GREENVILLE ESTATE PLANNING COUNCIL

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Retirement Assets
and
Digital Assets

presented by

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SAVING YOUR CLIENTS'. . . .
RETIREMENT SAVINGS --
RECENT DEVELOPMENTS IN ESTATE PLANNING FOR RETIREMENT ASSETS

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I. INTRODUCTION

A. If you take a step back and honestly assess the portion of total estate planning time spent for a client on planning for the client's retirement benefits, do you feel it is proportionately appropriate?

B. Prior to 2010, one could argue that, due to the relative estate/gift tax rates and exemptions then applicable and the number of clients to which the estate/gift tax applied, the majority of our planning time was necessarily focused on estate and gift tax planning techniques, to the potential detriment of appropriately considering the planning options with respect to retirement benefits.

C. I wish to make the case that, in the current tax law environment, planners should spend a disproportionate amount of planning time with respect to clients' retirement benefits.

1. According to the Urban-Brookings Tax Policy Center, the current estate and gift tax rates and exemptions impact only .15% of the U.S. population in general.

2. To the contrary, almost every client we encounter in the planning context has a retirement plan interest of sufficient size to warrant a greater amount of our attention.

D. Let us remind ourselves why retirement benefits are so unique so as to warrant a disproportionate amount of our planning time.

1. During a participant's life, retirement plan assets, while enjoying terrific income tax deferral options, remain "pregnant" with future income tax liability.

2. Maximum funding of retirement plan assets are a very effective asset protection technique.

3. The mere completion of a beneficiary designation form, which happens on many occasions with the assistance of someone who provides no tax or planning advice whatsoever, greatly impacts the amount and the timing of income taxation on the distribution of these benefits.

4. Unlike any other asset, directing retirement benefit assets to a trust involves a myriad of complicated rules and planning implications, as well as potential non-sensical income tax results.

5. Unlike most items of inheritance, every dollar distributed from a qualified retirement plan to a non-charitable beneficiary is subject to income tax.

6. In some states, a beneficiary's interest in a deceased participant's retirement plan can continue to enjoy creditor protection.

7. Retirement plan benefits open the door for a variety of proactive charitable planning techniques.

8. Absent expert intervention, much "estate planning for retirement benefits" may be done by non-professionals who have no idea of the income tax, estate tax, and distributive results they have inadvertently set in motion.

E. All references in this outline to an IRA shall be deemed to refer to a non-Roth IRA, unless specifically provided otherwise.

II. DESIGNATION OF INDIVIDUALS AS BENEFICIARIES OF QUALIFIED PLANS/IRAS

A. You Must Follow the Literal Guidelines of the Retirement Plan Document in Completing a Qualified Plan Beneficiary Designation!

1. In Ruiz v. Publix Super Markets, Inc., Case No. 8:17-cv-735-T-24 TGW, the U.S. District Court of the Middle District of Florida held that substantial compliance with plan requirements for designation of a beneficiary of a qualified retirement plan was not good enough to constitute an effective beneficiary designation.

2. The District Court relied heavily on the principles of the Supreme Court decision in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, 555 U.S. 285 (2009).

B. Distribution Rules During Life and After Death

1. Distributions During The Taxpayer's Lifetime

a. In order to advise your client in structuring his or her IRA beneficiary designation, you have to be familiar with the minimum distribution rules. The required minimum distribution ("RMD") rules specify how long a taxpayer (and after the taxpayer's death, the beneficiary(s)) may defer withdrawals from retirement accounts. IRC § 401(a)(9).

b. During life, the taxpayer must generally begin taking withdrawals by April 1 of the year after the taxpayer reaches age 70 ½. This date is referred to as the required beginning date ("RBD"). (For certain employees, the RMDs do not have to begin until the calendar year of retirement if the employee retires after age 70½).

c. An IRS table that takes into account the taxpayer's life expectancy sets the RMD amount the taxpayer must withdraw in each year after the RBD. Treas. Reg. § 1.401(a)(9)-5.

(1) Unless the account owner's spouse is more than ten (10) years younger than the account owner, then the account owner will use the "Uniform Lifetime Table." Treas. Reg. § 1.401(a)(9)-9(A-2).

(2) If there is a spouse more than ten (10) years younger, then the account owner uses the "Joint and Last Survivor Table." Treas. Reg. § 1.401(a)(9)-9(A-3).

d. Distributions from qualified retirement plans that are taken before the taxpayer reaches the age of 59 ½ are subject to an additional 10% "early withdrawal" tax, unless the distribution falls within a statutory exception. IRC § 72(t).

(1) Code §72(t) was amended recently to expand the "Public Safety Employee" exception to the general rule of requiring a 10% additional tax on early distributions. Specifically, the Defending Public Safety Employees Retirement Act (H.R. 2146) was enacted after being signed by President Obama on June 29, 2015. One aspect of this legislation allows retired federal public safety officers to access their Thrift Savings Plan funds at age 50 without incurring the 10% early withdrawal penalty.

e. Recently, the courts have clarified under what circumstances this 10% tax will be imposed.

(1) In Kott v. C.I.R., T.C. Summ.Op. 2015-42 (2015), a taxpayer who was younger than age 59 ½ and delinquent in his mortgage payments withdrew funds from his 401(k) plan account in order to use such funds to

avoid foreclosure. The Tax Court held that the taxpayer was liable for the 10% early distribution penalty as the Code does not include an exception for a general "financial hardship." While the Tax Court noted Reg. § 1.401(k)-1(d)(3)(iii)(B)(4), which allows for distributions to be made to employees for payments necessary to prevent eviction from the employee's principal residence or foreclosure, the Tax Court held that this exception only permitted the hardship distributions be made, and does not exempt the distributions from the 10% additional early distribution tax.

(2) In Adams v. Commissioner, the taxpayer lost his job with the Department of Defense and immediately filed suit for wrongful termination based on discrimination. Because he could not find another comparable job, the taxpayer took out over $220,000 from his IRA; he was under 59½ years old at the time. He reported all but $70,000 as income, and did not self-assess the premature withdrawal penalty. Upon examination by the IRS, Adams claimed that the penalty should not apply, as the withdrawals resulted from discrimination at work and were needed for medical care and "to fight for justice." The Service said fine, please provide receipts and other documentation. Adams never provided any documentation, and the Tax Court held that the 10% premature withdrawal penalty applied (as well as the other penalties for underreporting income).

(3) In *In re* Bradford, 2015 WL 4549603 (Bankr. M.D. Ga., July 20, 2015), a Georgia bankruptcy court indicated that the early distribution tax imposed by §72(t) is an excise tax, and not a punitive tax measure, for purposes of bankruptcy.

(a) In examining the legislative history behind §72(t) of the Code and several relevant Supreme Court cases, the court held that this tax was enacted to deter debtor conduct rather that to support the government. Specifically, the court believed that the tax sought "to prevent retirement plans from being treated as savings accounts, to recapture a measure of tax benefits that have been provided prior to the withdrawal, and to deter the use of retirement funds for nonretirement purposes." *In re* Cassidy, 983 F.2d at 164.

(b) Next, the Court determined whether the penalty was entitled to priority as compensation of the government's actual pecuniary loss. After finding that the government sustains little loss if any when the tax recoups a loss to the government incurred through the taxpayer's deferment of income and that the losses claimed by the IRS do not constitute actual pecuniary loss, the Court held that Code § 72(t) is not entitled to priority.

(c) Ultimately, the court found the exaction was neither a tax, as it was not enacted to support the government, nor a

penalty in compensation for actual pecuniary loss under Code § 507(a)(8). Therefore, the 10% exaction was not entitled to priority in the debtor's bankruptcy case.

f. How to reduce your clients RMDs.

(1) Your client can buy a qualified longevity annuity contract. This contract does not start paying the client an annuity until the client attains age 85. The funds used to purchase the annuity will have many years to accumulate and grow, so the income eventually received will be larger. Normally, such a delayed annuity is not permitted for IRAs, as the minimum distribution rules require RMDs no later than the RBD. The IRS has made an exception for qualified longevity annuities with up to $125,000 of the IRA balance, or 25% of the IRA owner's total IRA balance if it is less than $125,000.

(2) If a client is still working after attaining age 70½, he or she may be entitled to reduce compensation income by tax deductible contributions to some type of retirement plan. These tax deductible contributions provide a current tax deduction reducing the income tax effect of his or her RMDs from other IRAs. If the client is self-employed, the client can adopt a SEP-IRA, to which such contributions may be made.

(3) If your client works for a non-profit entity, or a for-profit company if the client has less than 5% ownership in that company, and such entity has a qualified retirement plan that accepts rollovers from IRAs, the client can rollover his or her IRA into the company plan and then not have to take RMDs from that plan until actual retirement from that employer.

(4) If the client participates in an employer's qualified retirement plan, and has "after-tax money" in that plan, then upon retirement from that company the client should request that the plan send a direct rollover of all pre-tax money to a traditional IRA and the after-tax money to a Roth IRA. In essence, this is a tax-free Roth IRA conversion.

(5) Of course, there is always the plain old Roth conversion of the client's traditional IRA, as Roth IRAs do not require RMDs during the owner's life. However, the client must be willing to pay tax on the amount converted as though it were distributed from the plan at that time.

2. Distributions After Death if the Spouse is Beneficiary.

a. We are all familiar with the rules enabling a spouse to roll over retirement benefits upon the death of his or her spouse, and they will not be repeated here. However, there are a few recent developments in this area that are worth discussing.

b. In 2009, the ACTEC Estate Planning for Employee Benefits Committee initially requested that the IRS issue a revenue ruling with respect to spousal rollovers of qualified plan and IRA benefits when an estate or trust is named beneficiary of a decedent's interest.

(1) This request was repeated in 2010 and again earlier this year, and guidance on this issue has been requested in connection with the ACTEC recommendations for the IRS Guidance Priority Plan in each of the last four (4) years.

(2) Several hundred favorable private letter rulings have been issued over the last ten years, and it makes no sense for taxpayers to expend the filing fee required for a private ruling.

(3) As an example, in PLR 201511036, the IRS allowed spousal rollover treatment when the decedent's estate was named as beneficiary of several IRAs, and the spouse was the executor of the estate, the Trustee of decedent's trust, and was the income beneficiary and had a general power of appointment over the trust which was ultimately to receive the IRA proceeds.

(4) The most recent ruling in this regard is PLR 201707001. The decedent and the taxpayer/surviving spouse were residents of a community property state, and held all of their assets as community property. At the

time of his death, Decedent owned seven Roth IRAs and one traditional IRA. Decedent and surviving spouse had established a joint revocable Trust, under which they were the sole trustees. Upon decedent's death, the surviving spouse became sole Trustee, and three sub-trusts were created by the Trust instrument. First, a Survivor's Trust was created, consisting of her separate property and her share of community property, with respect to which surviving spouse is entitled to all of the income and principal during her life. Then, a Marital Trust and a Bypass Trust were established pursuant to an estate tax minimization formula. Spouse is entitled to all income from each of the Bypass and Marital Trusts, and discretionary principal for health, education, maintenance and support. She is also entitled to receive any IRA distributions made to wither the Bypass or Marital Trusts. Four of the Roth IRAs named "the trust" as beneficiary, and the other three Roths and the traditional IRA named the marital Trust as beneficiary. After decedent's death, surviving spouse went to the local court and obtained an Order reforming the Marital Trust beneficiary designations, retroactive to the date they were signed, to show "the Trust" as the beneficiary. Spouse, as Trustee, then allocated all of the first four Roths to the Survivor's Trust, and half of the other three Roths and the traditional to the Survivor's trust, and the other half of each to the Marital Trust. Spouse then sets up a Roth IRA in her name, and a traditional IRA in her name, and intends to roll over each distribution of Decedent's Roth IRA to her Roth IRA, and each distribution of

Decedent's traditional IRA to her traditional IRA. The IRA ruled that spousal rollover treatment would be allowed for each distribution transaction (with the caveat that the spouse had to combine all of the Decedent's Roth IRAs into one Roth IRA in tax-free trustee-to-trustee transfers, so that one rollover transaction would occur in each one year period).

c. The impact of the **Windsor** holding.

(1) As we all know, on June 26, 2013, the U.S. Supreme Court held in U.S. v. Windsor, 133 S.Ct. 2675 (2015) that Section 3 of the Defense of Marriage Act "DOMA" is unconstitutional.

(2) The IRS issued follow-up guidance for same-sex marriages in Revenue Ruling 2013-17 and Notice 2014-19.

(3) Generally, participants and their spouses who are in same-sex marriages must be treated as married for all purposes under a qualified retirement plan as of June 26, 2013.

(a) A sponsor of a qualified plan may elect to recognize only same-sex marriages of participants as of June 26, 2013 who lives in a state that recognizes same-sex marriages.

(b) For participants who live in a state that does not recognize same-sex marriages, a sponsor of the plan is permitted to delay recognition of their marriages until September 16, 2013, the date that Revenue Ruling 2013-17 was issued.

(c) A plan amendment is required to reflect the use of this optional effective date.

(4) A sponsor of a qualified retirement plan may elect to recognize same-sex marriages as of a date that is prior to June 26, 2013, for some or all purposes under the plan. A plan amendment would be required to implement this optional retroactive effective date.

(5) Possible amendment of plan definitions required.

(a) If a qualified plan defines "spouse", "legally married spouse", "spouse under federal law", etc. in a manner consistent with Windsor, or does not define those terms, then the plan does not need to be amended so long as the plan has been properly administered.

(b) However, if the plan's definitions of these terms are not consistent with the holding in Windsor, then the plan must be amended.

(6) For ERISA, Internal Revenue Code, and DOL Regulation purposes, the following is true:

(a) The term "spouse" includes an individual married to a person of the same gender IF he or she is lawfully married under state law (including foreign jurisdictions).

(b) The term "marriage" includes a marriage between individuals of the same gender.

(c) The term "spouse" does not include an individual in a registered domestic partnership or a civil union, and the term "marriage" does not include a registered domestic partnership or a civil union.

(d) A same-sex marriage validly entered into in a state or foreign jurisdiction that permits same-sex marriages will be recognized regardless of whether the couple moves to or lives in a state that does not permit or recognize same-sex marriages.

(7) In Schuett v. FedEx Corporation, et al., No. 15-CV-0189, N.D. Calif., 2016 U.S. Dist. LEXIS 224, the Federal District Court in the Northern District of California applied Windsor retroactively, allowing a lesbian widow to pursue her claim to spousal benefits under her deceased spouse's pension plan. This same sex couple was married on June 19, 2013, and one of the spouse's passed away one (1) day later. Six (6) days later, the United States Supreme Court issued its decision in Windsor.

d. The Impact of the **Obergefell** holding.

(1) Following in the wake of Windsor in 2013, on June 26, 2015, the United States Supreme Court in Obergefell v. Hodges, 135 S.Ct. 2584 (2015) held that same-sex married couples are entitled to equal protection under the laws of every state, and that their marriages must be recognized nationwide. As such, any state prohibitions against the recognition of a same-sex marriage were held to violate the 14th Amendment and were invalidated.

(2) Because state laws banning same sex marriage are effectively invalidated, after Obergefell, same-sex couples are afforded the same spousal rights that other couples enjoy. Spousal rights that occur independent of proactive planning and that are now equally granted to same-sex couples include, among others, (i) spousal survivorship rights under state pension or

other retirement benefits, even in states that previously did not recognize same-sex marriage and the ability to file tax returns as a married couple and (ii) take advantage of the married couple's state estate tax exemption where applicable.

