By **Bruce D. Steiner**

IRA Rollovers

Making this option possible for a spouse who's not the named beneficiary

Absent a significant non-tax reason, married retirement plan participants and individual retirement account owners will almost always want to leave their retirement benefits outright to their spouses. (See "Benefits of Leaving Outright to Spouse," this page.) But, there are certain occasions when the IRA owner might want to leave the IRA to his spouse in trust, rather than outright. For example, a client might want to take this step if his spouse is a spendthrift. Leaving the IRA to his spouse in trust, rather than outright, generally destroys the ability to roll it over and prevents the spouse from converting it to a Roth. It also generally limits the stretch to the spouse's life expectancy. However, if the spouse will need substantial distributions, the limitation on the stretch may not be very costly.

An IRA owner who wants to provide both for his spouse and children from a previous marriage may also want to leave some or all of the IRA in trust for his spouse. But, the IRA owner may be able to achieve a better result by leaving some or all of the IRA to the spouse outright and other assets to or in trust for the children. Alternatively, the IRA owner could leave some or all of the IRA to or in trust for the children, thus allowing for a stretch over the children's life expectancies and other assets to or in trust for the spouse. Either of these approaches will enable the IRA owner to provide for both his spouse and his children from a previous marriage without limiting the stretch to the spouse's life expectancy.

Many IRA owners leave their IRA benefits in trust or to the estate, even when it might be advantageous to leave the IRA outright to a spouse. In many of these cases, the IRA owner could have left the IRA to his spouse without defeating any of his estate-planning

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Benefits of Leaving Outright to Spouse

Why this strategy works for many clients

- The spouse can roll the retirement benefits over into his own individual retirement account, thereby postponing required minimum distributions until the spouse reaches his required beginning date, generally the April 1 following the year he reaches age 70½.
- The spouse can name new beneficiaries, thereby obtaining a longer stretch after the spouse's death. If the children won't need all of the IRA benefits, the spouse can leave some or all of them to or in trust for the grandchildren, so they can be stretched over the grandchildren's life expectancies.
- The spouse can convert to a Roth IRA, either all at once or over a number of years so as not to bunch the income from the conversion into a single year. The Roth conversion may add substantial value, especially if the spouse has other assets with which to pay the income tax on the conversion. Since 2010, IRA owners have been able to convert to a Roth regardless of their income.

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objectives. Fortunately, no matter why the IRA wasn't left outright to the spouse, it's often possible to get the IRA to the spouse so that she can roll it over. In recent years, the Internal Revenue Service has become more liberal in allowing such rollovers. However, an estate plan that requires a private letter ruling isn't as efficient as one in which the spouse is the named beneficiary of the retirement benefits. One can't help but wonder why some IRA owners created such complicated estate plans when they could have simply left their IRAs to their spouses outright.

Now that the federal estate tax exclusion amount is $5.43 million (indexed for inflation), in most cases, there won't be a marital share, so it will seldom be possible to accomplish a rollover in this manner.

There are no court cases or revenue rulings on the issue of whether a spouse who doesn't get an IRA outright can roll it over. So, I'll summarize some of the relevant PLRs. While PLRs aren't binding on the IRS, except with respect to the taxpayers to whom they're issued, the existence of a large number of PLRs provides a good indication of how the IRS views these issues and may be helpful to practitioners faced with similar situations.

Rollovers Through an Estate

Many cases have involved retirement benefits payable to the estate, either as the named beneficiary or as the default beneficiary under the plan or IRA.

The simplest situation is when the spouse is the sole beneficiary of the estate. The IRS has issued numerous PLRs allowing the spouse to roll the benefits over into her own IRA.

In PLR 200650027 (Sept. 18, 2006), the beneficiary designation said "per my will." The will didn't specifically bequeath the IRA. However, since the entire estate passed to the spouse, the IRS allowed the rollover.

