# NAMING TRUSTS AS BENEFICIARIES OF RETIREMENT BENEFITS: SOLVING THE ESTATE PLANNING CONCERNS

By

James G. Blase, CPA, JD, LLM and Mimi G. Sharamitaro, JD[1]
Blase & Associates, LLC
Attorneys at Law
12429 Nicholas Lane
St. Louis, Missouri 63131
314-909-6565
Fax: 314-909-6523
**www.blaselaw.com**

Recent private letter rulings issued by the Internal Revenue Service[2] have created concern among estate planning attorneys regarding the best way to draft trusts which are intended as potential receptacles of significant IRA or other qualified plan benefits (hereinafter sometimes referred to as "retirement benefits") upon the death of the account owner or participant. This concern stems from the fact that, unless the trust is properly

---

[1]Mr. Blase is principal with the St. Louis, Missouri law firm, Blase & Associates, LLC. He is a 1981 graduate of the Notre Dame Law School and a 1982 graduate of the New York University School of Law Graduate Program in Taxation. Mr. Blase is a frequent author and lecturer on a wide variety of tax and estate planning topics, and is Adjunct Professor of Estate Planning at St. Louis University School of Law. Ms. Sharamitaro is a 2005 graduate of St. Louis University School of Law, where she served as Managing Editor on the St. Louis University Law Journal, and is an associate with the firm. The authors would like to thank Ryan G. Polley, J.D., an associate with the firm, who provided valuable research assistance in the preparation of this article.

[2]*See* PLRs 200610026 and 200843042. Note that earlier PLRs on a similar subject matter, but which were not applying the final IRS regulations, are deemed by the author not to be relevant to the instant discussion.

drafted, it will not be possible to "stretch out" the payment of the significant retirement benefits over the lifetime of the trust beneficiary.

One alternative to ensure the maximum possible income tax deferral for the retirement benefits is the so-called "conduit trust" set forth in the final IRS regulations. The problem is that this recommendation carries with it numerous issues for most estate planning clients. Another approach, sometimes referred to as the "accumulation trust" approach, includes its own set of potential estate planning problems.

The purpose of this article is to present a trust alternative which will hopefully allow the estate planner to provide his or her clients the opportunity to maximize the deferral of income taxes on qualified retirement plan and IRA benefits payable to trusts after their deaths, but without causing other significant estate planning concerns for the clients. The related area of nonqualified annuities payable to trusts will also be discussed.

Background

On April 17, 2002, "Final" Regulations relating to the payment of plan benefits to trusts were published in the Federal Register applicable to calendar years beginning after January 1, 2003.[3] The final regulations specify that if a beneficiary's entitlement to the

[3] 67 Federal Register 18987-19028 (April 17, 2002). In addition, the "Final" Regulations have been modified in part. *See* 2004-26 I.R.B. 1082, 1098 (June 28, 2004).

participant's benefit is contingent on an event other than the participant's death or the death of another beneficiary, the contingent beneficiary is considered in determining which designated beneficiary has the shortest life expectancy as well as whether any beneficiary is not an individual.[4] The final regulations also provide 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 or entity could become the successor to the interest of one of the beneficiaries after the beneficiary's death.[5] Instead, if the person 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 beneficiary upon that beneficiary's death," the person will be considered a beneficiary for the aforesaid purposes.[6]

Natalie Choate includes the following excellent summary of the IRS rules in her popular book, *Life and Death Planning for Retirement Benefits - The Essential Handbook for Estate Planners:*[7]

---

[4]Regs. §1.401(a)(9)-5, Q&A-7(b).

[5]Regs. §1.401(a)(9)-5, Q&A-7(c)(1).

[6]Regs. §1.401(a)(9)-5, Q&A-7(c).

[7]N. Choate, *Life and Death Planning for Retirement Benefits - The Essential Handbook for Estate Planners* (6th ed. 2006), at ¶ 6.3.04.

How does the mere potential successor rule apply to a trust? The IRS recognizes two types of trusts, called in this book “conduit trusts” and “accumulation trusts.”

Under a conduit trust, because the trustee is required to pass all plan distributions out to the individual trust beneficiary, the IRS regards the conduit beneficiary as the sole beneficiary of the trust; all beneficiaries other than the conduit beneficiary are considered mere potential successors and are disregarded.