(3) After Windsor, same-sex married couples are to receive equal treatment under federal law and are to be treated the same as any other married couple for federal tax purposes and for other benefits under federal law (including spousal rights under ERISA, etc.). Now, in the aftermath of Obergefell, same-sex couples have been elevated to equal stature with other marriages and are entitled to equal protection under the laws of every state.

3. Distributions After Death if a Non-Spouse is Beneficiary (Non-Spouse Rollovers)

a. If someone other than the spouse is the beneficiary, the beneficiary's RMD depends on whether there is a "Designated Beneficiary" of the account, as that term is specifically defined in Treasury Regulation § 1.401(a)(9)-5. Although individuals qualify as Designated Beneficiaries, estates, states, charities, and business entities do not qualify as Designated Beneficiaries for these purposes. Treas. Reg. § 1.401(a)(9)-4.

(1) A trio of 2016 private letter rulings illustrate the rigidity of the Designated Beneficiary rules. In each of these letter ruling fact

patterns, the taxpayer had designated a beneficiary on his IRA showing three separate trusts, each of which qualified as a Designated Beneficiary. Later that year, the taxpayer's financial advisors joined another firm and became affiliated with a different custodian, which required new IRA documents. At that time, the custodian had the taxpayer sign new beneficiary forms, which named the taxpayer's estate as the primary beneficiary. Upon the owner's death, this error was discovered and the trustees of the trusts petitioned the local probate court to reform the beneficiary designation retroactive to the time before the mistaken form was executed by the decedent which relief was granted by the local court. However, in each of these rulings, the IRS refused to recognize the reformed designations, and held that the estate was the beneficiary at the time of the taxpayer's death, and therefore, none of the IRAs had a Designated Beneficiary.

(2) If you inherit a situation like this, don't give up on trying multiple post-mortem remedies!

b. If there is a Designated Beneficiary -

(1) If the taxpayer died <u>before</u> the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the beneficiary's life expectancy. This is the "Single Life Table," found at Treas. Reg. § 1.401(a)(9)-9(A-1).

(2) If the taxpayer died <u>after</u> the taxpayer's RBD, then the beneficiary's RMD is based on an IRS table that takes into account the longer of (i) the beneficiary's life expectancy from the Single Life Table (based on the beneficiary's age in the calendar year after the calendar year of the account owner's death), or (ii) the taxpayer's life expectancy from the Single Life Table, based on the taxpayer's age in the calendar year of the taxpayer's death.

c. If there is <u>no</u> Designated Beneficiary

(1) If the taxpayer died <u>before</u> the taxpayer's RBD, then the beneficiary must withdraw all of the retirement account within 5 years of the taxpayer's death.

(2) If the taxpayer died <u>after</u> the taxpayer's RBD, then the beneficiary's RMD is based on the Single Life Table that takes into account the deceased taxpayer's life expectancy (immediately before death).

d. The beneficiary may withdraw more than the RMD in a given year, but the beneficiary must withdraw at least the RMD each year to avoid IRS imposition of a penalty. When a beneficiary takes his RMD based on his life expectancy, it is often referred to as a "<u>stretch</u>" of the IRA.

(1) Although life expectancy payouts in IRAs are common, not all IRAs offer this option.

(2) Many qualified plans do not allow a life expectancy payout option, and they typically require a lump sum distribution upon death.

(3) However, the Pension Protection Act of 2006 added Code § 402(c)(11), which now allows a non-spouse Designated Beneficiary to rollover a qualified plan account into an IRA by a trustee to trustee transfer.

(4) It is important to ensure that the beneficiary of a qualified plan is a Designated Beneficiary, so that such a non-spousal rollover will be a planning option upon the participant's death.

(5) This rollover is not as favorable as the spousal rollover, as the non-spouse rollover is treated as an inherited IRA, not as a contributory IRA. The main benefit of the non-spouse rollover is the ability to transfer the account to an IRA that allows a life expectancy payout option.

e. Following a recent court decision, a designated beneficiary of a traditional IRA may be responsible for including the entire distribution of an IRA in his or her gross income, even if the beneficiary distributed a portion of the IRA among others.

(1) In Morris v. C.I.R., T.C. Memo. 2015-82 (2015), a beneficiary of an IRA who had received an IRA in a lump sum after his

father's death followed his father's wishes by sharing the IRA with his siblings, but did not include the lump sum or the distributions on his income tax return. Finding that the taxable status of the distributions themselves is determined by the Code, and not by the conduct of the beneficiary, the Court found that the beneficiary bore the responsibility of reporting the IRA distribution on his tax return and not telling his siblings to report it as well.

(2) The court in Morris noted that the beneficiary could have done a variety of things to avoid having to pay tax on the entire distribution, including the following:

(a) The beneficiary could have required each sibling to report one-third of the IRA distribution rather than bearing the tax implications on his own.

(b) The beneficiary could have issued a Form 1099-R to each sibling and included an explanation of the issue with his tax return.

(c) The beneficiary could have persuaded the life insurance company to issue the IRA in 3 equal portions.

(d) Alternatively, a family settlement agreement could have been created, acknowledging that although he was a sole beneficiary, he was merely an agent for all of the children. Under this scenario, the beneficiary could have withheld and paid income tax for all the siblings.

4. Sixty (60) day rollover for inherited retirement benefits

a. A participant, IRA owner or spousal beneficiary may take distributions of qualified plan or IRA assets and roll them over into another qualified plan or IRA within sixty (60) days of such distribution. However, any other non-spousal beneficiary cannot do such a rollover, but may do a direct trustee-to-trustee transfer.

b. Recent Private Letter Rulings have addressed specific scenarios that allow for a waiver of the 60-day rollover requirement:

(1) In PLR 201529016, the IRS, pursuant to Code §402(c)(3)(B), waived the 60-day rollover requirement where the taxpayer's failure to timely rollover funds was due to her medical and emotional condition following her spouse's death that impaired her ability to manage her financial affairs.

(2) In PLR 201529017, pursuant to Code §408(d)(3)(I), the IRS waived the 60-day requirement where the taxpayer's failure to timely rollover funds was due to the financial institution's failure to follow the taxpayer's instructions to keep those funds in his IRA.

(3) In PLR 20152901, again, pursuant to Code § 408(d)(3)(I), the IRS waived the 60-day rollover requirement where the taxpayer's failure to timely rollover funds was due to the bank making unauthorized distributions from his retirement accounts.

c. Rev. Proc. 2016-47, issued on August 24, 2016 establishes a "self-certification" procedure enabling the taxpayer to complete a rollover without the expense and hassle of a private letter ruling request.

(1) Prior to this Revenue Procedure, you could obtain a waiver of the 60-day rollover deadline only by making application to the IRS, paying a $10,000 filing fee, and waiting at least a year to get an answer.

(2) To qualify for this new self-certification approach, you must satisfy three requirements.

(A) You must not have been previously denied a waiver by the IRS for this particular distribution.

(B) You must have been unable to complete the rollover due to one or more of the eleven reasons listed below; and

(C) You must complete the rollover as soon as practical after you are no longer prevented from doing so due to the reasons you have certified.

(3) The following eleven (11) reasons are "blessed" by the IRS as justifying a waiver:

(A) An error was committed by the financial institution receiving the contribution or making the distribution to which the contribution relates.

(B) The distribution was made in the form of a check which was misplaced and never cashed.

(C) The distribution was deposited into and remained in an account that the taxpayer mistakenly thought was an eligible retirement plan.

(D) The taxpayer's principal residence was severely damaged.

(E) A member of the taxpayer's family died.

(F) The taxpayer or a member of the taxpayer's family was seriously ill.

(G) The taxpayer was incarcerated.

(H) Restrictions were imposed by a foreign country.

(I) Postal error.

(J) The distribution was made on account of a levy under Internal Revenue Code Section 6331 and the proceeds of the levy have been returned to the taxpayer.

(K) The party making the distribution delayed providing information that the receiving plan or IRA required to complete the rollover despite the taxpayer's reasonable efforts to obtain the information.

(4) Be careful! If the taxpayer's return is audited, and a material misstatement was made in the self-certification of the rollover of an IRA distribution or one of the other requirements for self-certification

was in fact not met, the IRS can still disallow the waiver, which will lead to income taxes, plus interest, plus penalties.

C. Separate Accounts and Multiple Beneficiaries

1. If there are multiple beneficiaries of a retirement account, then the RMD is based on the life expectancy of the oldest beneficiary. Treas. Reg. § 1.401(a)(9)-5, A-7(a)(1).

2. If separate accounts are "established" for multiple beneficiaries prior to December 31 of the year after the calendar year of the taxpayer's death, then the RMD rules will apply separately to each such separate account. Treas. Reg. § 1.401(a)(9)-4, A-5(c); Treas. Reg. § 1.401(a)(9)-8, A-2(a)(2).

a. A separate account allows you to calculate the RMD based on the life expectancy of the oldest beneficiary of <u>such separate account</u>.

b. To establish separate accounts, the beneficiaries' interests must be fractional (i.e. not pecuniary). In addition, some affirmative act is required to establish the separate accounts (i.e., a physical division of a single account into completely separate accounts, or using separate account language on the beneficiary designation form).

c. Whenever possible, it is best to create the separate accounts with appropriate language directly on the beneficiary designation form.

3. Is separate account treatment available when a trust is the beneficiary of an IRA?

a. Treas. Reg. § 1.401(a)(9)-4, A-5(c) clearly provides that the separate account rules are not available to individual beneficiaries of a trust with respect to the trust's interest in the participant's retirement plan.

b. PLR 201503024 provides a lesson to the effect that, you should not believe every word you read in IRS regulations! This PLR involved an IRA wherein the decedent's trust was named as beneficiary, and such trust provided for ultimate distribution of its residuary to five (5) individual beneficiaries. In PLR 201503024, the IRS made the following rulings:

(1) The decedent's trust constitutes a "see-through" trust within the meaning of the Section 401(a)(9) regulations.

(2) Five separate beneficiary IRAs, established by the Trustee for each of the five residuary trust shares, will be considered "inherited IRAs" within the meaning of Section 408 of the Code.

(3) Sections 401(a)(9) and 408 of the Code do not preclude the division of decedent's IRA and the establishment of the five

beneficiary IRAs, each in the name of the decedent for the benefit of one of the five beneficiaries of the trust.

(4) The trustee-to-trustee transfers to the five beneficiary IRAs will not constitute taxable distributions, nor will they be considered attempted rollovers.

(5) The trustee-to-trustee transfers to the five beneficiary IRAs will not cause the beneficiary IRAs to lose their qualified status under Section 408(a) of the Code.

(6) Each of the individuals may receive the required minimum distribution under Section 401(a)(9) of the Code from his or her respective beneficiary IRA, using the life expectancy of the oldest of the five individuals who remains a beneficiary as of the Beneficiary Determination Date of September 30, 2014.

C. Eliminating Unwanted Beneficiaries Prior To September 30th

1. The deadline for determining who the initial beneficiaries of a retirement account are is the date of the taxpayer's death.

2. However, between the taxpayer's death and September 30th of the year following the year of the taxpayer's death, non-individual beneficiaries may be removed by a disclaimer of the interest, creating separate

accounts, or eliminating them as beneficiaries by distributing their benefits outright to them in full. Treas. Reg. § 1.401(a)(9)-4, A-4(a).

D. Roth IRAs

1. Although we do not have near as much heartburn about the structure of beneficiary designations on Roth IRAs, the above-described RMD rules apply to the beneficiaries of a Roth IRA, and the RMD is computed as though the decedent had died before his RBD. Treas. Reg. § 1.408A-6, Q&A (14)(b).

2. As you know, contributions to a Roth IRA have already been taxed, and therefore, qualified distributions from such Roth IRAs are not subject to income tax. Nonetheless, it is still important to defer distributions from the Roth IRA as long as possible, so that the assets inside the Roth IRA continue to appreciate income tax free. Accordingly, it is still critical for the beneficiary of a Roth IRA to be considered a "Designated Beneficiary".

3. If the Roth IRA owner is interested in generation-skipping planning with adult grandchildren, naming the adult grandchildren as the beneficiaries of the Roth IRA will be a more efficient utilization of the GST exemption than naming them as beneficiary of a traditional IRA (since parts of the traditional IRA proceeds will be consumed by income tax liability).

E. What if the IRA owner is incapacitated, and there is no or an inadequate beneficiary designation in place?

1. An agent under a durable power of attorney will need to be specifically empowered to make a new beneficiary designation.

2. Here is suggested sample language –

"To make contributions to and withdrawals from, rollovers, voluntary contributions, or any elections with respect to any retirement plans, including an individual retirement account, and to designate beneficiaries for any rollovers consistent with my overall estate plan;"

3. If there is no general durable power of attorney in place, then a court-appointed conservator (guardian in some states) will need specific court authority, and the acceptance of the IRA custodian, in order to make an effective beneficiary designation.

III. LEAVING RETIREMENT ASSETS TO TRUSTS

A. Situations In Which Trusts Are Crucial

1. In some situations a trust must be named as beneficiary, such as when (i) the beneficiary is a special needs child that relies on government

benefits, (ii) the beneficiary is a second spouse whom you want to have limited access to the trust principal, (iii) the beneficiary is a minor, (iv) the beneficiary is a spendthrift, has substance abuse problems, etc., and (v) when retirement account assets must be used to fund a credit shelter trust. (discussed below).

2. In these situations, the client may decide the reasons for naming a trust as beneficiary of the IRA outweigh the lost income tax deferral, or may decide a look-through trust is appropriate.

B. What Are Look-Through Trusts, or See-Through Trusts?

1. A trust that qualifies as a Designated Beneficiary is often referred to as a "look-through trust".

a. If a taxpayer names a look-through trust as the beneficiary, then the trust may make withdrawals from the account based on the life expectancy of the oldest beneficiary of the trust (i.e. the trust's RMD is based on the age of the oldest beneficiary).

b. In essence, for these purposes, the trust is ignored and the beneficiaries of the trust are treated as the beneficiaries of the retirement account.

2. A trust must satisfy five tests to qualify as a Designated Beneficiary.

a. The first four tests are as follows: (i) the trust must

be valid under state law, (ii) the trust must be irrevocable or become irrevocable at the taxpayer's death, (iii) the trust beneficiaries must be identifiable, and (iv) certain documentation must be provided to the plan administrator or IRA custodian by October 31 of the year after the taxpayer's death.

b. If these four tests are met, then the trust is a Designated Beneficiary and the RMD will be based on the oldest trust beneficiary's life expectancy.

c. There is, in essence, a fifth test for the trust to be a Designated Beneficiary, as all of the beneficiaries of the trust must be individuals the oldest of whom can be identified.

3. What Trust Beneficiaries Can Be Ignored

a. It is sometimes a challenge to draft a trust that only has individual beneficiaries and where it is possible to ascertain the oldest beneficiary (especially when the IRS has not told us which contingent beneficiaries can be ignored!).

b. The regulations provide that if the first four tests above are met, then the beneficiaries of the trust are considered beneficiaries of the retirement account. The question is, which beneficiaries must be considered?

(1) The regulations provide two rules in this regard.

(2) The general rule is that with respect to determining if there is a beneficiary of the trust that is not an individual (which would disqualify the trust as a Designated Beneficiary), and determining who is the oldest beneficiary, a "contingent beneficiary" must be taken into account.

(3) The second rule provides that, a person will not be considered a beneficiary for purposes of determining who is the beneficiary with the shortest life expectancy, or whether a person who is not an individual is a beneficiary, merely because the person could become the successor to the interest of one of the employee's beneficiaries after that beneficiary's death. However, the preceding sentence does not apply to a person who has any right (including a contingent right) to an employee's benefit beyond being a mere potential successor to the interest of one of the employee's beneficiaries upon that beneficiary's death.

c. This rather unhelpful regulation tells us that a "contingent beneficiary" must be taken into account, but a "mere potential successor" beneficiary can be ignored. However, it does not bother to define these terms!

d. ACTEC has requested a revenue ruling on this issue on five occasions, the most recent query being made last summer. Stay tuned!

e. Recent private IRS letter rulings have not been terribly helpful in providing additional guidance as to which contingent remainder

beneficiaries can be ignored.