In PLR 200637033 (June 20, 2006), the spouse withdrew the IRA benefits and attempted to roll them over into her own IRA.[1] However, the financial institution wouldn't accept the rollover without a PLR. Because the ruling process takes more than 60 days, the IRS waived the 60-day deadline for a rollover. After the PLR was issued, the financial institution allowed the rollover.

If Spouse Has Right to Withdraw

In several rulings, the IRS allowed the spouse to roll over the IRA benefits when they were payable to a trust from which a spouse could withdraw.[2]

In PLRs 200915063 (Jan. 14, 2009) and 200940031 (July 9, 2009), the IRA was payable to a trust. The trust contained a pecuniary marital and residuary credit shelter trust (CST). The spouse, as trustee, allocated the IRA to the marital trust. Because the spouse had the power to withdraw from the marital trust, the IRS allowed the rollover. There was no discussion as to whether the income was accelerated by reason of the distribution of the IRA to fund a pecuniary bequest. Similarly, in PLRs 200807025 (Nov. 23, 2007) and 200531031 (May 13, 2005), the IRA was payable to the estate, which was payable to a trust. A portion of the IRA was allocated to a marital trust from which the spouse could withdraw. The IRS allowed the spouse to roll over the portion of the IRA allocated to the marital trust. Also, in PLR 200615032 (Jan. 18, 2006), the IRA was payable to the estate, which poured over into a revocable trust, which was divided into a CST and a marital trust from which the spouse could withdraw. The trustee added the spouse as co-trustee and delegated the power to allocate assets to the spouse. The IRS allowed the spouse to allocate the IRA to the marital trust, withdraw it and roll it over.

Now that the federal estate tax exclusion amount is $5.43 million (indexed for inflation), in most cases, there won't be a marital share, so it will seldom be possible to accomplish a rollover in this manner.

In PLR 200603032 (Nov. 22, 2005), the IRA was payable to a trust. The trustee could distribute assets to the spouse or give the spouse the power to withdraw the trust assets. Because the spouse was the trustee, the IRS allowed the rollover. There was no discussion as to whether a trustee who was also a beneficiary could participate in discretionary distributions to herself, either under state law or the trust agreement.

Similarly, in PLR 200346025 (Aug. 21, 2003), the IRA was payable to a revocable trust. The revocable trust was divided into a survivor's trust from which the spouse could withdraw and a CST. Both the revocable trust and the beneficiary designation specified that any IRA benefits were to be allocated to the survivor's trust. The IRS allowed the spouse to roll over the IRA benefits.

In PLR 200443035 (July 28, 2004), the IRA was payable to a revocable trust, which contained a pecuniary CST and a residuary marital trust. Based on the value of the assets, all of the trust assets were allocated to the CST. The spouse received all of the income of the CST, and the trustees had discretion to distribute the principal to the spouse. The spouse was the trustee and exercised her discretion to distribute the IRA to herself. The IRS permitted the rollover. There was no discussion as to whether a trustee could participate in discretionary distributions to herself, either under state law or under the trust agreement. In this case, because the trust was a CST, it wouldn't make sense to permit the spouse to participate in discretionary distributions to herself, as this action would expose the CST to estate tax, even though the income tax benefits of the rollover may have outweighed the potential estate tax benefits of retaining the IRA in the CST. The spouse might have achieved the same result by using disclaimers.

Spouse as Residuary Beneficiary

In some cases, the retirement benefits were payable to the estate, and the spouse was the residuary beneficiary. Several rulings allowed the rollover when other assets were used to fund the pre-residuary bequests.[3]

Beginning with PLR 9623056 (March 12, 1996), the IRS required that no one other than the spouse could have discretion to allocate the retirement benefits. As a result, estates would arrange to have the spouse be the sole executor, so that the spouse could use other assets to fund the pre-residuary bequests. However, the preamble to the 2002 final regulations under Internal Revenue Code Section 401(a)(9) provides that a surviving spouse may be eligible to roll over a distribution if the spouse actually receives the distribution.[4] Therefore, it should no longer matter whether the spouse is the sole executor, so long as the retirement benefits are actually allocated or distributed to the spouse.

