Heckerling Institute Report
Report #3 - "When IRD Meets ERISA"

The following is Report #3 from our on-site reporters regarding some of the highlights from the events and presentations that are taking place at the 34th Annual Philip E. Heckerling Institute on Estate Planning that is being held January 10-14, 1999 at the Fontainebleau Hilton in Miami Beach, Florida.

This Report covers Natalie Choate's Tuesday morning session entitled "When IRD Meets ERISA: Making Retirement Benefits Payable to Trusts."

This report was filed by on-site reporter, Robert Wolf. Bob is also a speaker at this year's Institute and an acknowledged expert on TRU.

Natalie Choate gave a brilliantly clear and entertaining session on the most difficult issue facing estate planners dealing with retirement plan assets, and that is, when is a trust a qualifying trust so that the beneficiaries of the trust can be considered "designated beneficiaries" for purposes of the pay out rules of Section 401(a)(9). She broke the issue down into 6 rules, although the IRS only explicitly admits to 4. She had inquired of one Treasury official as to why their 4 was really 6, and he replied that "it depended upon what the meaning of 4 was for," or words to that effect. These rules must be met at the time of the RBD, or, if later, at the date the trust is named as beneficiary.

1. **Trust must be valid under state law**. No big problem here. A testamentary trust should be O.K.

2. **Beneficiaries must be "identifiable"**. This rule causes a good deal more difficulty--as of the RBD, is it possible to determine who is the oldest person who could ever be a beneficiary of the trust.(the oldest one needs to be determined, because it is the oldest one used for the life expectancy calculation). Similar to the common law Rule against Perpetuities, because even the possibility of flunking the test is enough. Hence "to spouse and then to issue" is O.K., since issue must be younger than spouse (query by reporter-adoption?), but if it is to spouse and then to issue and spouses of issue" it would flunk, because the child could marry someone older than the child's parent.

3. **Irrevocability**. The trust must be irrevocable or will, by its, terms, be irrevocable upon the death of the employee. This is the "new" rule--Prop.

Reg. Section 5(b)(2). This should mean that a revocable living trust or a testamentary trust should qualify.

4. **Documentation Requirement**.

(Death before RBD) The new rule here has been relaxed, to allow the documentation to be provided "to the plan administrator" by the end of the ninth month beginning after the death of" the participant. Either a copy of the trust or certain summary information about the trust and the beneficiaries.

(at RBD) to get to use a beneficiary's life expectancy, the participant must provide a copy of the trust to the plan administrator, and agree that if the document is amended any time in the future, to provide a copy of the trust within a reasonable time to the plan administrator.

Note re IRA's --they have no plan administrator, so the custodian is the safest bet. If litigating, the participant arguably is plan administrator, since he is responsible for compliance (not the custodian)

What about people using living trusts who are taking out over single life expectancy whose RBD arrived between 87and 97? Could they convert to a slower payout by complying now by following the rules NOW? Good question --no answer yet.

5. **All beneficiaries must be individuals**. A charity is not an individual. An estate is not an individual, according to the IRS in this context (although it seems to be for the purpose of spousal rollovers). If your trust allows payment of taxes and expenses of the estate from the trust, arguably the estate is a beneficiary--hence you flunk the test. Natalie thinks this is wrong, because of the treatment of estates as "look-through" entities for spousal rollover purposes. Why not this too! This is a real trap-so put language that prohibits such payment from these assets in your trusts. If you're in trouble on this, you may want to look for some protective statute in your state which holds IRA's and qualified plans harmless from creditors. For arguments on this see the September issue of *Trusts and Estates Magazine*.

6. **No changing beneficiaries after Participant's death**. This could cause problems for all powers of appointment, but several private letter rulings indicate that the power itself should be O.K., so long as the participants themselves would qualify. So, as long as no possible appointee would disqualify the trust, you should be O.K.

Who are beneficiaries--note that you can disregard contingent beneficiaries, if they will not take if the preceding beneficiaries live to their life expectancies. So, if you have a charitable beneficiary if a child dies before a trust terminates at 35, that is O.K., because if the child lives to their actuarial life expectancy, the charity won't take.

Dynasty Trusts-Natalie thinks these will flunk simply because the benefits will never really all go to beneficiaries who are individuals.

For more on this, and also, on the new guidance on TIP Trust qualification see Natalie's website at http://www.ataxplan.com

That's it for Report #3.

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