(1) Under the IRS's analysis in these rulings, if a trust is to distribute the assets <u>outright</u> to a beneficiary upon a life income beneficiary's death, then the only remainder beneficiaries that must be counted are the individuals that would receive those assets, <u>provided</u> those individuals are alive on the taxpayer's death and they have already attained the required age to receive the assets outright.

(2) This ruling is not helpful to dynasty trusts or lifetime trusts with periodic principal distributions or withdrawal rights, as the beneficiary may never be required to take outright ownership of the trust assets.

f. PLR 201633025, published in mid-August of 2016, sheds very important light on the IRS' current thinking on this issue.

(1) In this ruling, a trust was named as beneficiary of an IRA. Under the terms of the trust, the Trustee is to distribute all of the net income of the trust to the decedent's child, and the trustee also has discretion to make principal distributions to the child or the child's issue for health, education, support or maintenance. When the child attains age fifty (50), the trust will terminate and all remaining income and principal will be distributed to the child.

(2) If the child dies prior to attaining age fifty (50), the trust provided that the trust will terminate and will be distributed to the

children of the child. If the child and all of the child's issue are deceased prior to the final distribution of the trust assets, the trustee shall distribute the remaining trust assets to the decedent's siblings. If the child, all the child's issue, and the decedent's siblings are all then deceased, then the rest of the trust shall be distributed to various charitable organizations.

(3) The IRS ruled that the only beneficiaries which must be taken into account are the child and the child's children for purposes of determining whether the trust qualifies as a "Designated Beneficiary" for RMD purposes. Therefore, the trust qualified as a "see-through" trust and the trust may receive minimum distributions after the owner's death based on the child's life expectancy. All other potential recipients of the trust were deemed to be mere potential successors!

g. In informal conversations with some of my colleagues, the IRS representative who has been writing many of the above-described private letter rulings over the years made a few observations in this regard.

(1) For example, in a trust share created for a minor, which terminates and fully distributes at a stated age which the minor has not attained as of the Determination Date (i.e., the 9/30 date), then the "first tier remaindermen" who would take if the minor died on that Determination Date must be taken into account.

(2) In a trust for a surviving spouse's life, which terminates at spouse's death, the beneficiaries to be taken into account are the spouse and the remaindermen who would take if the spouse died on the Determination Date. However, if the trust continues after the spouse's death, then additional contingent beneficiaries must be taken into account.

(3) What about a trust with a power of appointment?

(a) If it is a general power of appointment, there will be no Designated Beneficiary, per this IRS representative!

(b) If the permissible appointees are limited to all individuals in the world younger than the powerholder, the agent agreed that this class would be "identifiable" and Designated Beneficiary treatment would be allowed.

C. “Conduit Trusts”

1. Fortunately, the 401(a)(9) regulations do provide a type of safe harbor trust, a “conduit trust”, where a beneficiary will be treated as a Designated Beneficiary.

a. A conduit trust requires the trustee to distribute all of the retirement account withdrawals to the beneficiary.

b. The trustee may use conduit trust assets to pay expenses attributable to such assets.

c. As the trust may not accumulate any assets withdrawn from the retirement account, the IRS allows the trust beneficiary to be treated as the oldest beneficiary of the retirement account.

2. Although conduit trusts have the advantage of certainty as they are specifically described in the treasury regulations, they also have a major disadvantage.

a. A conduit trust cannot withdraw retirement account proceeds and accumulate them inside of the trust.

b. This is often contrary to the intent of the client, who may be using a trust to prevent the retirement account assets from being distributed to the beneficiary for one reason or another.

D. Accumulation Trusts

1. A trust that allows accumulation of retirement account withdrawals (an "Accumulation Trust") may also qualify as a Designated Beneficiary.

a. As noted above, the only IRS guidance in this area is embodied in the above-described private letter rulings.

b. If a trust does not fit within such framework and is not a conduit trust, it is unclear how remote of a contingent beneficiary the IRS will take into account.

c. To be safe, one must draft the trust assuming the IRS may take into account all contingent beneficiaries. Although this may be possible by adding certain savings clauses to the trust, there still is no specific guidance that this approach works.

d. Obtaining a private letter ruling may provide certainty, but is expensive and time-consuming. It appears a private letter ruling may be granted while the account owner is still living or after the account owner's death.

2. Finally, the compressed income tax brackets of a trust lead to a significant tax cost to the usage of an accumulation trust.

a. A trust pays the highest rate of tax after the first $12,000 in income.

b. If significant amounts will likely be accumulated, the income tax cost is a significant detriment to consider before utilizing this type of trust.

E. Marital Trusts

1. We are all aware that one of the major requirements for a marital trust (either a general power of appointment trust or a QTIP trust) is that the surviving spouse be entitled all income of the Trust, at least annually.

2. Rev. Rul. 2006-26, 2006-1 C.B. 939, considered whether the "all income" requirement of I.R.C. §2056 and Treas. Reg. §§20.2056(b)-5(f)(1) and 20.2056(b)-7(d)(2) was satisfied in three fact situations. In each, a marital deduction trust held an IRA or a defined contribution plan.

a. Assuming that a QTIP marital trust was governed by the law of a state that had adopted the 1997 version of the Uniform Principal & Income Act ("UPIA"), the ruling concluded that the trust may not meet the "all income" requirement if: (1) the trust language did not require the trustee to distribute to the spouse the greater of all the income of the IRA (considered as if the IRA were a separate trust) or the annual required minimum distribution under I.R.C. §408(a)(6), and (2) the governing law included §§409(c) and (d) of the 1997 version of the UPIA.

(1) This was because UPIA §409(c) provided that a required minimum distribution from the IRA was allocated 10 percent to income and 90 percent to principal of the recipient trust, whereas the view of the IRS was that such an apportionment between principal and income was not based on the total return of the IRA and did not reflect a reasonable apportionment of the total return between income and remainder beneficiaries.

(2) If the trust language did not require the distribution of at least the income of the IRA when the spouse exercised the spouse's

right to direct a withdrawal and UPIA §409(c) applied, the "all income" requirement may not be satisfied, according to the ruling.

(3) Although §409(d) of UPIA 1997 states that a trustee must allocate a larger portion of any distribution to income to the extent that doing so is necessary to qualify for the marital deduction, the Service in Rev. Rul. 2006-26 stated that this provision was ineffective to reform an instrument for tax purposes, analogizing the statute to a savings clause in a document that would be ineffective to reform the document for federal tax purposes.

b. This ruling set forth a "safe harbor" that would apply if a QTIP election were made over both the trust and the IRA or retirement plan and the spouse had the power exercisable annually to compel the trustee to withdraw the income earned on the IRA or retirement plan and to distribute that income and all income earned on the other trust assets to the spouse.

c. The ruling concluded that marital trusts governed by §§409(c) and (d) of UPIA 1997 could not qualify for the safe harbor.

3. The Uniform Law Commission considered Rev. Rul. 2006-26 and made the changes discussed below to permit trusts governed by the 2008 version of the UPIA to qualify for the above-described safe harbor.

a. The 2008 UPIA §409 retains a 90/10 allocation for trusts other than QTIP and general power of appointment marital trusts.

b. However, for trusts intended to qualify for the estate tax marital deduction, the trustee is required to separately determine the income of each "separate fund" in such a trust for each accounting period. Separate funds include annuities, IRAs, pensions, profit sharing and bonus sock funds and stock ownership plans.

(1) All distributions received by a trust from such a separate fund are considered income until the income determined in this manner is reached. Distributions in excess of that amount are considered principal.

(2) If the distributions are less than this amount, the 2008 UPIA §409 states that the spouse may require that the trustee allocate principal from a source other than the separate fund to income, to make up the difference.

(3) Subsection (f) of the 2008 UPIA §409 requires that a trustee demand that the person administering the fund distribute the internal income to the trust upon the request of the surviving spouse.

(4) Under UPIA 2008, if a trustee cannot determine the income of a separate fund, the trustee is to apply a percentage between 3 and 5 percent, depending on the adopting state's choice, to the fund's value to determine the income.

(5) Further, if the value of the separate fund cannot be determined, the trustee is to compute an income equivalent by multiplying the I.R.C. §7520 rate by the present value of the payments, based on the §7520 rate.

4. The Service has published no new guidance on this issue since the 2008 revisions to the UPIA.

a. A new revenue ruling replacing Rev. Rul. 2006-26 and concluding that the "all income" requirement is satisfied by marital trusts governed by the laws of a state adopting §409 of UPIA 2008 is needed.

b. ACTEC has formally requested that the Service to issue a revenue ruling concluding that marital trusts governed by UPIA 2008 that hold IRAs or defined contribution plan benefits satisfy the "all income" requirement.

F. Separate Accounts For Trusts

1. Treasury Regulations provide that the separate account rules are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit.

a. The IRS now takes the position that separate account treatment is not available when a single trust is named as beneficiary.

b. Under the IRS's interpretation, if all of the separate trusts created under a revocable trust are look-through trusts, then the RMDs of all such separate trusts will be based on the oldest beneficiary of all of the separate trusts together, not the oldest beneficiary of each trust share at issue.

c. Therefore, on the beneficiary designation form, it is best to directly name the separate trusts to be created, as opposed to naming the funding trust. For example, instead of naming the "John T. Smith Revocable Trust" as the beneficiary, designate each separate share of the John T. Smith Revocable Trust as fractional beneficiaries.

2. Separate accounts for trusts is only an issue if each such separate trust is a look-through trust (a conduit trust or Accumulation Trust), otherwise the ages of the trust beneficiaries are irrelevant in determining the trust RMDs, and separate account treatment is not necessary.

3. However. . . see PLR201503024 (released January 16, 2015), which <u>in effect</u> allowed separate account treatment <u>in part</u> for a trust which paid out equally to five children.

G. Outright to Spouse Versus a Marital Trust

1. Leaving qualified retirement assets outright to the

surviving spouse is always the best tax strategy.

2. On many occasions, a client is extremely reticent to leaving retirement assets outright to a spouse, for a variety of reasons, including the existence of a second marriage, asset protection concerns, spendthrift concerns, or disability concerns.

a. A "QTIP" Trust for a surviving spouse has the following consequences:

(1) The surviving spouse cannot rollover the IRA, and therefore distributions from the IRA must begin in the calendar year after the first spouse's death, instead of being deferred until the surviving spouse attains the age 70½. Therefore, if the surviving spouse is younger than 70½ years old, a tremendous tax deferral opportunity will be lost.

(2) Minimum distributions during the spouse's life will be based on a single life expectancy table. If the benefits were left outright to the surviving spouse, then once the spouse begins distributions of her rolled over IRA, she uses the Uniform Lifetime Table, which is based on the <u>joint</u> life expectancy of the surviving spouse and a hypothetical new spouse who is ten years younger. Thus, the QTIP trust beneficiary designation forces larger annual distributions and less income tax deferral.

(3) The distributions from the IRA will be

subject to more income taxes than if the benefits were payable to the spouse outright. Each state's law regarding principal and income allocations are different, but in any event, a portion of the received IRA distributions will constitute "principal" for trust accounting purposes and such principal will be retained in the QTIP trust and taxed at trust income tax rates. As we all know, a trust reaches the highest income tax bracket at approximately $12,500 in income.

(4) If the intention is for the QTIP Trust to qualify for the estate tax marital deduction, then the trust must receive the greater of the minimum distribution amount, or the amount of income earned by the IRA. If the income earned by the IRA exceeds the minimum distribution amount, then greater amounts must be distributed from the IRA and less deferral is achieved.

b. As an alternative to the QTIP Trust technique in second marriage situations, I have been successful in persuading clients to instead leave a fractional amount to the surviving spouse and fractional amounts to the children of the first marriage.

c. Another alternative is to leave the total retirement asset amounts to the surviving spouse, and "compensate" the children of the first marriage with non-retirement assets.

d. If asset protection, spendthrift protection, or some other disability protection is the objective motivating the client to consider a trust

for the spouse, we must make sure that the client understands the real cost in naming a trust versus naming the spouse outright.

H. Estate Taxes and Funding Credit Shelter Trusts

1. Retirement accounts are not only subject to income tax when distributed to the beneficiary, they are also subject to estate tax at the death of the owner.

a. For 2017, the combined impact of the 40% estate tax, a top federal income tax rate of 39.6%, and a possible state income tax, can be devastating, even though the estate taxes on the retirement account assets are deductible for income tax purposes. IRC section 691(c).

b. In planning for estates that are subject to estate tax, one of the most troublesome areas is the use of retirement assets to fund a credit shelter trust.

2. There are five main reasons to avoid naming a credit shelter trust as beneficiary of a retirement account.

a. If the credit shelter trust is the beneficiary: (i) distributions from the retirement account must begin quicker (the year after the taxpayer's death) than if the spouse was directly named beneficiary, if the surviving spouse is under age 70 ½, (ii) the RMDs are larger after the spouse's death, (iii) the trust will often be in the highest income tax bracket, (iv) the use of trust assets to pay

income taxes on the RMDs wastes the first spouse's estate tax exemption, and (v) we now have portability (at least for the moment!).

I. Trusts which include gifts to charities involve potential traps for this unwary if the Trust is named as beneficiary of a qualified retirement plan, as discussed infra.

IV. CREDITOR ACCESS TO INHERITED IRAs

A. It is always big news when an "estate planning" topic is addressed by the U.S. Supreme Court, and it happened most recently in the summer of 2014 in Clark v. Rameker, 573 U.S. ____, 134 S.Ct. 2242 (June 12, 2014).

1. In Clark, the United States Supreme Court granted c*ertiorari* to resolve a conflict between the Circuits on the issue of whether a beneficiary of an inherited IRA can claim a federal bankruptcy exemption from creditors for such inherited IRA.

2. The federal bankruptcy law provides an exemption for "[r]etirement funds to the extent that those funds are in a fund or account that is exempt from taxation under §§ 401, 403, 408, 408A, 414, 457 or 501(a) of the Internal Revenue Code of 1986." 11 U.S.C. §§ 522(b)(3)(c), 522(d)(12) (It is noteworthy that an "inherited IRA" is an IRA classification specifically recognized by Code Section 408(d).)

3. In a unanimous decision, the Court first defined "retirement funds" as funds set aside for the day when an individual is no longer working, and then cited three (3) characteristics which, in the view of the Court, prevents inherited IRAs from being considered "retirement funds."

a. The holder of an inherited IRA may never make contributions thereto, as opposed to traditional IRAs and Roth IRAs which receive tax incentives for the accumulation of additional funds for retirement.

b. A holder of an inherited IRA is required to withdraw money from such account, without regard to how far away that person is from retirement.

c. The holder of an inherited IRA may withdraw all of the funds at any time without penalty, and use them for any purpose, while the owner of a traditional IRA or a Roth IRA must wait until attaining age 59½ in order to withdraw funds from such accounts without penalty.

4. In a crowning blow, the Court stated that nothing about an inherited IRA's legal characteristics prevents or discourages an individual from using the entire balance immediately after bankruptcy for purposes of current consumption.

B. The history behind Clark.

1. Remember that IRAs belonging to the original account owner are generally exempt from the account owner's creditors in federal bankruptcy and otherwise.