Similarly, in PLR 200433026 (May 18, 2004), the IRA owner left his IRA to his estate. His will contained a fractional share marital trust. The spouse, as executor, allocated the IRA to the marital trust. Because she had the right to withdraw all of the assets of the marital trust, she could roll over the IRA.

It's often possible to get retirement benefits to the spouse by means of disclaimers, so that the spouse can roll them over into her own IRA.

In PLR 200639002 (July 7, 2006), the IRA was payable to a trust that provided that any IRA benefits were to be distributed to the spouse outright. The IRS allowed the rollover.

Portion of Trust Payable to Spouse

In PLR 201210045 (Dec. 15, 2011) an IRA was payable to a trust of which one-third was payable to the spouse outright. The IRS allowed the trustee to divide the IRA and the spouse to roll over the portion of it that she received. There was no discussion of whether the trust received any other assets, and if so, whether the assets were divided non-pro rata.

Similarly, in PLR 200449040 (Sept. 8, 2004), a specified percentage of the IRA was payable to the spouse. The IRS allowed the trustee to divide the IRA and the spouse to roll over her percentage. There was no discussion as to

whether the trust received other assets and, if so, whether the trustee could have divided the assets non-pro rata to give the spouse a greater share of the IRA.

In PLR 200707159 (Dec. 20, 2006), the qualified plan and IRA benefits were payable to a revocable trust, which was to be divided between a marital trust and a CST. The spouse was the trustee. The marital trust was further divided between a generation-skipping transfer (GST) taxable trust from which the spouse could withdraw and a GST tax-exempt trust. The IRS allowed the spouse, as trustee, to allocate the IRA to the GST taxable trust, withdraw it and roll it over. The IRS also waived the 60-day deadline because the IRA proceeds were placed in a non-IRA account in the name of the revocable trust as a result of instructions from an attorney inexperienced in estate planning involving qualified arrangements and spousal rights with respect thereto. As in the other rulings involving trusts that are divided between a marital and a credit shelter share, it may no longer be possible to allocate the IRA to the marital share now that the estate tax exclusion amount is $5.43 million.

The ability to divide community property non-pro rata provides a major benefit.

Elective Share

In at least two rulings, the IRS allowed a spouse who received retirement benefits by claiming an elective share to roll them over into her own IRA.[5]

Intestacy

In PLR 9047065 (Aug. 30, 1990), the decedent's IRA was payable to his estate, one-half of which passed to the spouse by intestacy. The IRS allowed the spouse to roll over her one-half share of the IRA.

Deceased Participant or IRA Owner

In several rulings, an IRA owner withdrew funds from an IRA and died before rolling the funds over into another IRA. The IRS waived the 60-day rollover requirement to permit the surviving spouse, who was the beneficiary of the IRA, to complete the rollover.[6]

In PLR 200450057 (Sept. 13, 2004), the IRS allowed the surviving spouse, who was the beneficiary of an employer plan, to set up an IRA in the decedent's name and designate herself as beneficiary. A surviving spouse who's under age 59½ might want to do this to avoid the 10 percent excise tax on distributions from an IRA before age 59½.

In PLR 201035044 (June 7, 2010), the plan issued a check payable to the participant's IRA and sent it to the participant. However, the participant died before the check was deposited to the IRA. The IRS ruled that the issuance of the check was sufficient to effectuate a direct rollover, so that the administrator of his estate could deposit the check into his IRA without the need for a waiver of the 60-day requirement.

More recently, in PLR 201514020 (Jan. 9, 2015), which I obtained, the participant took a lump sum distribution and directed that the check be payable to his IRA, of which his wife was the beneficiary. However, he died before receiving the check. After the decedent's death, the custodian wouldn't accept the check for deposit to the decedent's IRA. The plan then issued a check payable to his estate. The IRS waived the 60-day requirement, so that the administrator of the estate could contribute the amount of the distribution to his IRA, and his wife could then roll it over into her own IRA.

Disclaimers

It's often possible to get retirement benefits to the spouse by means of disclaimers, so that the spouse can roll them over into her own IRA.