Any trust that is not a conduit trust is an accumulation trust, meaning that the trustee has the power to accumulate plan distributions in the trust. Under an accumulation trust . . . some or all of the potential remainder beneficiaries *do* count (i.e., they are not disregarded) for purposes of the MRD [minimum required distribution] rules.

Estate Planning Concerns Associated with Conduit Trusts

The several significant drawbacks inherent to the conduit trust approach are rather self-evident to the attorney practicing in the estate planning area. Among these potential undesirable results are the following:

1. Forcing annual conduit trust payments onto a minor beneficiary.
2. Forcing annual conduit trust payment onto a younger (even though not a minor) beneficiary.

3. Forcing annual conduit trust payments onto a beneficiary who is older but a spendthrift.
4. Forcing annual conduit trust payments onto a special needs child.
5. Forcing annual payments onto a surviving spouse from a second marriage, when the desire is that the trust corpus pass to the descendants of the first spouse to die at the surviving spouse's death (which would normally be the case when a trust is used).
6. Subjecting conduit trust payments to potential creditors of the beneficiary.
7. Subjecting conduit trust payments to the potential rights of a divorced spouse of the beneficiary.
8. Subjecting conduit trust payments, compounded over the lifetime of the beneficiary, to estate tax at the beneficiary's death as well as at the subsequent deaths of the beneficiary's descendants.

The practicing estate planning attorney, who has for years prided himself or herself on the ability to provide protection against all of the above potential issues, now finds himself or herself looking for a better alternative to the conduit trust approach to qualifying significant retirement benefits for the maximum potential income tax deferral.

Estate Planning Concerns Associated with Accumulation Trusts

Through private letter rulings interpreting the final regulations, the IRS has created a "rule" applicable to accumulation trusts which Natalie Choate has very succinctly and accurately identified as follows:

> Under the approach exemplified in [PLR 200438044], and in PLRs 200522012 and 200610026 to the same effect, once you find a now-living person who is entitled to outright ownership of the benefits on the death(s) of the prior limited interest beneficiary(ies), all other potential subsequent beneficiaries are disregarded as mere potential successors to the "outright ownership" remainder beneficiary.[8]

Accumulation trusts designed to ensure maximum income tax deferral for qualified plan and IRA benefits, while not including any of the problems associated with the conduit trust, therefore carry with them their own separate set of estate planning concerns, among which are the following:

1. Remaindermen and contingent takers under the accumulation trust may not include individuals who are significantly older than the lifetime beneficiary of the trust, since the IRS would otherwise seek to use these older individuals for purposes of determining the shortest life expectancy of the trust.

---

[8] N. Choate, *Life and Death Planning for Retirement Benefits - The Essential Handbook for Estate Planners* (6th ed. 2006), at ¶ 6.3.06. *See also* PLR 200843042, to the same effect.

2. Remaindermen and contingent takers under the accumulation trust may not include one or more charities, an undetermined surviving spouse, or the estate of the beneficiary, since the IRS would otherwise argue that the trust has no designated oldest individual beneficiary.

3. The accumulation trust may not include a limited testamentary power of appointment in favor of charities, surviving spouses, the estate of the beneficiary, or older beneficiaries, since the IRS would otherwise argue that there is either no designated oldest individual beneficiary of the trust (i.e., where charity, the estate of the beneficiary, or an undetermined surviving spouse is a permissible appointee), or at least that the trust must use the oldest permissible individual appointee as the individual beneficiary with the shortest life expectancy.

Regardless of whether one agrees that the final regulations support the expansive approach to determining beneficiaries of an accumulation trust which the IRS has taken in its recent private letter rulings, the fact is that these private letter rulings nevertheless exist, and estate planners therefore need to be able to address them in a manner which does not hamper their clients' other legitimate estate planning objectives.

The Modified Accumulation Trust

Assuming the above-outlined drawbacks associated with the conduit and accumulation trusts are adequately explained, very few clients who own interests in substantial qualified retirement plan benefits and/or IRAs will be enamored by the possibility of establishing a conduit or accumulation trust of the type which ensures maximum deferral of income taxes on qualified plan and IRA benefits. Clients typically want the principal advantage of the conduit and accumulation trusts, i.e., the ability for their beneficiaries to defer income tax on significant retirement plan and IRA benefits, but they do not want any of the numerous disadvantages associated with the same.