2. One major source of confusion in this area is, although bankruptcy law is federal law decided in federal bankruptcy courts, many states opt out of the federal bankruptcy scheme, thus activating the application of state exemption statutes in federal bankruptcy cases (some states, like Texas, allow a debtor to select state or federal exemptions). The majority of states opt out, and thus the bankruptcy exemptions are decided under state exemption laws.

3. Prior to Clark, there were twelve (12) reported cases dealing with beneficiaries of inherited IRAs within the federal bankruptcy context.

a. Eight of these courts (all of which are in "opt-out" states, except for Texas) found that the inherited IRAs were not exempt from the bankrupt estate in federal bankruptcy, including: *In re* Sims, 241 B.R. 467 (Bankr. N.D. Okla. 1999); *In re* Greenfield, 289 B.R. 146 (Bankr. S.D. Cal. 2003); *In re* Navarre, 332 B.R. 24 (Bankr. M.D. Ala. 2004); *In re* Taylor, Bank. No. 05-93559, 2006 WL 1275400 (Bankr. C.D. Ill. May 9, 2006); *In re* Kirchen, 344 B.R. 908 (Bankr. E.D. Wis 2006); *In re* Jarboe, 365 B.R. 717 (Bankr. S.D. Tex. 2007); *Robertson v. Deeb*, 16 So. 3d 936 (Fla. 2d DCA 2009); and *In re* Chilton, 2010 WL 817331 (Bankr. E.D. Tex. March 5, 2010).

b. Four of the courts found that the inherited IRA <u>was</u> exempt in federal bankruptcy, those being: *In re* McClelland, Bank No. 07-40300, 2008 WL 89901 (Bankr. D. Idaho Jan. 7, 2008); *In re* Nessa, 2010 Bankr. Lexis 931 (B.A.P. 8th Cir. Apr. 9, 2010); *In re* Tabor, 2010 105 AFTR 2d (Bankr. M.D. Pennsylvania June 18, 2010); and *In re* Hamlin, 465 B.R. 863 (BAP 9th Cir. 2012).

c. The Nessa decision (in a non-opt-out state) led many district courts, in unreported decisions, to allow the inherited IRA to be an exempt asset, until Clark came along.

C. Some states' statutes provide a different result than Clark.

1. In some opt-out states, the interpretation of existing statutes with broad exemption language may allow the exemption of inherited IRAs for state exemption purposes, and state exemptions are recognized under U.S. Bankruptcy Code § 522(b)(3)(A).

a. The state of Kansas has such a broad statute which could arguably be construed to exempt inherited IRAs.

b. However, in Mosby v. Clark (In Re Mosby), 15-5193-JWL (D Kan. Oct. 30, 2015), the Kansas District Court held that an inherited IRA is not exempt under the Kansas exemption statute.

2. In my home state of Missouri, along with Alaska, Arizona, Florida and Texas, the Clark holding is completely irrelevant, as these states have

statutes which specifically exempt inherited IRAs for state exemption purposes and have opted to use the state exemptions for federal bankruptcy law purposes. Attached hereto is a copy of the Missouri statute, RSMo. § 513.430.1(10)(f) (although "drafted" by yours truly, it is admittedly a combination of some of the language in the previously existing statutes in Florida and Arizona).

3. In a post-Clark decision, the federal Bankruptcy Court in New Jersey held that a debtor's inherited IRA was not property of the bankruptcy estate under New Jersey law. *In re* Andolino, 525 B.R. 588 (Bankr. D.N.J. 2015). The Bankruptcy Court stated that the question of inclusion in the estate must be reached first, before the Clark analysis of the application of an exemption can be made.

D. Use of spendthrift trusts as an alternative asset protection device.

1. If you are in a state where the applicable exemption is either indefinite or not existent, you should consider naming a spendthrift trust for the benefit of any beneficiary with creditor issues as the beneficiary of the IRA.

2. However, if the RMD amount received by the trust must be distributed from the trust (i.e. in a conduit trust), the Uniform Trust Code reverses the common law spendthrift protection for this type of a distribution interest and allows any creditor to attach the RMD amount from a spendthrift trust.

3. As an alternative, consider a "Trusteed IRA." If the provider offers a Trusteed IRA, and the Trusteed IRA agreement contains a spendthrift clause, then creditor protection should be accomplished.

V. IRA OWNERS/RETIREMENT PLAN ADMINISTRATORS BEHAVING BADLY

A. Prohibited transactions disqualifying an IRA from recognition as such.

1. As discussed previously, IRAs are tax exempt as well as exempt from bankruptcy proceedings. However, when an IRA engages in a prohibited transaction, those exemptions are lost. One prohibited transaction occurs when an IRA is transferred to, or used by or for the benefit of, a disqualified person.

2. In Ellis v. Commissioner, Decision No. 14-1310, (8th Cir. June 5, 2015), the 8th Circuit affirmed a Tax Court holding that an IRA owner engaged in prohibited transactions under Code §4975(c) by directing his IRA to acquire a membership interest in an LLC with the expectation that the LLC would employ him (and in fact he received wages from the LLC). The facts of this case arose out of a business established in Harrisonville, Missouri, wherein Mr. Ellis invested almost his entire rollover IRA ($321,253) in a 98% membership interest in an LLC, under which Ellis served as General Manager. As a result of these transactions, the IRA lost its status as an individual retirement account and its

entire fair market value was treated as taxable income as of the date of its establishment.

3. A different result was reached in *In re* Nolte, 2015 Westlaw 2128670 (Bankr. E.D. Va. 2015). At Nolte's instructions, the IRA investment advisor invested $100,000 out of the IRA in a 5% interest in an LLC. Nolte later served on the Board of the LLC but received no compensation. In a bankruptcy proceeding, a creditor objected to the debtor's discharge on the basis that the IRA had lost its exemption because Nolte had engaged in a prohibited transaction under Code §4975. In this case, the Bankruptcy Court found that merely investing in a 5% interest in an entity in which the IRA owner served on the Board was not a prohibited transaction, and the IRA was not disqualified.

4. In contrast to Nolte, Mr. Kellerman's IRA was found not to be exempt due to actions taken by Mr. Kellerman. *In re* Kellerman, 2015 Westlaw 3377907 (Bankr. E.D. Ark. 2015). Kellerman formed a partnership between his self-directed IRA and another LLC which was wholly owned by Kellerman. Kellerman ordered the IRA custodian to sell a substantial portion of the assets of the IRA and purchase a tract of land, in which the LLC and his IRA owned undivided interests. After finding that the IRA had engaged in prohibited transactions, the Court held the IRA had been disqualified and was not entitled to a bankruptcy exemption.

5. In McGaugh v. Commissioner, T.C. Memo. 2016-28, the taxpayer's IRA custodian initially refused to purchase shares in a closely-held entity since it was not on the custodian's approved buy list. The taxpayer then instructed the custodian to wire IRA funds directly to the corporation whereupon shares were issued by the Corporation in the name of the IRA which were then delivered by the taxpayer to the IRA custodian. Despite the fact that the taxpayer "pulled all strings" and controlled the wired funds in the transaction, the Tax Court held that the taxpayer was merely acting as a conduit for the custodian and that this transaction did not constitute constructive receipt of IRA proceeds. However, in Vandenbosch v. Commissioner, T.C. Memo. 2016-29, the taxpayer moved funds from his IRA to a joint account, followed by a move from the joint account into the taxpayer's personal account, followed by the taxpayer wiring the funds directly to a borrower, in exchange for a note from the borrower payable to the taxpayer and not the taxpayer's IRA. Here, the court held that the taxpayer was not a mere conduit in the same manner as in McGaugh, and the court held constructive receipt of IRA funds had occurred.

B. Claim of Breach of Fiduciary Duty against Plan Trustees

1. In Tibble v. Commissioner, 135 S.Ct. 1823 (2015), retirement plan participants brought suit against the plan for investing in mutual funds with high fees as opposed to low-cost mutual funds. The 9th Circuit had

found that the statute of limitations of six years after "the date of the last action which constituted a part of the breach or violation" was a bar to this suit, because the mutual funds in question were purchased more than six years before the suit was instituted. However, the Supreme Court reversed this decision, holding that the plan trustees engaged in a continuing breach of their duty of prudence in failing to monitor the investments, and remanded the case to the trial court for determination of whether that issue was timely raised.

C. Loss of Bankruptcy Exemption

1. In Running v. Miller, 77 F.3d 711 (8th Cir. 2015), the taxpayer purchased an annuity from Minnesota Life Insurance Company for a lump sum purchase payment of $267,319. Miller used funds from his IRA to make this payment. Miller later filed for bankruptcy and claimed that the annuity was exempt from the bankruptcy estate as an individual retirement account. The bankruptcy trustee objected, and the bankruptcy court overruled her objection. The bankruptcy trustee had claimed that, because Miller had used the IRA funds to purchase an annuity with a lump-sum premium, the funds thus became property of the bankruptcy estate.

VI. NAMING CHARITY(S) AS BENEFICIARY OF THE IRA

A. If a client indicates a desire to leave funds to charity(s) upon his or her death, the first words out of our mouths should be to consider making such at-death gifts from qualified retirement plans or traditional IRAs.

1. If the client's estate plan contemplates benefits both to charity and to children or other individual beneficiaries, the most efficient income tax planning is accomplished by satisfying the charitable gifts with retirement plan assets, and using other assets to leave to the individual beneficiaries. While the charity will not pay income tax on any inheritance it receives, including retirement plan benefits, individual beneficiaries will pay income tax on the distribution of a retirement plan interest, and will not pay income tax on almost all other forms of inheritance.

2. In addition to satisfying the client's charitable desires, a variety of charitable giving techniques involving retirement benefits will help realize additional estate planning objectives as well.

3. With this planning, charitable intent should be more important than tax savings!

4. In contrast, since Roth IRAs pass to the designated beneficiary without any income tax liability, naming charity as beneficiary of the Roth IRA is not tax efficient.

B. There are various techniques for leaving retirement benefits to charity(s) upon a taxpayer's death.

1. The easiest way to leave retirement plan benefits to charity(s) is to name the charity(s) as a direct beneficiary of one hundred percent (100%) of the benefits payable upon the taxpayer's death.

a. A properly completed beneficiary designation form in this regard is easy to accomplish.

b. Although all of the income associated with retirement benefits will be included in the income of the charitable organization named as beneficiary, such charity's income tax exemption will make the retirement plan benefit distribution not taxable.

c. In addition, the deceased taxpayer's estate will receive a dollar for dollar estate tax charitable deduction for the estate tax value of the retirement plan interest.

2. In many instances, the client will want to leave a specific dollar amount to one or more charities, with the balance of the retirement plan interest passing to other individual beneficiaries (i.e., his or her lineal descendants, per stirpes).

a. This usually requires an attachment to the beneficiary designation form setting forth the specific amount gift, and a description of the residual beneficiaries.

b. In my experience, you should be sure at the planning stage that the retirement plan administrator will accept and honor this attachment!

c. In order for the individual beneficiaries to be able to use separate accounts and a life expectancy payout, it will be necessary to be sure that the charity(s) are "cashed out" (i.e., fully paid from the retirement plan) before September 30 of the year following the year of the taxpayer's death.

d. Be careful doing this through a trust vehicle!

(1) In PLR 201438014, decedent's Trust was named as beneficiary of his IRA, and the Trust provided for payment of pecuniary bequests to two charities and the residue to be distributed to individuals.

(2) A state court ordered a reformation of the Trust, providing that either the Trust's transfers to the charities were to be treated as direct bequests of the IRA amounts to the charities, or such transfers were to be

considered to be made out of the trust's gross income pursuant to the terms of the governing instrument.

(3) The IRS ruled that the Trust must treat the payments to the charities as sales or exchanges (since the IRA is being used to satisfy a pecuniary legacy), and the Trust must include in its gross income the amount of the IRA used to satisfy the charitable legacies. Further, the Trust is not entitled to a charitable income tax deduction for these distributions. The bottom line was, because the purpose of the reformation was not to resolve a conflict but merely to obtain tax benefits, then the IRS will not respect the reformation and treat it as part of the governing instrument. PLR 201438014.

e. Careful drafting will be necessary when an IRA is designated to be distributed to a Trust, which contains residuary charitable bequests.

(1) Chief Counsel Memorandum 200848020 (July 28, 2008), provides that a Trust is denied a charitable income tax deduction after it receives taxable IRA distributions and then distributes some of those amounts to charities.

(a) CCM 200848020 involved a decedent who left his IRA payable to his Trust upon his death, which benefited his six children and several charities. The Trust received distributions from the IRA, and the Trustee

immediately paid those amounts to the charities, leaving the six children as the only remaining beneficiaries of the Trust. The Chief Counsel's Office concluded that the Trust had taxable income from the IRA distribution, but was <u>not</u> entitled to claim an offsetting charitable deduction (remember only an estate may claim an income tax charitable "set aside" deduction").

(b) In order for the distribution of IRA proceeds to charity to be deductible by the Trust, the Trust must meet the legal requirement for a trust to claim a charitable income deduction. In order to claim a charitable income tax deduction, the charitable payment must be traced to income <u>and</u> must generally be made pursuant to the terms of the governing instrument specifically requiring income to be paid to a charity. IRC § 642(c).

(c) In the Trust involved in CCM 200848020, there was no <u>specific</u> instruction to distribute income to a charity, just a general provision for a percentage of the residuary to be paid to several charities. Therefore, the Trust could not claim the charitable income tax reduction.

(2) Ostensibly, one solution would be to include a clause in the Trust document that instructs all residuary charitable gifts to be made, to the extent possible, from property that constitutes "income in respect of the decedent" as that term is defined under the U.S. income tax laws.

(a) However, Treas. Reg. § 1.642(c)-

3(b)(2) provides that instructions in a trust instrument to distribute specific types of income to a charity will not be respected for federal income tax purposes <u>unless</u> the instruction has an "economic effect independent of income tax consequences".

(b) The examples in this Regulation provide that, unless the amount to be paid to charity is dependent upon the type of income from which it is to be paid, the above-described ordering provision is considered to not have economic effect independent of income tax consequences.

(3) Interestingly, in PLR 201444024, where the Trust was named as the beneficiary of decedent's IRA and the Trust provided that, after two pecuniary bequests, the residue shall be immediately distributed to charity, the IRS held that the Trust may re-title the name of the IRA to reflect the name of the charity in a non-taxable transfer, and the charity, not the trust, will include the taxable amount of the IRA distributions in charity's income for tax purposes, as if the charity were the direct beneficiary.

(4) The alternative answer at the planning stage is to draft the beneficiary designation of the IRA so as to mirror the dispositive provisions of the Trust (i.e., list the children and the charities and their respective percentages on the IRA designation itself, rather than sending the IRA to the decedent's Trust).

(5) In addition, the will and/or revocable trust of

the decedent must provide that no estate taxes are to be charged against or paid out of the charity's share of trust assets.

3. Charitable Remainder Trusts

a. This technique involves a charitable remainder trust ("CRT") as that term is defined in IRC § 664.

b. Income tax consequences

(1) Since a charitable remainder trust is exempt from income tax, the distribution of all the retirement benefits to a charitable remainder trust results in no current income tax liability.

(2) The individual beneficiaries of the charitable remainder trust will receive their lifetime interest earned from the <u>entire amount</u>, as opposed to an after-tax amount, of the distributed retirement benefit interest.

(3) However, the tax-deferred income received by the CRT must be "booked" from day one by the CRT, and will gradually "leak out" to the individual beneficiaries with the distribution of each lifetime payment. Under the "tiered" approach to income taxation of CRT distributions, the distribution to the individual lifetime beneficiary is deemed first to be derived from ordinary income earned in all prior years and the current year, to the extent such amount has not already been allocated to a prior distribution.