In PLR 8838035 (June 27, 1988), the participant named his revocable trust as the primary beneficiary of his retirement benefits and his wife as the contingent beneficiary. The trustees and beneficiaries of the revocable trust disclaimed the benefits, so they passed to the wife as the contingent beneficiary. She could then roll them over into her own IRA.

In PLR 9609052 (March 1, 1996), the decedent left his IRA to his estate. His will contained a pecuniary CST and left his residuary estate to his wife. His wife and all

of his issue disclaimed their interests in the CST so that his entire estate passed to his wife. She could then roll the IRA over into her own IRA.

In PLR 9615043 (Jan. 17, 1996), the decedent also left his IRA to his estate. His will contained a pecuniary marital bequest outright and a residuary CST. His wife and issue disclaimed their interests in the CST and intestacy, so that the residuary estate went to the spouse by intestacy. Because the spouse received the entire estate, she could roll the IRA over into her own IRA.

In PLR 200532060 (May 19, 2005), the IRA owner left his IRA to his ex-wife. The ex-wife disclaimed the IRA. As a result of the disclaimer, the IRA passed to the IRA owner's estate. The IRA owner died intestate, and under the applicable state law, his entire estate passed to his new wife, who could roll the IRA over into her own IRA.

In PLR 200938042 (June 24, 2009), the IRA owner's will contained a pecuniary CST and left the residuary estate to the spouse outright. The IRA was payable to the CST. The spouse disclaimed the CST, so that the IRA became payable to the residuary estate. Because the spouse received the entire residuary estate, she could roll the IRA over into her own IRA.

In PLR 200934036 (April 29, 2009), the decedent named his children as the primary beneficiaries of his IRA and his estate as the contingent beneficiary. The children disclaimed the IRA, so that it became payable to the estate. The estate was payable to a trust that was divided into a pecuniary CST and a residuary marital trust. The spouse was the trustee and allocated the IRA to the marital trust. She then exercised her discretion to distribute the IRA to herself. The IRS allowed her to roll it over into her own IRA. There was no discussion as to whether a trustee who was also a beneficiary was permitted to make a discretionary distribution to herself either under state law or under the trust agreement.

Community Property

In numerous rulings, an IRA was payable to a joint revocable trust in a community property jurisdiction and then allocated to a survivor's trust that the surviving spouse could withdraw. The IRS allowed the spouse to roll the IRA over into her own IRA.[7]

The ability to divide the community property non-pro rata provides a major benefit. For example, suppose one spouse has a $4 million IRA and the couple has $4 million of other assets. Regardless of which spouse dies first, if state law permits a non-pro rata distribution of the community property, the IRA can be allocated to the surviving spouse and the other assets allocated to a CST to the extent of the federal estate tax exclusion amount. This distribution will allow the couple to take advantage of both spouses' GST tax exemptions. It will also keep the income and principal of the CST out of the surviving spouse's estate (which is significant because the deceased spousal unused exclusion amount isn't indexed for inflation), and it provides greater creditor protection.

The IRS has ruled that a spouse can roll over income in excess of required distributions.

Exceeding Required Distributions

In several cases, an IRA was payable to a trust in which the spouse was entitled to distributions or had a partial withdrawal right.

In PLR 200944059 (Aug. 3, 2009), the spouse received all of the income. The trustees could distribute principal to the spouse, but only based on a limited standard. The IRS ruled that the spouse could roll over the income in excess of the required distributions. Similarly, in PLR 9649045 (Sept. 11, 1996), the spouse had the right to withdraw $50,000 a year and was allowed to roll over the withdrawals, presumably to the extent they exceeded the required distributions.

On the other hand, in PLR 9145041 (Aug. 16, 1991), the spouse had the right to withdraw the greater of $100,000 or 10 percent of the value of the trust each year but wasn't permitted to roll the withdrawals over into her own IRA. Presumably, that ruling no longer reflects the views of the IRS.

