, except
- Don has three healthy, adult children:
  - Frank
  - Sam, and
  - Tom

Don’s Options

- Outright to each
- Conduit trust for each
- Accumulation trust for each
- Non-DB accumulation trust for each
- “Mix and Match” for each
- Accumulation “pot” trust for all 3
- Non-DB accumulation ”pot” trust for all 3

Don’s Options (con’d)

- “Separate account rule” under existing law
  - For each DB to determine RMDs independently
  - Each account created per plan or DBD (not trust)
- Should Don care about separate account rule?
  - May not matter if 10-year rule applies to all three
  - But still recommended to preserve flexibility
  - Example: Child is EDB by time of Don’s death

Planning for Healthy, Minor Children

Planning for Amy’s minor child

- Same facts as Paula, except
- Amy has one minor child, Andrew, age 3
- Andrew is EDB:
  - LE method until majority
  - Majority occurs between ages 18 – 26, or later if disabled
  - Switch to 10-year period at majority

Amy’s Options

1. Outright:
   – May require legal guardian
   – Could use UTMA, suggest not past age 21
   – RMDs per LE method for minor EDB
   – Taxed at individual rates
   – Not ideal for 3-year old

Amy’s Options

2. Conduit trust:
   - RMDs per LE method for minor EDB
   - Switch to 10-year period at majority
   - Taxed at individual rates
   - Still not ideal for 3-year old
   - At least protects up to majority plus ten-year rule

Amy's Options

3. Accumulation trust:
   - What is rule for RMDs when EDB is not sole DB?
   - Worst case: No LE method and 10-year rule
   - Best case: LE until majority if EDB is oldest DB
   - Don't assume LE method pending guidance
   - Distributions taxed at compressed trust rates if accumulated, or individual rates if distributed
   - *(Special disabled/chronically ill rules covered later)*

Amy’s Options (con’d)

- Amy must choose between:
  - No accumulation if conduit trust, or
  - Potential loss of “LE method until majority”
  - Compressed tax rates apply to accumulations

Minors and EDB Status – Calculations

How much does it matter for a $1 million IRA?

Age	Life Exp.	RMD as %	RMD on $1 mm
0	82.4	1.21%	$12,136
10	72.8	1.37%	$13,736
18	65.0	1.54%	$15,384
26	57.2	1.75%	$17,482

IF minor loses EDB status – RMD of 100% over ten years

Planning for Bob’s three minor children

- Same facts as Paula and Amy, except
- Bob has three minor children:
  - Huey, age 8
  - Dewey, age 5, and
  - Louie, age 3

Planning for Disabled or Chronically Ill Eligible Designated Beneficiaries

Also known as – “D/CIDBs”

What is Disabled?

- SECURE Act cites IRC § 72(m)(7)/Reg 1.72-17(f) to define "disabled" as:

"…unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment – which can be expected to result in death or to be of long-continued and indefinite duration."

- Social Security definition is very similar
- Difficult to apply this definition to **minors** who are too young to work
- Unclear from Code and regs which health care professionals may certify

What is Chronically Ill?

- SECURE Act cites IRC § 7702B(c)(2) (long-term care contracts) to define "chronically ill" as:

"…*certified by a licensed health care practitioner as being unable to perform at least 2 activities of daily living for a period of at least 90 days due to a loss of functional capacity…. …or requiring substantial supervision to protect such individual from threats to health and safety due to severe cognitive impairment.*"

What is Chronically Ill (con’d)

- SECURE Act further requires certification that illness is “indefinite” and “reasonably expected to be lengthy in nature.” IRC § 401(a)(9)(E)(ii)(IV)
- Certification is made by a “licensed health care practitioner,” who is:
  - A physician, as defined in § 1861(r)(1) of the Social Security Act;
  - A registered professional nurse or licensed social worker; or
  - Other individual who meets such requirements as may be prescribed by the Secretary
- Definition is possibly even harder to apply to **minors** since it is based on a lack of ability to engage in daily acts of self care for the elderly, and assumes a “loss” of functional capacity that may never have existed.

Planning for Veronica's D/CIDB

Veronica's adult child, Vicki, is a D/CIDB. What are Veronica's options?