(4) Although an individual IRA beneficiary is entitled to a Section 691(c) income tax deduction for the portion of federal estate taxes attributable to retirement plan benefits, this deduction is rarely if ever available to an individual beneficiary of a CRT, as all of the tiers of ordinary income, capital gain income and tax exempt income would need to be exhausted before any CRT distribution would carry out the use of the IRD deduction.

c. Estate tax consequences

(1) The decedent's estate is entitled to a federal estate tax charitable deduction for the actuarial value of the charitable remainder interest at the time of the decedent's death.

(2) The actuarial value of the charitable remainder interest must be at least ten percent (10%) of the date of death value of the trust in order for the CRT to be qualified.

(3) Because the non-charitable actuarial interest in the CRT is taxable in the decedent's estate, the decedent's tax clause in his or her will or revocable trust will need to provide for payment of any estate tax attributable to the non-charitable CRT interest from other sources of the decedent's estate.

d. Leaving a retirement plan interest to a CRT is not a good idea in all situations.

(1) If the individual beneficiary or beneficiaries are young enough, the actuarial value of the charitable interest may not exceed ten percent (10%) of the total value of the trust, and the trust will not qualify as a CRT. However, a term of years could be used to make the CRT work in this situation.

(2) If the CRT will receive a large amount of retirement benefits, it is possible that there will not be enough non-retirement assets to pay any estate tax due because of the actuarial value of the non-charitable interest in the CRT.

e. If the "stretch IRA" technique is eliminated, then a designation of a charitable remainder trust will allow some "stretching" to still occur.

4. Charitable Lead Trusts

a. Since a charitable lead trust ("CLT") is the theoretical opposite of a charitable remainder trust (i.e., the initial stream of payments is paid to a charity for a term of years, with the remainder passing to one or more individuals at the end of the term), this seems on its face to be a viable technique.

b. However, the charitable lead trust has one important characteristic which is different from a CRT; the CLT is <u>not</u> exempt from income tax. Therefore, when all of the retirement benefits are distributed to the CLT, the trust must pay income tax on the entire amount of benefits distributed.

c. Because of the drastic income tax consequences, one should not advise leaving retirement benefits to a CLT.

VII. LIFETIME GIFTS OF QUALIFIED RETIREMENT BENEFITS TO CHARITY

A. Lifetime Gifts From Retirement Plan Distributions

1. For some of our clients, the most readily available funds with which to make lifetime charitable gifts are their retirement plan funds.

2. Except for the charitable IRA rollover discussed below, the only way for this client to make such a gift is to withdraw funds from the qualified plan or IRA and then gift such funds to the charity.

a. This of course results in the immediate taxation of the distributed assets from the plan on the donor's income tax return.

b. One would hope that the income tax charitable deduction will result in a "wash" of this income for income tax purposes. However, there are some circumstances which will prevent a complete wash of the income.

(1) If the charitable donations exceed the applicable percentage of AGI limits, then a complete wash will not result.

(2) For high income taxpayers, there is an automatic reduction of itemized deductions under Code § 68 which could also prevent a complete wash of the income.

(3) Of course, if the taxpayer is under age 59½ at the time of the withdrawal, he or she will suffer a ten percent (10%) penalty on the distribution. The charitable deduction will not in any way reduce this penalty.

(4) If the taxpayer resides in a state that does not allow a charitable deduction in computing its state income tax, then a complete wash will not be possible.

(5) Of course, any individual who does not itemize deductions would not achieve a wash of the income since he or she would not be itemizing the charitable deduction.

B. Gifts of RMD Amounts to Charity(s)

1. A taxpayer who is already receiving RMDs from his or her IRA or qualified plan may use the distributed amounts for charitable giving.

2. Although the above-described obstacles may prevent a complete wash of the income, since the taxpayer is <u>required</u> to receive the RMD

in any event, he or she may as well attempt to receive some income tax relief through charitable giving.

C. There are Potential Charitable Gifts of Unique Retirement Plan Benefits That Can Be Beneficial During Life

1. An individual under age 59½ may avoid the ten percent (10%) premature withdrawal penalty through implementing a "series of substantially equal periodic payments" from a retirement plan, and such taxpayer could use those payments to make offsetting charitable gifts.

2. In certain limited circumstances, wherein a distribution is made from a qualified plan of employer stock which includes "net unrealized appreciation", the taxpayer is not immediately taxed on such net unrealized appreciation at the time of the plan distribution. Instead, taxation of this unrealized appreciation is deferred, and may be completely avoided through certain future charitable gifts.

3. A lump sum distribution from a qualified plan to a participant who is born before January 2, 1936 (or to the beneficiaries of such a participant) may exclude the distribution from the recipient's gross income and is taxed under a different rate schedule. In some circumstances, the distributee may

give the distributed amount to charity, and effectively deduct the gift from his or her other income, since the lump sum distribution is taxed at a much lower rate.

4. "Qualified replacement property" received by a business owner who has sold his or her stock to an ESOP, wherein the owner did not have to pay income tax on the sale, may be gifted to charity to avoid permanently some or all of the tax on such sale.

D. IRA Charitable Rollover

1. Congress has had an on-again/off-again love affair with the IRA Charitable Rollover.

a. The 2006 Pension Protection Act first established the "IRA Charitable Rollover" concept. After being allowed to expire in 2008, this provision was renewed temporarily two more times, and expired again on January 1, 2014.

b. The "Public Good IRA Rollover Act" was introduced in the Senate on November 21, 2013, which sought to renew and make permanent the IRA Charitable Rollover. Comparable legislation was introduced in the House in early 2014, and passed on July 17, 2014. Finally, on December 16, 2014, the Senate signed off on several "extenders," including this provision, which

was signed into law by the President on December 19, 2014. Unfortunately, the IRA Charitable Rollover provision expired again as of January 1, 2015!

c. After months of watching two separate bills which proposed to enact the IRA Charitable Rollover on a permanent basis sit idle in the House of Representatives, action finally came in December, 2015. President Obama signed the "Protecting Americans from Tax Hikes Act" into law on December 18, 2015. Among other things, this Act finally makes the IRA Charitable Rollover permanent.

2. What constitutes an "IRA Charitable Rollover"?

a. A "Qualified Charitable Distribution" is an otherwise taxable distribution from an IRA (not including an ongoing SEP or SIMPLE IRA) owned by an individual who is at least age 70½, and that is paid directly from the IRA to "eligible charitable organizations."

b. A taxpayer can exclude from gross income up to One Hundred Thousand Dollars ($100,000) of a Qualified Charitable Distribution made for a given year.

(1) The Qualified Charitable Distribution can be used to satisfy any required minimum distributions from the IRA for that year.

(2) Likewise, the amount of the Qualified Charitable Distribution excluded from gross income is not shown as an itemized deduction for a charitable contribution.

c. An eligible charitable organization for these purposes includes a public charity, other than a donor advised fund or supporting organizations. Individuals can make a Qualified Charitable Distribution to a private operating foundation or to a private foundation that elects to meet certain conduit rules in the year of the distribution.

d. The donor must instruct their IRA administrator to make the contribution directly to the eligible charity.

3. Who really benefits from this continued IRA Charitable Rollover technique?

a. A high income donor who itemizes deductions and whose charitable contribution deductions are reduced by the percentage of income limitation (otherwise, such individuals who receive a distribution from their IRA and make a corresponding charitable contribution, must count the entire distribution as income and receive a charitable deduction for a lesser amount).

b. Individuals who do not itemize their deductions.

c. Individuals in certain states where the operation of the state income tax law would offer greater benefits as a result of a charitable rollover.

d. Those rare individuals who already exceed their percentage of income limitation in terms of charitable contribution limits (i.e., more than 50% of their adjusted gross income for gifts of cash to public charities).

VIII. IS THE BAND ABOUT TO BREAK ON THE STRETCH IRA?

A. Introduction

1. In January or early February of 2012, Senate Bill 1813, the "Highway Investment, Job Creation and Economic Growth Act," which was primarily a highway enhancement bill, included a provision that would no longer permit "stretching" of an IRA for beneficiaries other than a spouse, minor children or a disabled beneficiary. All other beneficiaries would be left with the five (5) year distribution period.

2. After many Republican Senators cried foul, Senator Harry Reed withdrew the provision from the Bill doing away with stretch IRAs in late February 2012.

3. In July 2013, the Senate proposed eliminating the stretch IRA in a similar fashion as described above in order to increase revenue and keep a

3.4% interest rate in place on federally subsidized Stafford loans for low and moderate income students. Again, the proposal failed to gain any traction amongst a majority of Senators.

4. A similar proposal was revived in conjunction with a 2014 bill aimed at extending funding for the Highway Trust Fund. This proposal echoed part of President Obama's 2014 fiscal year budget proposal. Again, this proposal was abandoned after failure to reach much consensus in the Senate.

5. Once again, the Obama administration included elimination of the stretch IRA in its 2015 fiscal year budget proposal, and most recently in its 2016 fiscal year budget proposal.

6. In September of 2016, The Senate Finance Committee unanimously voted in support of a bill which would eliminate the stretch for the majority of non-spouse beneficiaries. This is the first evidence of bi-partisan approach for this concept, but it WAS prior to the 2016 election!

7. The obvious question is, is this a precursor of things to come in 2017 or thereafter? For the moment, this proposal is not part of the most recent tax law changes proposed by the House.

B. The Policy Arguments in Favor of and Against the Stretch IRA Concept

1. Those who would argue in favor of limiting the ability of tax-deferred stretching of IRAs by most beneficiaries claim that:

a. Such a change in the tax law is a relatively easy method of raising significant revenue (the Senate Finance Committee estimated in 2012 that such a provision would raise over $4.6 billion over the next ten (10) years).

b. The primary purpose of IRAs is for the retirement of the <u>creator</u> of the IRA, and <u>not</u> the provision of tax-free benefits to later generations.

c. This change would encourage consumption spending, as opposed to savings.

d. How many children actually "stretch" the distributions anyway?

e. This provision could put a sizeable dent in the current governmental deficit.

f. Such a provision appropriately taxes the "rich."

g. As planners, we will no longer agonize over the structure of trusts who will be beneficiaries of an IRA.

2. Those who would argue in favor of maintaining the ability to stretch the tax deferral of IRAs by beneficiaries say the following:

a. The ability of a taxpayer's beneficiary to continue tax deferral of IRA funds is an important component of the creator's decision to implement IRA planning.

b. Such a policy encourages savings.

c. Doing away with the stretch IRA option forces the timing of an inheritance and eliminates the beneficiary's ability to implement his or her own estate planning.

d. A quick payout of an inherited IRA provides a windfall to creditors.

e. Any additional revenue created by such a proposal will only fuel more governmental spending.

f. Such a proposal in fact hurts the middle class.

C. Planning Opportunities in the Event the Stretch IRA is Ultimately Curtailed

1. Charitable Planning

a. Such a change will provide even more incentive for benefitting charity with IRAs upon death.

b. Funding a CRT with an IRA will achieve some of the deferral lost if the IRA stretch technique is eliminated.

2. Such a change will add more fuel to the fire in Roth IRA conversion planning.

3. Such a change will arguably provide more need for ILIT's.

4. If generation skipping planning is a major objective of a client, utilizing IRAs to push taxable inheritance down to lower bracket beneficiaries should be strongly considered.

5. The advisor should anticipate to the extent feasible the possible use of disclaimers by designated beneficiaries of the IRA, in the structuring of the IRA owner's beneficiary designation.

X. MYRAs

A. In late 2014, United States Treasury announced that it will begin offering the "myRAs" Program, providing individuals with a simple, safe and affordable way to start saving for retirement. These myRAs will initially be offered through employers.

B. The key features of myRAs are as follows:

1. As little as $25 can be used to open a myRA account.

2. A participant may add to savings through a regular payroll direct deposit of Five Dollars ($5.00) or more each pay day.

3. No fees are involved.

4. MyRAs will earn interest at the same variable rate as the Government Securities Investment Fund in the Thrift Savings Plan for federal employees.

5. MyRAs will not be limited to one employer, and therefore the participant's account is portable to later employers.

6. MyRA contributions can be withdrawn tax-free, and earnings can be withdrawn tax-free after five (5) years if the participant is 59½ years old.

7. Participants can build savings for thirty (30) years or until their myRA reaches Fifteen Thousand Dollars ($15,000), whichever comes first. After that, the myRA balances will transfer to private sector Roth IRAs.

8. Employers will not be required to make myRAs accounts available to their employees.

XI. OTHER RECENT LEGISLATIVE/REGULATORY PROPOSALS AFFECTING ESTATE PLANNING FOR RETIREMENT ASSETS

A. Requiring distributions from Roth IRAs.

1. Under current law, an IRA owner need not take distributions from a Roth IRA after attaining age 70½.

2. The Obama administration proposed to require Roth IRA owners to take distributions from Roth IRAs after attaining 70½, in the same manner as is currently the case for traditional IRAs.

B. Sixty (60) day rollover for inherited retirement benefits.

1. As discussed earlier, while a participant, IRA owner or spousal beneficiary may take distributions of qualified plan or IRA assets and roll them over into another qualified plan or IRA within sixty (60) days of such distribution, any other non-spousal beneficiary is prohibited from doing such a rollover, but may do a direct trustee-to-trustee transfer.

2. The Obama administration proposed to permit non-spousal beneficiaries to roll over distributions to an inherited IRA within sixty (60) days of receipt.

C. Limiting Roth conversions to pre-tax dollars.

1. The Obama administration proposed to permit Roth IRA conversions only to the extent that distributions would be includable in income if they were not rolled over. The after-tax amounts attributable to

"basis" held in a qualified plan or traditional IRA could not be converted to a Roth IRA.

D. Repeal of the exclusion of net unrealized appreciation in employer securities.

1. As noted earlier in this outline, in the case of a distribution of employer stock as part of a lump sum distribution, the participant can exclude the amount of the net unrealized appreciation. Instead, net unrealized appreciation in such stock is currently taxed as a capital gain when the recipient ultimately sells such stock.

2. The Obama administration proposed to repeal the exclusion of net unrealized appreciation for participants who have not attained age 50 by December 31, 2015.

E. Requirement for certain employers to contribute to individual retirement accounts.

1. In a Fact Sheet released by the White House in early 2015, President Obama proposed a number of measures aimed at generating revenue, including a proposal requiring employers with more than ten (10) employees that do not have a 401(k) retirement plan to automatically enroll full time and part time employees in an individual retirement account.

2. The "Automatic IRA Act" of 2015 (S. 245) was introduced in the Senate in late January 2015, which proposed to amend the Code to: (1) require certain employers who do not maintain qualifying retirement plans or arrangements to make available to their eligible employees a payroll deposit individual retirement account (IRA) arrangement, which grants such employees the right to opt out of participation; (2) require the Treasury to provide employers with a model notice for notifying employees of their opportunity to participate in an automatic IRA arrangement and to provide participants with an annual statement setting forth the status of the IRA; (3) impose a penalty on employers who fail to provide eligible employees access to an automatic IRA arrangement; (4) allow employers who do not have more than one hundred (100) employees a tax credit for costs associated with establishing an automatic IRA arrangement; and (5) increase the dollar limitation on the tax credit for small employer pension plan start-up costs.

3. A comparable bill was introduced in the House in April 2015 (H.R. 506).

4. Nothing like this is currently being actively proposed.

F. IRAs for youth.

1. The "Start Saving Sooner Act of 2015", introduced in the House as H.R. 1125, proposed to amend the Code to establish a tax-exempt

individual retirement account for taxpayers under age 18, to be known as a "young savers account." Such accounts are to be treated as Roth IRAs for income tax purposes. This measure would also allow a tax credit for retirement savings for any contribution to such a young savers account.