Reformation of Trust

In PLR 200807025 (Nov. 23, 2007), the IRA was payable to a testamentary trust. The trust was reformed to permit the spouse to withdraw the trust assets. The IRS allowed a rollover. In addition, because the trustees had already collected the IRA benefits, the IRS waived the 60-day deadline.

Similarly, in PLR 200704033 (Oct. 31, 2006), the IRA was payable to a revocable trust that contained a marital trust. The trust was reformed to provide that the IRA would be allocated to the marital trust and that the wife would have the right to withdraw the IRA. The IRS allowed her to roll the IRA over into her own IRA. The IRS also waived the 60-day deadline, because the trust had already collected the IRA as a result of erroneous advice from both the custodian and the financial institution into which the proceeds were deposited.

It may no longer be possible to accomplish this result. In PLR 201021038 (March 4, 2010), the IRS refused to recognize a trust reformation intended to permit a beneficiary to stretch distributions over her life expectancy.

Pre- or Post-Nuptial Agreement

In PLR 200317003 (Dec. 18, 2002), the couple entered into an agreement in which the deceased spouse's IRA would go to the surviving spouse. The IRS allowed the surviving spouse to roll it over.

Endnotes

1. Private Letter Rulings 201212021 (Dec. 27, 2011), 201211034 (Dec. 22, 2011), 200720024 (Feb. 21, 2007), 200637033 (June 20, 2006), 200634065 (April 7, 2006), 200611037 (Dec. 22, 2005), 200526023 (April 7, 2005), 200544032 (Aug. 8, 2005), 200510032 (Dec. 16, 2004), 200343029 (July 29, 2003), 200324059 (March 18, 2003) 9515041 (Jan. 18, 1995), 9450042 (Sept. 23, 1994), 9229022 (April 20, 1992), 8925048 (March 28, 2989), 8746055 (Aug. 19, 1987) and 8649057 (Sept. 10, 1986).
2. PLRs 200950028 (Sept. 2, 2009), 200831025 (May 5, 2008), 200807026 (Nov. 20, 2007), 200646026 (Aug. 21, 2006), 200644028 (Aug. 7, 2006), 200440024 (July 7, 2004), 200245055 (Aug. 12, 2002), 200221051 (Feb. 26, 2002), 9611057 (Dec. 18, 1995), 9515042 (Jan. 18, 1995), 9423039 (March 28, 1989) and 9302022 (Oct. 19, 1992).
3. PLRs 200703035 (Oct. 27, 2006), 200644031 (Aug. 7, 2006), 200453016 and 200440025 (Oct. 6, 2004), 200406048 (Nov. 13, 2003), 200405017 (Nov. 3, 2003), 9545010 (Aug. 14, 1995), 9138067 (June 27, 1991), 9034046 (May 29, 1990) and 8842058 (July 27, 1988).
4. Preamble, 67 Fed. Register 18992-93 (April 17, 2002).
5. PLRs 200438045 (June 21, 2004) and 9524020 (March 21, 1995).
6. PLRs 200420037 (Feb. 18, 2004), 200415012 (Jan. 15, 2004) and 200415001 (Dec. 24, 2003).
7. PLRs 201225020 (March 28, 2012), 201125047 (March 31, 2011), 201005059 (Nov. 10, 2009), 200950053 (Sept. 18, 2009), 200943046 (July 30, 2009), 200935045 (June 1, 2009), 200928043 (April 14, 2009), 200905040 (Nov. 3, 2008), 200509034 (Dec. 6, 2004), 200424011 (March 17, 2004), 200402029 (Oct. 16, 2003), 200304037 and 200242044 (Oct. 29, 2002), 9427035 (April 29, 1994) and 8927042 (April 11, 1989).

SPOT LIGHT

Doggonit

"The Dog at the Door" (30 in. by 22 in.) by Fairfield Porter, sold for $11,250 at Doyle's recent Prints and Multiples Sale in New York on April 28, 2015. A staunch realist, Porter was both criticized and praised for his temerity in continuing to produce representational work in the midst of the Abstract Expressionist movement.