1. Outright:
   - Qualifies for EDB exception
   - Distributions taxed at individual rates, but
   - Not practical for D/CIDB

Planning for Veronica’s D/CIDB (con’d)

2. Conduit trust:
   - Look thru and see Vicki as sole D/CIDB
   - Qualifies for EDB exception
   - Distributions taxed at individual rates, but
   - Probably not practical for D/CIDB

Planning for Veronica’s D/CIDB (con’d)

3. Accumulation trust:
   - Look thru and see multiple DBs
   - Not likely to qualify for EDB exception since Vicki is not sole EDB
   - Dilemma – choosing accumulation means giving up LE method?
   - And Vicki will have high financial needs for life
   - What to do?

Help for Disabled and Chronically Ill

At 11th hour Congress recognized the need to do more in the SECURE Act to help disabled and chronically ill DBs who need trusts that accumulate and, in some cases, serve as "special needs trusts."

New provisions were added just before enactment on December 20, 2019.

Applicable Multi-Beneficiary Trusts

Under the Act, a trust qualifies as an Applicable Multi-Beneficiary Trust (AMBT) if:

- The trust has more than one bene,
- STT and all of trust's benes are DBs, and
- At least 1 of the benes is a D/CIDB
- IRC § 401(a)(9)(H)(v)

Applicable Multi-Beneficiary Trusts

Under the Act, two special rules
are provided for AMBTs.

IRC § 401(a)(9)(H)(iv)

AMBTs – 2^{nd} Rule

Proceeding in reverse order, 2^{nd} rule provides:

- If under terms of AMBT no one other than D/CIDB has right to plan until death of all D/CIDBs, then
- AMBT may use the LE method instead of 10-year rule
- Great - but whose life governs? Act is unclear.
- Worst case: LE of oldest DB governs under existing STT rules

AMBTs – 2nd Rule (con’d)

- Best case: LE of oldest D/CIDB?
  - Act states any non-D/CIDB is treated as “a beneficiary of the D/CIDB” at death of such D/CIDB. What does THAT mean?
  - Maybe it means that non-D/CIDBs can be disregarded as long as the D/CIDB is living?
  - This is consistent with what we think Congress intended
  - We won’t know until we have more guidance
- Pending more guidance, use age restriction or other means to limit ages of all trust benes including non-D/CIDBs

AMBTs – 2nd Rule (con'd)

2nd rule is good news even with uncertainty:

Provides roadmap to draft accumulation STT for D/CIDB(s) that uses LE method, not 10-year rule

What about Bob?

Remember Bob, with 3 minor kids?

Dewey is now a D/CIDB. What are Bob's IRA options now?

What if IRA passes entirely for Dewey? IRA could be designated 100% to trust for Dewey that:

- Is a STT and an AMBT, and
- Is an accumulation trust with Dewey as sole current beneficiary (can be SNT if necessary)

What about Bob? (con’d)

Trust for Dewey (con’d):

- Use age restriction provisions based on Dewey’s age so no one older than Dewey is counted as a DB?
  - Doing so would exclude Huey as a contingent bene
  - Consider basing age restriction on Huey’s age

What about Bob? (con’d)

If less than 100% of IRA is designated to Dewey’s AMBT:

- The interests for Huey and Louie should arise under DBD so that AMBT has its own account under the separate account rule . . .
- Or maybe not?

AMBTs – 1st Rule

Now let’s cover the 1st rule for AMBTs:

- If under terms of AMBT the AMBT is to be divided immediately on P’s death into separate trusts for each bene
- Each portion of P’s plan interest “payable to” a D/CIDB may use the LE method
- No special rule for any portion of P’s plan interest not payable to a D/CIDB

AMBTs – 1st Rule (con'd)

AMBT divides and D/CIDB receives conduit trust:

- LE method applies using D/CIDB's LE
- Even though otherwise flunks separate account rule
- But a conduit trust may not be best for D/CIDB

AMBTs – 1^{st} Rule (con'd)

AMBT divides and D/CIDB receives accumulation trust:

- LE method applies if trust qualifies as AMBT (2^{nd} rule)
- But whose life? (guidance needed)
- These and other interpretive issues under 1^{st} rule suggest caution is advised pending further guidance
- Safer to use 2^{nd} rule until then if you can