2. The Roth Accounts for Youth Savings Act of 2015, or the "RAYS" Act, was introduced in the House as H.R. 1377. This Bill amended the Code to allow dependents of taxpayer to establish a tax-preferred savings account, similar to a Roth IRA, to be known as a Roth Account for Youth. Any amounts in such an account will be disregarded for purposes of determining eligibility for benefits or assistance under any means-tested federal benefit program.

3. The "401(Kids) Education Savings Account Act of 2015," was introduced in the Senate as S. 195. This Bill which would amend the Code by eliminating after 2015 the income-based reduction of contributions to Coverdell education savings accounts, increase the annual contribution limit for such accounts, allow the youth of such an account to pay homeschool expenses and the acquisition costs of a first-time home buyer, and allow tax-free rollovers of amounts in a Coverdell education savings account to a Roth IRA.

PIXAR FOR ESTATE PLANNERS: WHO GETS YOUR DIGITAL STUFF WHEN YOU'VE LOGGED OFF FOR THE FINAL TIME

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I. UNDERSTANDING THE DIGITAL PROPERTY ISSUE

A. As the number, complexity, types <u>and</u> value of digital property held by our clients increases, questions regarding the administration and disposition of such items are increasing as well.

1. According to a 2011 McAfee survey, the average value of a person's digital assets is $55,000!
2. The average individual has 25 passwords.
3. There are thirty million (30,000,000) Facebook accounts that belong to <u>dead</u> people!
4. Eighty-four percent (84%) of all U.S. adults use the internet at least occasionally (if the average income of the sample is at least $75,000, that number jumps to ninety-seven percent (97%)).
5. Seventy-six percent (76%) of all U.S. adults use a social networking site.
6. Consider how much this will change over the next five-ten years….

B. What is meant by the generic term, "digital property"?

1. The Uniform Fiduciary Access to Digital Assets Act ("UFADAA") defines a "digital asset" to mean "an electronic record in which an individual has a right or interest."
   a. The term does not include an underlying asset or liability unless the asset or liability itself is an electronic record.

b. “Catalogue of electronic communications” is defined to mean information that identifies each person with which a user has had an electronic communication, the time and date of the communication, and the electronic address of the person.

c. “Content of electronic communication” means information concerning the substance or meaning of an electronic communication which (A) has been sent or received by a user; (B) is in electronic storage by a custodian providing an electronic-communication service to the public or is carried or maintained by a custodian providing a remote-computing service to the public; and (C) is not readily accessible to the public.

2. Perhaps the term "digital property" is best understood by reviewing examples of the same.

a. Frequent flyer, hotel, credit card and other mileage awards and points (see www.colloquy.com).

(1) Airline rewards.

(A) United and American allow the transfer of these points upon death.

(B) Delta and Southwest do not allow a transfer upon death.

(2) Hotel points.

(A) Marriott, Starwood and Best Western allow transfer of points upon death.

(B) Hilton does not allow transfer of points upon death.

b. E-mail accounts.

c. Social networking accounts.

d. Voicemail accounts.

e. Online photographs and videos.

f. Photograph sharing accounts (i.e. Instagram).

g. Video sharing accounts (i.e. YouTube)

h. I-tunes and other electronically stored music.

i. Financial information accounts.

j. Web pages and blogs.

k. Online purchasing accounts (i.e. PayPal, Amazon).

l. Domain names.

m. Online sales accounts (i.e., eBay, Craigslist).

n. Intellectual property rights that are created and stored digitally.

o. Video games and related virtual assets.

(1) Bit coins, for example, are an exclusively online currency that are acquired by creation or are purchased through online exchanges.

(2) The overall value of all bit coins being traded is currently estimated to be above $1 billion in real dollars.

p. Residential or commercial real estate security system.

q. Any and all usernames and passwords and other security access to any of the foregoing.

r. Any other items or information stored on a desktop, laptop, tablet or other computer, peripheral drive, storage device, mobile telephone or any similar device.

s. All similar digital items which currently exist or may exist as technology develops in the future.

C. Why all the fuss? Why should we, as estate planners, care about digital property?

1. Particularly for our younger clients, <u>there can be real value</u> in such assets.

a. In 2010, a person sold several parcels of virtual real estate for $635,000.

b. In 2012, an investor purchased a large amount of virtual real estate for $2,500,000!

2. Although many items of digital property do not produce real financial value, <u>our clients and their heirs attach tremendous sentimental value</u> to many items of digital property.

3. One of the major risks with many items of digital property is security, particularly when the user becomes disabled or dies.

D. Helping the client identify his or her own digital property.

1. Ultimately, the estate planner's role is to strongly encourage your clients to develop and maintain a current list of digital property, as well as the security passwords and/or encryptions necessary to access such assets, as well as provide for the access and disposition of such property in their estate plans.

2. Although you cannot make them do it, urging your client to complete a digital asset inventory as part of the estate planning process, including usernames, passwords and special encryptions, will be vital to the ultimate fiduciary handling the client's property.

II. WHY IS DIGITAL PROPERTY UNIQUELY DIFFICULT TO DEAL WITH?

A. Federal and State Laws

1. Anti-Hacking Laws: "Hacking" generally means breaking into a computer system, frequently with the intention to alter or modify existing settings. Putting aside those who hack for fun but without the intent to harm (and whatever psychological and sociological issues may exist), there is a fundamental privacy issue, not to mention the obvious potential for harm - both in terms of damage

to one's technology and loss of data, and in terms of financial loss from the theft of personal information.

a. Every state has a statute prohibiting hacking and other types of unauthorized access to personal computer systems. See, e.g. RSMo. §§ 537.525, 569.095, 569.097, 569.099.

b. The Stored Communications Act ("SCA"), 18 U.S.C. Section 2701(a) et seq, part of the Electronic Communications Privacy Act (or "ECPA"), contains two relevant prohibitions for planners and internet service providers:

   (1) 18 U.S.C. Section 2701(a), which concerns access to digital property, creates a criminal offense for anyone to "intentionally access…without authorization a facility through which an electronic communication service is provided", as well as to "intentionally exceed…an authorization to access that facility." This section does not apply to "conduct authorized…by a user of that service with respect to a communication of or intended for that user."

   (2) 18 U.S.C. Section 2702, prohibits an electronic communication service or a remote computing service from knowingly divulging the contents of a

communication that is stored by or carried or maintained on that service; HOWEVER, disclosure is permitted "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service".

(3) In 2012, beauty queen Sahar Daftary fell 150 feet to her death in what was ruled a suicide. In an effort to overturn the suicide ruling, two family members obtained a subpoena to compel Facebook to turn over the decedent's Facebook account contents, believing the account contained evidence showing the decedent's actual state of mind in the days just prior to her death. The U.S. District Court in San Jose, California quashed the subpoena, holding that the Stored Communications Act, while permitting a provider (such as Facebook) to divulge the contents of a communication with the permission of the subscriber (here the decedent), does not require the provider to divulge the information. The court declined to address whether the family members could consent on the decedent's behalf.

(4) A recent California Court of Appeal decision has provided a 180 degree turn on the Stored Communications Act issue. The California Court held that, due to the fact that a Florida court had ordered a former employee of a company to give his express consent to disclosure of his e-mails in the process of discovery in a lawsuit filed against the employee by his former employer in Florida, whereupon the employee complied with that order by e-mailing Google and consenting to its production of e-mails sought. The California court held that this “express consent” takes the contemplated production of e-mails outside of the Stored Communications Act and permitted Google to make the requested disclosure. In doing so, the California Court of Appeals gave a different spin to the word “permissive” in the context of the consent exception to the Stored Communications Act prohibition against disclosure. Google argued that the Stored Communications Act allows but does not require disclosure by an electronic communication service provider if consent exists. The California Court of Appeals held that, insofar as the Stored

Communication Act permits a given disclosure, it permits a court to compel that disclosure under state law. Matteo Negro v. The Superior Court of Santa Clara, County, case number H040146, in the Court of Appeal of the State of California, Sixth Appellate District.

(5) In Vista Marketing, LLC v. Burkett, 812 F.3d 954 (11th Cir. 2016), the 11th Circuit examined the case in which ex-wife allegedly violated the SCA when, following her lawyer's advice, she viewed her ex-husband's e-mails in an effort to prove to the divorce court that he was lying about and hiding assets. Although it was found that she was in technical violation of the SCA, the trial jury decided not to award the ex-husband any damages for this violation. The ex-husband appealed to the district judge, who declined to award him the claimed hundreds of thousands of dollars in damages and instead awarded him a very modest amount and no attorney's fees reimbursement. Ex-husband appealed to the 11th Circuit which held that, under the SCA, the court has no authority to award

statutory damages in the absence of a showing of actual damages to the account holder.

(6) In Cheng v. Romo, 2013 U.S. Dist. LEXIS 179727 (Dec. 20, 2013), the United States District Court for the District of Massachusetts denied a motion for judgment notwithstanding a jury verdict affirming that Cheng was entitled to damages for Romo's violation of the SCA and an invasion of privacy in violation of Massachusetts statutes. In this case, Romo admitted accessing a number of Cheng's e-mails that were stored in Cheng's Yahoo e-mail account by logging into Cheng's e-mail account using Cheng's password; however, Romo argued that at the time she read the e-mails, they had previously been opened by Cheng and, therefore, were not in "electronic storage" as that term is used in the SCA. The District Court was not impressed with Dr. Romo's creative argument.

(7) The SCA protects "contents" of a communication (i.e., the subject line and the body of a communication) and not non-content records (i.e., user's name and address, network IP address, and

addressee's name and address). Also, the SCA does not apply to contents which are completely public.

c. The Computer Fraud and Abuse Act ("CFAA"), 18 U.S.C. Section 1030, prohibits unauthorized access to computers.

(1) The U.S. Department of Justice takes the position that this Section supports a criminal charge when anyone "exceeds authorized access" by violating the access rules set forth in the provider's terms of service agreement. There is NO specific exemption or authorization for fiduciaries attempting to access a decedent's digital assets.

(2) Virtually no one reads the terms of service agreement ("TOSA") when setting up online accounts. A recent university study centered around a fake website's TOSA, which included provisions indicating that the user's data would be shared with the NSA <u>and</u> that the user's first born child would be taken as payment for using this site. Notwithstanding these terms, 98% of the users agreed to the terms of the service agreement!

(3) There are a few cases which have addressed this issue directly.

(A) In United States v. Nosal, 676 F.3d 854 (9th Cir. 2012), the 9th Circuit held that written restrictions on the use of a computer, such as website terms of use or an employer's work place policy, do not control whether access is authorized. In this case, an employee of an executive search firm left that firm to set up a competitive shop, and he convinced his former co-workers to use their computer system authorization to download information for him from the former employer's data base. The former employee was charged with aiding and abetting his former co-workers in exceeding their authorized access under the employer's terms of service agreement, and the 9th Circuit dismissed the indictment, holding that the phrase "exceeds authorized access" in the CFAA does not extend to violations of a company's "use restrictions" on the information obtained from the computer.

(B) The government later re-indicted Nosal, arguing that, after Nosal and his colleagues

left their employer, they had no underlying legal right to access the company's computer network at all, and the use of a sympathetic current employee's log in credentials violated the "access without authorization" ban under the CFAA. This time, Nosal was convicted and the 9th Circuit upheld his conviction. The majority of the court held that since Nosal's former employer had revoked his credentials, gaining the permission of a former co-worker to share a password constituted "access without authorization" under the CFAA. United States v. Nosal, Nos. 14-10037 & 14-10025 (9th Cir. July 5, 2016).

(C) A 2015 Second Circuit case involved a New York City cop who accessed the NYPD's computer system to search for a high school friend was in technical violation of the police department's computer use policy. He later used the information he obtained from the NYPD database in an online chat room, where he discussed kidnapping and

cannibalizing his old friend (hence, he became known as the "Cannibal Cop"). However, he had not actually threatened anyone in those chats. He was charged with violating the CFAA but the trial judge acquitted him. The Second Circuit Court of Appeals upheld the acquittal, saying that the CFAA should be narrowly construed and should not support a conviction for a "mere" TOSA violation. United States v. Valle, No. 14-2710-CR, 2015 WL 7774548 (2d Cir. Dec. 3, 2015)

(4) Some state's anti-hacking statements may be more strictly construed than the CFAA (i.e., Pennsylvania and Delaware).

d. Germany has not struggled with this issue like we have.

(1) In late April 2016, a Berlin regional court held that the parents of a deceased minor had the right to access their child's Facebook account.

(2) Applying common sense, the court reasoned that the digital messages were no different than written messages.

(3) Even though privacy is an important aspect of German law, the court held that a third party sender had no more special right of privacy for online messages than they would for written messages.

(4) Facebook contested the matter vigorously, and an appeal is pending.

2. A few states, Connecticut, Delaware, Idaho, Indiana, Louisiana, Nevada, Oklahoma, Rhode Island, and Virginia all enacted very basic statutes regarding fiduciary access to a decedent's digital property prior to the Uniform Law Commission's endorsement of "UFADAA" (the Uniform Fiduciary Access to Digital Assets Act). Although these states deserve some praise for initially tackling this issue, all but one of them address the roadblocks created by federal law, as well as other factors.

   a. Connecticut and Rhode Island gave the Personal Representative the power to access or copy the decedent's e-mail accounts.

   b. Oklahoma and Idaho gave the Personal Representative the power to take control of, conduct, continue or terminate the decedent's e-mail, social networking, blogging or messaging service.

   c. Nevada gave the Personal Representative the power to direct termination of any online account or similar

electronic or digital asset of the decedent (but not to access or copy it!).

d. Indiana initially had the broadest statute, which allows the Personal Representative to access or copy the decedent's information stored electronically by a "custodian." It also attempts to require custodians to retain the decedent's electronic information for a two year period after death.

e. Virginia passed a narrow statute that allows the Personal Representative of a deceased minor's estate to assume the obligations under a term of service agreement for purposes of consenting to and obtaining disclosure of contents. Virginia initially has no statute with respect to an adult decedent's estate!

f. As discussed further below, Delaware enacted the Delaware Fiduciary Access to Digital Assets Act, which was effective as of January 1, 2015.

B. Service Provider Limitations

1. The home page of virtually every commercial website has a link at the bottom of the page to that website's Terms of Use. Signing up for an account on that website inevitably includes consenting to the site's Terms of Service Agreement ("TOSA"). From the standpoint of estate planning with regard to digital property, and

later administration of a decedent's digital property, the Terms of Service are likely to be problematic.

a. The Yahoo! terms of service agreement provides: "You agree that your Yahoo! account is non-transferable and any rights to your Yahoo! ID or contents within your account terminate upon your death. Upon receipt of a copy of a death certificate, your account may be terminated and all contents therein permanently deleted."

b. Among Facebook's terms of service is the following: "You will not share your password (or in the case of developers, your secret key), let anyone else access your account, or do anything else that might jeopardize the security of your account."

   (1) Facebook allows a decedent's account to be "memorialized" - his or her profile remains available only to Facebook friends, and sensitive information is removed.

c. The Yahoo!, Facebook, and Google websites, among others, provide that their Terms of Service Agreements are governed by California law. If the account holder resides in Missouri and his or her digital property has its situs in Missouri, which state's law will apply in determining a

fiduciary's access to a deceased account holder's digital property?

C. Technology Itself

1. Even if one has legal authorization to open someone else's electronic file or view the contents of a person's online account, access to the information will be impossible if the owner has protected the file or account with a strong password but has not provided access to the password.

III. ESTATE PLANNING STRATEGIES FOR DIGITAL PROPERTY

A. A digital property inventory should be completed by the client.

1. See the attached Exhibit A for one form to give to your client for this purpose (our Estate Planning Questionnaire has doubled in size as a result!).

2. This will take significant pushing and prodding by you, the planner, all within the time constraints of a fixed fee amount that your client is willing to pay.

3. The inventory should include an itemization of each item of digital property, along with all applicable passwords and encryptions.

B. Once the client has completed his or her inventory of digital property, what should he or she do with it?

1. A written list may be stored in one's safe deposit box, with a copy stored in the estate planner's file.

a. Such a list may be outdated in a matter of months.

b. Despite one's best intentions, a written inventory can be easily lost or destroyed.

2. A digitally stored inventory, secured by one password or encryption.

a. This is more secure, less susceptible to loss or destruction, easier to maintain and update, and portable.

b. There are free software and web-based services available for storage of passwords (i.e., Last Pass, Roboform, 1Password, Dashlane).

c. Can the client be persuaded to go to this much "trouble"?

d. One additional potential downside is, will the electronic inventory also lock out the client's fiduciary?!

(1) There exist additional web-based services which assist fiduciaries and designated family members with access.

(2) For example, see www.deathswitch.com; others include Assets in Order, LegacyLocker, LegacyVault.

(3) For clients with extensive and potentially valuable digital property, they may want to combine the written inventory and electronically-stored list methods.

e. Passwords and encryptions can be a blessing and a curse:

(1) The security of your smart phones, computers, etc. is only as strong as the password used.

(2) Don't use a password that is easy to guess! Recently, a hacker stole the passwords of 32 million users from "RockYou, Inc.," a developer of games through social networking sites like Facebook. According to the New York Times, about 5,000 commonly used passwords would unlock 20% of these 32 million user accounts.

(3) Microsoft recommends passwords of at least 14 characters, using a mix of letters, numbers and symbols.

(4) However, will you "lock out" your fiduciary in the process?! (Leonard Bernstein left his memoir on his death in electronic form with a password; to this day, no one has been able to access it, or help realize the financial value of it!)[1]

3. New Google service

a. In April, 2013, Google launched a new feature that facilitates a subscriber telling Google what he or she wants done with their Google account(s) when he or she dies or is

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[1] Gunnarsson, Helen W., "Planning for Administering Your Digital Estate," 99 Ill.B.J.71 (2011).

no longer able to use such account(s).

b. The feature is called "Inactive Account Manager," which you can now find on your Google "Settings" page.

c. You can choose to have your digital data stored in the Google account deleted after a certain amount of inactivity, OR you can select trusted contacts to receive such data after the chosen period.

d. Before this system takes the chosen action, Google will first warn you by sending a text message to your mobile phone and an email to a secondary address you have provided.

4. New Facebook service

a. Early in 2015, Facebook instituted a new "Legacy Contact" feature.

b. Go to www.facebook.com/help/1568013990080948, and you can designate someone to manage friend requests and other updates after death.

C. Making provision for access to the client's digital property upon the client's incapacity, with appropriate language in a durable power of attorney.

1. Sample clause: To access and obtain all digital or electronic data that may be stored on my desktop, laptop, tablet, or other computer, peripheral drive, storage device, mobile telephone or

any similar device, including without limitation, all internet accounts (including e-mail accounts, iTunes, financial reports and archives of the same), on-line photographs and videos, on-line music, on-line documents, all licenses to on-line items and software, social network accounts, domain registrations, DNS service accounts, web hosting accounts, on-line stores, tax preparation service accounts, file sharing accounts, computer backup processes, and user passwords and other security access to any of the foregoing, and all similar digital items which currently exist or may exist as technology develops.

2. The planner should be sure to tailor the above clause for specific valuable digital property which a particular client has.

3. Even if your state statute includes such a power in its list of default or general powers for durable powers of attorney, it will be wise to include this power specifically in your durable power of attorney form, as many third party providers of digital property will demand that such power be explicit.

D. Similar provisions should be made in the decedent's estate planning documents for fiduciary access and handling of digital property during administration.

1. See Exhibit B for a sample Powers clause for your estate planning instruments.

2. The <u>choice of fiduciary</u> will also be key, if there is significant digital property.

3. In certain situations, consider using a “Special [Fiduciary]” specifically to handle digital property.

E. Provisions for ultimate disposition of digital property should be made in the decedent's estate planning documents.

1. In the decedent's will?

2. In the decedent's revocable trust?

F. Should the client be able to place a clause in his or her estate planning instrument providing for destruction of certain digital property (i.e., the “burn the Rembrandt” clause)?

1. Writings which the client has created.

2. "Private" e-mails and other digital correspondence.

G. Does the client <u>want</u> to leave digital property to anyone?

H. We also have our clients execute a standard Digital Asset Authorization, in the form attached hereto as Exhibit C.

I. Why is the planning stage so critical?

1. Identifying digital property with tremendous sentimental value.

2. Identifying digital property with real or potential fair market value.

3. Preservation and safekeeping of usernames, passwords and encryptions to protect security during the client's life and maintain such security upon the client’s incapacity or death.

4. Immediate access to digital property upon the client's incapacity or death.
5. Providing the fiduciary immediate access to a treasure trove of the client's information immediately upon incapacity or death.
6. Empowering the client's fiduciary to protect such digital property during the pendency of estate administration.
7. Providing for an orderly transfer or termination of such digital property upon the client's demise.
8. Preserving evidence which is stored electronically, in case the client is involved in litigation at the time of his or her death or incapacity.
9. Indeed, the IRS is using electronically stored information to track your clients and their assets. Among other things, IRS training manuals tell their agents to search the internet for a taxpayer's online activities, to review social media accounts in which the taxpayer participates, to search for domain names owned by the taxpayer, etc.
    a. In its Chief Counsel Advice 201146017, the IRS advised that an IRS agent can summon a taxpayer's original electronic data files containing unaltered "metadata", as long as the information in the metadata "may be relevant" to a proper purpose for the IRS examination.
    b. This is a critical ruling, as "metadata" contains a history of

all document revisions, formulas and spreadsheets that are not printed, hidden text that is not printed and a record of who edited and reviewed the document as well as the dates and times of all revisions.

c. However, on April 16, 2013, the IRS Commissioner testified that their policy is not to seize "protected communications" without a search warrant.

J. Planning for the high net worth client.

1. Digital assets may be candidates for wealth transfer planning.

a. Intellectual property

b. Domain names

c. Bit coins

2. Consider utilizing digital property in wealth transfer planning.

a. Taxable gifts on tight

b. GRATs

c. Sales to IDGTs

IV. THE UNIFORM FIDUCIARY ACCESS TO DIGITAL ASSETS ACT ("UFADAA")

A. Background

1. In January, 2012, the Uniform Law Commission ("ULC") authorized the formation of a drafting committee to write model legislation that will give fiduciaries the authority to manage and

control digital assets, copy or delete digital assets, and access digital assets.

2. It is important to realize that the scope of this drafting committee's assignment was to draft a model act that would govern access, and <u>not</u> ownership or the succession of ownership. The charge given the drafting committee did not include granting fiduciaries any greater rights to digital property than the original account holder enjoyed, and was not to set forth any methods for the distribution of digital assets. The UFADAA drafting committee consisted of several "Commissioners" from the ULC, American Bar Association "Advisors", and representatives of the National Academy of Elder Law Attorneys, the American Bankers Association, several companies which provide digital accounts, the American College of Trust and Estate Counsel, the Uniform Law Conference of Canada, and other attorneys, judges and legislators from all over the country.

3. The UFADAA was developed initially in two separate two-day drafting meetings in December, 2012 and February, 2013, followed by a first reading at the ULC's July, 2013 annual meeting in Boston. The UFADAA was revised and revised again in two-day drafting meetings held in November, 2013 and March, 2014, prior to its final reading at the ULC's July, 2014 annual meeting in Seattle. By a vote of 50 to 0, the ULC approved UFADAA in its

then "final" form which was followed by review and publication by the ULC Style Committee during September, 2014.

4. Despite a number of introductions/discussions of UFADAA as bills in multiple states, Delaware is the only state which adopted UFADAA. Indeed, the legislature in Delaware proceeded to adopt the final draft version of UFADAA prior to the ULC annual meeting in July, 2014, which was signed into law by the Governor of Delaware later in 2014.

5. The multiple 2015 bills were blocked by a coalition of internet providers and privacy advocates (i.e., the ACLU) who vehemently opposed the adoption of UFADAA in these approximately twenty-seven (27) states.

6. This led to renewed informal discussions between members of the UFADAA Enactment Committee, internet providers and privacy advocates. A revised model act was produced, which Facebook and other original opponents of UFADAA was acceptable. On July 15, 2015, the ULC approved a Revised Uniform Fiduciary Access to Digital Assets Act ("RUFADAA"), a copy of which is attached.

B. The structure of RUFADAA

1. Section 1 sets forth the title of this Act.

2. Section 2 includes key definitions of terms used throughout the act.

a. Many of the definitions are based on those originally set forth in the Uniform Probate Code.

b. In other instances, the definitions attempt to mirror the definition of certain terms contained in federal law, including the Electronic Communications Privacy Act, and the Uniform Electronic Transactions Act.

c. The “terms-of-service agreement” definition originated in part from the definition of “agreement” found in Uniform Commercial Code Section 1-201(b)(3).

d. You should note the breadth of the definition of the word “digital asset”. The drafting committee went through at least half a dozen different definitions of this term before ending up with the current definition.

3. Section 3 sets forth the four types of fiduciary to which RUFADAA applies, and makes clear that the Act does not apply to any digital asset of an employer used by an employee. This Section now makes sure that this Act applies to a custodian (i.e., provider) of digital assets for a user IF the user resides in this state or resided in this state at the time of the user’s death.

4. RUFADAA Section 4 provides that users may consent to disclosure of their electronic communications, either online or in a record, and that such consent will override any TOSA provision to the contrary.

a. Without consent, providers are not required to disclose content.

b. If a user has not used an online tool to give direction as contemplated above, or if a custodian has not provided an online tool, a user may allow or prohibit disclosure to a fiduciary of some or all of the user's digital assets, in a will, trust, power of attorney, or other record.

5. Section 5 makes clear that RUFADAA does not override a custodian's TOSA, except to give effect to the consent provisions of Section 4.

   a. Thus, if there is no advance planning by the user, then the TOSA will control fiduciary access.

6. Section 6 of RUFADAA sets forth the possible procedures for custodians to disclose the digital assets of a user under RUFADAA.

   a. The custodian may, in its sole discretion, grant the fiduciary full access to the user's account, or grant partial access to the user's account sufficient to perform the task with which the fiduciary is charged, or provide the fiduciary with a digital or paper copy of a digital asset

   b. If a custodian considers a user's direction or a fiduciary's request to impose an undue burden, either the custodian or

the fiduciary may petition the court for an order clarifying the method of disclosure.

7. Section 7 of RUFADAA sets forth the rules for disclosure of <u>protected</u> electronic communications of a deceased user.

    a. If the user consented to disclosure of electronic communication contents, or if the court directs disclosure, a custodian shall disclose to the personal representative of the estate of a deceased user the content of an electronic communication sent or received by the user, provided that the personal representative provides to the custodian:

        (1) A written request for disclosure in physical or electronic form;

        (2) A certified copy of the death certificate of the user;

        (3) A certified copy of the letters of appointment of the personal representative, or a small estate affidavit, or a court order;

        (4) Unless the user provided direction using an online tool, then the personal representative shall provide a copy of the user's will, trust, power of attorney, or other record evidencing the user's consent to disclosure of the contents of electronic communication; and

(5) If requested by the custodian, the personal representative shall provide a number, user name or address assigned by the custodian to identify the user's account, evidence linking the account to the user, or an order of the court finding that (A) the user had a specific account with the custodian, identifiable by a number, user name or address assigned by the custodian; (B) the disclosure of the content of the user's electronic communications will not violate federal privacy law; (C) unless the user provided direction using an online tool, the user consented to disclosure of the contents of electronic communications; or (D) disclosure of the contents of electronic communications of the user is reasonably necessary for estate administration.

8. RUFADAA Section 8 sets forth the disclosure requirements of non-protected digital assets of a deceased user.

   a. Unless the user prohibited disclosure of digital assets, or the court directs otherwise, a custodian shall disclose to the personal representative for the estate of a deceased user a catalog of electronic communications sent or received by the user.

b. Additionally, unless the user prohibited disclosure or the court directs otherwise, a custodian shall disclose any other digital assets in which the user had a right or interest, except for protected contents of electronic communications.

c. The personal representative must provide to the custodian (1) a written request for disclosure in physical or electronic form, (2) a certified copy of the death certificate of the user, (3) a certified copy of the letters of appointment of the personal representative, or a small estate affidavit or a court order, and (4) if requested by the custodian, a number, user name or address assigned by the custodian to identify the user's account, evidence linking the account to the user, an affidavit stating that disclosure of the user's digital assets is reasonably necessary for estate administration, or an order of the court finding that (1) the user had a specific account with the custodian, identifiable by a number, user name or address assigned by the custodian, or (2) that disclosure of the user's digital assets is reasonably necessary for estate administration.

9. Section 9 of RUFADAA addresses the disclosure of contents of electronic communications of a principal to an agent under a power of attorney.

a. To the extent a power of attorney expressly grants an agent authority over the contents of electronic communications sent or received by the principal, and unless otherwise directed by the principal or the court, a custodian shall disclose to the agent the content of electronic communication sent or received by the principal, if the agent gives the custodian:

(1) A written request for disclosure in physical or electronic form;

(2) An original or copy of the power of attorney expressly granting the agent authority over the contents of electronic communications of the principal to the agent;

(3) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(4) If requested by the custodian, (A) a number, user name or address assigned by the custodian to identify the principal's account; or (B) evidence linking the account to the principal.

10. Section 10 of RUFADAA addresses disclosure of non-protected digital assets to the agent under a power of attorney.

a. Unless otherwise ordered by the court, directed by the principal, or provided by a power of attorney, a custodian

shall disclose to an agent with specific authority over digital assets or general authority to act on behalf of a principal a catalog of electronic communications sent or received by the principal, as well as any other digital assets in which the principal has a right or interest, except the protected contents of electronic communications.

b. The agent must provide to the custodian:

(1) A written request for disclosure in physical or electronic form;

(5) An original or a copy of the power of attorney that gives the agent general authority to act on behalf of the principal;

(6) A certification by the agent, under penalty of perjury, that the power of attorney is in effect; and

(7) If requested by the custodian, (A) a number, user name or address assigned by the custodian to identify the principal's account; or (B) evidence linking the account to the principal.

11. Section 11 of RUFADAA addresses disclosure of digital assets held in trust when the trustee is the original user.

a. Unless otherwise ordered by the court or provided in the trust instrument, a custodian shall disclose to the trustee who is an original user, any digital asset held in trust,

including any catalog of electronic communications of the trustee and the contents of an electronic communication.

12. Section 12 of RUFADAA deals with disclosure of protected electronic communications held in trust when the trustee is not the original user.

    a. Unless otherwise ordered by the court, directed by the user, or provided in the trust instrument, a custodian shall disclose to a trustee who is not the original user the content of electronic communications sent or received by an original or successor user and carried, maintained, processed, received or stored by a custodian in an account of the trust if the trustee gives to the custodian:

        (1) A written request for disclosure in physical or electronic form;

        (2) A copy of the trust instrument or a certification of trust under the Uniform Trust Code, that includes consent to disclosure of the contents of electronic communications to the trustee;

        (3) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust; and

        (4) If requested by the custodian, (A) a number, user name or address assigned by the custodian to

identify the trust's account; or (B) evidence linking the account to the trust.