AMBTs – 1^{st} Rule (con’d)

1^{st} rule could be very helpful once we have more guidance, and hopefully 1^{st} rule will:

- Allow designation to 1 AMBT that divides at death into separate trusts for D/CIDB(s) and other DBs
- Provide an exception to the separate account rule
- Allow discretion to make non pro rata division of plan and non-plan assets at the time of division
- If this approach works, safest to design dedicated subtrust as the AMBT that is to be divided, and not the revocable trust

AMBT Additional Comments

- Post-mortem planning generally allowed if
  - Done by September 30 of year following year of death, and
  - All DBs as of September 30 were DBs at death
- Rules for AMBTs require certain provisions be provided “under the terms of the trust”
  - This requirement may not be satisfied if provisions added post-mortem. Further guidance is needed.
  - Does existence of mechanism that allows removal of provisions post-mortem jeopardize qualification as AMBT? Further guidance needed.

AMBT Additional Comments (con’d)

- Considerable guidance is needed on AMBT rules
- Until then, consider whether to include statements of intent in trust documents
- Include savings clause to ensure that decanting or other mechanisms for flexibility do not interfere with qualification as STT or as AMBT
- AMBT or other trust for disabled benes may qualify to deduct higher, “individual” exemption amount as “qualified disability trust” under IRC § 642(b)(2)(C)

The “Forgotten” Beneficiaries

The Forgotten Beneficiaries

- Remember Paula? We need to address who receives her IRA if Pauline doesn't survive her.
- Paula designated an accumulation trust for Pauline and wants her two siblings, Peter and Paul, to receive the IRA in equal shares if Pauline doesn't survive.
- Compare:
  - Door #1: Designate IRA to Pauline's trust and rely on language in trust naming Peter and Paul as alternates?
  - Door #2: Add alternate language in DBD to create separate accounts for Peter and Paul if Pauline doesn't survive?

The Forgotten Beneficiaries (con’d)

- Peter and Paul are EDBs since they are no more than 10 years younger than Paula
- If Paula used Door #2 and designated the separate shares outright or in conduit trusts, Peter and Paul qualify for LE method if Pauline predeceases Paula
- If Paula used Door #1, Peter’s and Paul’s interests arise under a trust that may or may not be a STT:
  - Best case: 10-year rule
  - Worst case: 5-year rule or ghost LE

The Forgotten Beneficiaries (con’d)

- Door #2 is generally best choice.
- Also preserves disclaimer path, which provides valuable post-mortem flexibility
- If Pauline disclaims the uncles receive LE method under Door #2, but not Door #1
- Takeaway:
  - Create separate accounts under DBD for each primary and alternate beneficiary, and
  - Designate each to pass outright or to appropriate subtrust

Planning for Spouses

The Traditional Family

- Ozzie and Harriet have the perfect family, with two loving children
- Harriet wants to leave her IRA to Ozzie and then the children

The Traditional Family (con’d)

- The perfect solution is same as before: Harriet designates Ozzie as primary beneficiary (NOT the revocable trust)
- And Harriet designates children (or trusts for them) as her alternate beneficiaries
  - Same options previously discussed
  - Use DBD to create separate accounts for all

The Traditional Family v2

- Ted and Alice have traditional family with children
- They are over the estate tax threshold
- Alice wants her retirement plan to benefit Ted, then children, but
- Alice worries about Ted’s money mgt. skills

The Traditional Family v2 (con’d)

- Alice designates a trust for Ted that is:
  - Marital QTIP Trust (includes language for IRA to qualify as QTIP property)
  - Designed as a conduit STT, not accumulation STT
- Alice may need to document spousal consent to designate trust instead of spouse:
  - If ERISA plan, federal “waiver and consent” may be needed
  - If Non-ERISA plan is CA community property, CA spousal consent needed

The Traditional Family v2 (con’d)

- Ted is EDB and sole DB of Conduit QTIP Trust
  - May use LE method with Ted’s LE, and
  - May “recalculate” (go back to table each year)
  - If Ted lives too long, conduit distributions may force out too much and leave less for children
  - Distributions taxed at individual rates

The Brady Bunch

- Mike and Carol are happily married
- 2nd marriage for both and each has 3 children from prior marriages
- Each wants to provide for the other, and then his or her own children
- What are their options?