13. Section 13 of RUFADAA addresses disclosure of non-protected digital assets held in trust when the trustee is not the original user.

    a. Unless otherwise ordered by the court, directed by the user, or provided in the trust instrument, a custodian shall disclose to a trustee who is not an original user a catalog of electronic communications sent or received by an original or successor user and stored, carried, or maintained by a custodian in an account of the trust, as well as any other digital assets in which the trust has a right or interest, <u>other than</u> protected contents of electronic communications.

    b. The trustee must provide to the custodian:

        (1) A written request for disclosure in physical or electronic form;

        (2) A certified copy of the trust instrument, or a certification of trust under the Uniform Trust Code;

        (3) A certification by the trustee, under penalty of perjury, that the trust exists and that the trustee is a currently acting trustee of the trust; and

        (4) If requested by the custodian, (A) a number, user name or address assigned by the custodian to

identify the trust's account; or (B) evidence linking the account to the trust.

14. Section 14 of RUFADAA addresses disclosure of digital assets to a conservator of a protectee.

    a. The court having jurisdiction over the conservatorship, after an opportunity for a hearing under state law, may grant a conservator a right to access a protectee's digital assets.

    b. Unless otherwise ordered by a court or directed by the user, a custodian shall disclose to that conservator a catalog of electronic communications sent or received by the protectee, and any other digital assets in which the protectee has a right or interest, <u>other than</u> protected contents of electronic communications.

    c. The conservator must provide to the custodian:

        (1) A written request for disclosure in physical or electronic form;

        (2) A certified copy of the court order that gives the conservator authority over the protectee's digital assets; and

        (8) If requested by the custodian, (A) a number, user name or address assigned by the custodian to

identify the protectee's account, or (B) evidence linking the account to the protectee.

d. A conservator with general authority to manage the assets of a protectee may request a custodian of the protectee's digital assets to suspend or terminate an account of the protectee for good cause. A request made under this section shall be accompanied by a certified copy of the court order giving the conservator authority over the protectee's property.

15. In one of the more important sections of RUFADAA, Section 15 provides guidelines with respect to general fiduciary duty and authority as they relate to digital assets.

a. The legal duties imposed on a fiduciary charged with managing tangible property also apply to the management of digital property, including the duties of care, loyalty, and confidentiality.

b. Specifically, a fiduciary's authority with respect to a digital asset of a user is subject to the terms of service agreement, except as otherwise provided in Section 4 of RUFADAA; is subject to other applicable laws, including copyright law; is limited by the scope of the fiduciary duties; and may not be used to impersonate the user.

c. A fiduciary with authority over the property of a decedent, protectee, principal or settlor, has the right to access any digital asset in which the decedent, protectee, principal or settlor had a right or interest and that is not held by a custodian or subject to a TOSA.

d. A fiduciary acting within the scope of the fiduciary's duties is an authorized user of the property of the decedent, protectee, principal or settlor for the purpose of applicable computer-fraud and unauthorized-computer-access laws, including this state's laws.

e. A fiduciary with authority over the tangible personal property of a decedent, protectee, principal or settlor, has the right to access that property and any digital assets stored in it, and is an authorized user for purposes of any applicable computer-fraud and unauthorized-computer-access laws, including this state's laws.

f. A fiduciary may request termination of a user's account if termination will not violate any fiduciary duty. A request for account termination must be in writing, in either physical or electronic form, and accompanied by:

(1) If the user is deceased, a certified copy of the death certificate of the user.

(2) A certified copy of the letters of appointment of the representative or a small estate affidavit or court order, power of attorney or a trust instrument, giving the fiduciary authority over the account; and

(3) If requested by the custodian, (A) a number, user name or address assigned by the custodian to identify the user's account, (B) other evidence linking the account to the user, or (C) an order of the court finding that the user had a specific account with the custodian, identifiable by a number, user name or address assigned by the custodian.

16. Section 16 provides for custodian compliance and custodian immunity

    a. Importantly, this section provides that a custodian, as well as its officers, employees and agents, are immune from liability for any act done in good faith in compliance with this model act.

17. Sections 17 through 21 contain several administrative provisions, including severability clause and effective date provisions.

C. Making the case for the enactment of RUFADAA in your state

1. Clearly, the nature of our client's property as well as their methods of communications have changed dramatically; a fiduciary's previous modus operandi of checking a sixty (60) day cycle of

mail, delivering photos stored in an album, reviewing books, documents and files in file cabinets, and securing money on deposit at the local bank, is simply substandard. For almost all of our clients, at least some of their property, as well as sentimental communications and pictures, are stored as data on one or more electronic devices.

2. Just as our clients want their nominated fiduciaries to marshal, access and dispose of their other property, they want the same for their digital assets!

3. The RUFADAA is all about the right of the account holder to make choices as to the account holder's digital assets.

4. RUFADAA is an "overlay statute," designed to work in conjunction with a state's existing separate laws relative to decedent's estates, conservatorship estates, trusts and powers of attorney.

V. ADMINISTERING THE DIGITAL ESTATE

A. Finding the Assets

1. The time-honored modus operandi of a fiduciary and her attorney searching through a decedent's/incapacitated person's papers in his workplace and at home, watching the decedent's mail for a 90 day cycle, and reviewing the decedent's tax returns and account statements, is simply sub-standard in this day and age.

2. If the client has planned ahead, the fiduciary's task will be made simpler. Regardless, the fiduciary will need to take several immediate steps, whether or not planning has occurred previously.

   a. An immediate inventory of all possible digital property must be made.

   b. It is critical to obtain physical and virtual access to the client's smart phone, iPad or other tablet, laptop computer, and all other digital equipment, and to keep them secure.

      (1) As discussed above, the Revised Uniform Fiduciary Access to Digital Assets Act provides procedures for the fiduciary to "step into the shoes" of the principal/ward/settlor/decedent for purposes of access to digital property that is covered by state computer fraud and abuse acts (discussed above), <u>and</u> that may be released by providers under the Electronic Communications Privacy Act ("ECPA").

      (2) Depending on the amount of digital property held by the decedent, consider the following additional steps out of an abundance of caution:

         (A) Make a backup of the original data before beginning any search.

(B) Consider hiring a consultant who specializes in data recovery to assist the fiduciary in accessing the various devices.

(C) Beware of implications of state and federal privacy and computer hacking laws (discussed above).

(3) The fiduciary must act quickly; some online account providers will delete the data associated with a user account if such account isn't accessed for four-nine months, and will delete the user's account if it isn't accessed for eight-twelve months.

(4) What should a fiduciary do IF no planning has been done?

c. Timely notice to third party e-mail providers is critical for preserving information.

(1) What if the client maintained an e-mail account through an employer e-mail system?

(2) Many providers of free e-mail accounts will delete the decedent's account and its contents within a few months following notice of his or her death.

d. A quick inventory should be taken of online purchasing accounts (as well as all other financial information stored online).

e. Access or control of web pages, blogs, social networking accounts, home security systems, voicemail systems, etc. is critical in order to prevent identity theft, as well as preserve and transfer sentimental information for the family.

f. Each terms of service agreement must be reviewed to ascertain (1) whether the account terminates at death; (2) whether the account is transferrable; (3) whether the agreement prohibits others from using the account; and (4) which state law governs the agreement.

g. Quickly determine the value, if any, of the decedent's digital property.

  (1) This must be reported accurately on a probate inventory, probate and/or trust accountings, and accountings required of an agent operating under a durable power of attorney.

  (2) If the client has a taxable estate for federal and/or state estate tax purposes, the applicable value must be reported accurately on the federal and/or state estate tax return.

  (3) How is digital property valued?

    (A) Comparables?

    (B) Capitalization of an ascertainable revenue share?

(C) Historical cost?

(D) Attempts to sell the item on Ebay or similar marketplaces?

(E) Other traditional valuation methods?

(4) Examples of potentially valuable digital property:

(A) Intellectual property created by the client.

(1) Intellectual property is typically valued by looking at recent revenue streams, together with forecasted future revenue streams.

(2) Bear in mind that the person’s death can impact the future value of the decedent’s intellectual property.

(B) Advertising revenue stream from web pages and/or blogs.

(1) In November 2011, The Atlantic reported that the top ten blogs in America had an aggregate value of $785 million.

(C) Domain names.

(1) These domain names typically cost around $15 to $30 online.

(2) In 2011, the domain name "social.com" sold for $2.6 million.

(3) In 2012, the domain name "investing.com" sold for $2.45 million.

(4) In 2006, the domain name "diamond.com" sold for $7.5 million.

(5) In 2004, the domain name "beer.com" sold for $7 million.

(6) In 2010, the domain name "sex.com" sold for $13 million.

(D) Virtual currency (e.g. Bitcoins).

(E) Virtual real estate.

(F) Unused credit card or travel points.

(G) Refunds from online purchasing accounts (watch for credit balances).

(H) Contents of e-mails and social networking accounts of certain public figures may have value.

(I) What about downloaded music, books and other copyrighted material??

(1) Under the “first sale doctrine”, as codified by Section 109 of the Copyright Act, the owner of a particular copy or phono record lawfully made is entitled, without the authority of the copyright owner, to sell or otherwise dispose of the possession of copy or phono record. 17 U.S.C. Section 109.

(2) In 2001 (a lifetime ago in the digital world), the United States Copyright Office rejected the extension of the first sale doctrine to the distribution of digital works in its report on the Digital Millennium Copyright Act.

(3) In a very limited technical decision, the Southern District Court of New York recently held that the first sale doctrine does not permit the sale of digital music files on or through a website that enabled users to buy and sell “used” copies of songs. However, this decision is based on

very unique facts and thus very limited in future application. Capitol Records, LLC v. ReDigi, Inc., Case No. 1:12-cv-00095-RJS (SDNY March 30, 2013). The court clarified that the first sale doctrine continues to protect a "lawful" owner's sale of her particular "phono record." The court further stated that the doctrine protects the sale of the device or hard drive containing the media. Therefore, it appears that the sale of a device containing legally acquired digital media files is protected by the first sale doctrine.

(4) Stay tuned on this issue (pun intended).

h. If there is a current or potential future law enforcement investigation or a civil lawsuit involving the deceased person, it is important to preserve potential electronic evidence to avoid obstruction of justice or contempt charges.

(1) The fiduciary should not attempt to power on or access the smart phone, computer or other storage media until appropriate precautions have been made to preserve the original data and to preserve the chain of custody of the electronic evidence.

(2) Consider using an independent computer forensics company to make an exact image copy of the storage media in order to preserve the original data.

B. Unlocking the Data

1. Again, the fiduciary will have to deal with the problem of data that is protected in some manner. If the fiduciary does not have access to passwords and encryption keys that were used by the decedent, the data may simply be unavailable.

2. You may want to hire a consultant who specializes in data recovery or computer forensics to access the devices and data, especially if you have reason to believe there is significant value in the digital property.

EXHIBIT A

DIGITAL ESTATE INFORMATION

A. HARD COPY FILE LOCATIONS

Financial=

House Materials=

Personal records=

Historical record=

B. DEFAULT INFORMATION

User names=

Passwords=

Secret questions=

Mother's maiden name=

Grade school=

Street where grew up=

C. ELECTRONIC DEVICE ACCESS

Device	Website	Username	PIN	Password
Computer				
Windows				
Cell phone				
Tablet				
GPS				
DVR/TiVO				
Television				

D. INCOME TAXES

Item	Website	User Name	PIN	Password
Federal income tax payment				
State income tax payment				
Prior computerized tax returns				

E. BANKING

Institution	Website	User Name	Password	Other information
Checking				Icon=
Savings				Verbal password=

F. STOCK

Institution	Website	User Name	Password	Other Information

G. RETIREMENT

Institution	Website	User Name	Password	Other Information
				Account #= Security question answer= Balance as of __________: $

H. INSURANCE

Institution	Website	User Name	Password	Other Information
Health				
Life				

I. CREDIT CARDS

Institution	Website	User Name	Password	Other Information
American Express				
Visa				
Master Card				

J. DEBTS

Institution	Website	User Name	Password	Other Information
Mortgage				
Cars				
Student Loan				

K. BUSINESSES

Institution	Website	User Name	Password	Other Information
Amazon.com				
e-Bay.com				
Airlines				
Netflix				

L. UTILITIES

Institution	Website	User Name	Password	Other Information
Electric				
Gas				
Internet				
Phone (landline)				
Phone (cell)				

TV				
Trash				
Water				

M. SOCIAL MEDIA

Institution	Website	User Name	Password	Other Information
Facebook				
LinkedIn				
YouTube				

EXHIBIT B

DIGITAL PROPERTY PROVISION FOR A WILL

Powers and authorizations regarding digital property. The personal representative may exercise all powers that an absolute owner would have and any other powers appropriate to achieve the proper investment, management, and distribution of: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; (4) any user account of mine; and (5) any domain name of mine. The personal representative may obtain copies of any electronically stored information of mine from any person or entity that possesses, custodies, or controls that information. I hereby authorize any person or entity that possesses, custodies, or controls any electronically stored information of mine or that provides to me an electronic communication service or remote computing service, whether public or private, to divulge to the personal representative: (1) any electronically stored information of mine; (2) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service; and (3) any record or other information pertaining to me with respect to that service. This authorization is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. The personal representative may employ any consultants or agents to advise or assist the personal representative in decrypting any encrypted electronically stored information of mine or in bypassing, resetting, or recovering any password or other kind of authentication or authorization, and I hereby authorize the personal representative to take any of these actions to access: (1) any kind of computing device of mine; (2) any kind of data storage device or medium of mine; (3) any electronically stored information of mine; and (4) any user account of mine. The terms used in this paragraph are to be construed as broadly as possible, and the term "user account" includes without limitation an established relationship between a user and a computing device or between a user and a provider of Internet or other network access, electronic communication services, or remote computing services, whether public or private.

EXHIBIT C

DIGITAL ASSET AUTHORIZATION

Authorization and Consent for Release of Electronically Stored Information

I hereby authorize any person or entity that possesses, custodies, or controls any electronically stored information of mine or that provides to me an electronic communication service or remote computing service, whether public or private, to divulge to my then-acting fiduciaries at any time: (1) any electronically stored information of mine; (2) the contents of any communication that is in electronic storage by that service or that is carried or maintained on that service; and (3) any record or other information pertaining to me with respect to that service. The terms used in this authorization are to be construed as broadly as possible, and the term “fiduciaries” includes an attorney-in-fact acting under a power of attorney document signed by me, a guardian or conservator appointed for me, a trustee of my revocable trust, and a personal representative (executor) of my estate.

This authorization is to be construed to be my lawful consent under the Electronic Communications Privacy Act of 1986, as amended; the Computer Fraud and Abuse Act of 1986, as amended; and any other applicable federal or state data privacy law or criminal law. This authorization is effective immediately. Unless this authorization is revoked by me in writing while I am competent, this authorization continues to be effective during any period that I am incapacitated and continues to be effective after my death.

Unless a person or entity has received actual notice that this authorization has been validly revoked by me, that person or entity receiving this authorization may act in reliance on the presumption that it is valid and unrevoked, and that person or entity is released and held harmless by me, my heirs, legal representatives, successors, and assigns from any loss suffered or liability incurred for acting according to this authorization. A person or entity may accept a copy or facsimile of this original authorization as though it were an original document.

Signed __________________, 2015 ____________________________________

[NAME]

STATE OF MISSOURI)
) ss.
COUNTY OF ___________)

On ______________________, 2015, before me, the undersigned, a Notary Public in and for the County and State aforesaid, personally appeared ____________________, to me known to be the person who executed the foregoing instrument, and acknowledged that he/she executed the same as his/her free act and deed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my official seal on the day and year last above written.

____
Notary Public

My appointment expires:

____