The Brady Bunch (con'd)

- Conduit QTIP Trust: children have to wait; not much left if survivor lives to or beyond LE
- Non-conduit QTIP Trust: Accumulation trust probably uses 10-year rule even if survivor and children are all EDBs
- Any other ideas?

The Brady Bunch (con’d)

- Explore whether survivor receives retirement assets to treat as his/her own, and non-retirement assets go to QTIP?
  - This is often easier in a community property state
- “Rough justice”
  - Spouse splits IRA in 2 portions
  - 1 portion to survivor who can treat as his/her own
  - 1 portion outright or in conduit trusts for children, take advantage of EDB status if possible

Charitable Planning

- Understand client’s charitable intent and if they are interested in lifetime donations
- QCDs during life
- Designate CRT as alternative to 10-year rule?
- Designate charity and leave other assets to kids? If so:
  - Name charity on DBD, name DAF on DBD, or name RT that has specific gift in it?
- Designate charity in exchange for Charitable Gift Annuity for intended bene?

Roth IRAs

- Downgraded from “Amazing Deal” to “Good Deal”
- Start young family members ASAP
- Consider Roth IRA conversion in same year as large charitable or other deduction
- Helpful during owner’s retirement
- Reduces estate tax (income tax paid with pre-estate tax $)
  - Overall benefit depends on state income and death taxes

Excise Tax on Failure to Take RMDs

- 50% excise tax under IRC § 4974
  - Excise tax = 50% of missed RMD for year; excise tax does not "compound"
  - But in last year of 5-year rule and each following year RMD = entire plan and excise tax DOES compound
  - Aggregate excise tax could be many times plan value
- Act did not change § 4974, but will result in many more beneficiaries using the 10-year rule
  - This increased exposure of compounded excise tax will come up more frequently

Drafting Tips – Chris & Carol Conduit Trust

- Architecture: Add conduit and statement of intent to existing dynasty trust, ¶ 5.3(b)
- Applies to all amounts received from plan, not just RMDs – ¶ 5.3(b)(i)(A)
- Distributions to trust beneficiary are net of expenses, and may be made for the benefit of the beneficiary, even though no authority confirms these terms are allowed – ¶ 5.3(b)(i)(A)
- Conduit clause only needed during beneficiary's life – ¶ 5.3(b)(i)(A)
- Limit powers of tax-sensitive trustee – ¶ 5.3(b)(i)(B)
- Limit conduit provisions to "DB Eligible Retirement Account Interests" – ¶ 5.3(b)(iii)(A)
- Limit future changes to support current qualification as conduit trust – ¶ 5.3(b)(ii)
- Address how debts, expenses, and taxes are charged – ¶ 9.3(d)

Drafting Tips – Alan & Alice Accumulation Trust

- Architecture: Add restrictions and statement of intent to existing dynasty trust, ¶ 5.3(b)
- Restrictions apply to powers of appointment, even though no authority requires this – ¶ 5.3(b)(i)(B)
- Trustee required to keep track of accumulations – ¶ 5.3(b)(i)(D)
- Limit future changes to support current qualification as accumulation trust – ¶ 5.3(b)(ii)
- Limit restrictions to “DB Eligible Retirement Account Interests” – ¶ 5.3(b)(iii)(A)
- Definition of “Qualified Recipient” is key, ¶ 5.3(b)(iii)(E):
  - Any individual is okay if DB status is enough,
  - Add age restriction if LE Method is intended (blue highlight)
- Lifetime power to withdraw Non-Exempt interests causes estate inclusion – ¶ 5.3(c)
- Trust Protector has power to modify to Conduit Trust, ¶ 7.6(b)(2)
- Address how debts, expenses, and taxes are charged – ¶ 9.3(d)

Closing Comments

- Any deferral during life is now more important in the ultimate value of a retirement plan:
  - Start saving earlier
  - Get children started earlier (ideally Roth IRAs)
  - Look for ways to defer lifetime distributions
- As planners, it is best to begin with what client wants, and not to allow tax or RMD rules become the tail that wags the dog
- We live in uncertain times – the best planning strategies will produce acceptable results in a wide range of scenarios