One potential solution to the various estate planning concerns associated with the conduit and accumulation trusts would be to develop a *modified* accumulation trust (or "MAT," for short) to be used when significant retirement plan and IRA benefits are involved. The MAT would include the following principal required and optional provisions:

1. A MAT must include a Share A and a Share B, Share A being the trust's right to receive the benefits under all qualified retirement plan benefits and IRAs, including Roth IRAs, and including the proceeds and reinvested proceeds therefrom, and Share B being all other trust assets.

2. Permissible testamentary appointees under Share A of the MAT may only include descendants of the parents of the individual who is the primary current

beneficiary of the trust who are in the same or younger generation as such primary beneficiary current beneficiary.

3. If desired, permissible appointees under Share A of the MAT may also include a surviving spouse who is no older than a specified number of years older than the age of the individual who is the primary current beneficiary of the trust.

4. As illustrated in the Sample Form set forth below, in the event of the death of the primary current beneficiary of the MAT before the trust has terminated, all potential outright remaindermen of Share A (including contingent remaindermen) who are older than the oldest living descendant[9] of the grantor at the time of the grantor's death (assuming all such descendants were alive at the termination of the trust), and all non-individual remaindermen, should be deemed to be deceased or not in existence for purposes of construing the remaindermen provisions (including contingent provisions) which would otherwise apply. In order to ensure that contingent takers of the client's retirement benefits be as closely-related to the grantor as possible, if the application of the foregoing rule will result in all otherwise then living descendants of the grantor's (and, if applicable under the trust document, the grantor's spouse's) parents being deemed to be deceased, then the youngest living remaindermen who is a descendant of either the grantor's (or the grantor's spouse's) parents should not be deemed to be deceased under such circumstances.

---

[9] If the trust is for the benefit of a grandchild, in order to allow for a greater deferral (or "stretch") period, then the word "grandchild" should be substituted for the word "descendant" here.

5. Outright remaindermen (including contingent remaindermen) who were deemed to be deceased or not in existence for purposes of construing Share A of the MAT will receive a priority distribution of Share B assets until they have received an amount sufficient to "make them whole" with respect to what they would have received from Share A, had they not been deemed to be deceased or not in existence.

6. In order to avoid a potential escheat situation, if the sole contingent taker under the trust document is a charity or charities, heirs-at-law must be added to take in the event one or more of the charities are not (or are deemed not) then in existence.

7. If desired, an additional equitable adjustment to the Share B priority distribution described in paragraph 5 can be made for the fact that the priority takers *may* receive their priority shares at a different income tax cost than the takers under Share A.

Drafting attorneys opting to employ the MAT for a particular client must also be aware of the potential hazards associated with the standard and so-called "facilitation of payment" clause which is commonly included in many estate planning attorneys' trust forms. These clauses often authorize a trustee to retain assets which would otherwise be distributable outright to a beneficiary under a legal incapacity in further trust for the benefit of the beneficiary and/or distribute trust assets to another individual or entity for the benefit of the beneficiary, and as a result the drafting attorney's standard facilitation of payment clause may therefore need to be modified in light of the special MAT requirements described above. For example, the clause cannot provide that the trust assets may be distributed in the trustee's discretion to another individual or entity for the

benefit of the beneficiary, other than to the beneficiary's legal guardian, conservator or custodian, or pass to the estate of the beneficiary at his or her death.

Income Tax Reporting for MAT

Shares A and B of the MAT should be taxed as separate trusts for federal income tax purposes, since their beneficiaries are not the same. The multiple trust rule under IRC Section 643(f) should not apply to the MAT, since a principal purpose of the division of the MAT into Share A and Share B is not the avoidance of federal income tax. In fact, the IRS regulations themselves allow for the deferral of income tax on distributions to a trust over the oldest beneficiary of the trust's life expectancy, provided that the trust instrument is prepared properly. Although the MAT may thus save as much as $1,000 in federal income taxes per year, per trust (i.e., due to separate runs up the tax brackets for Share A and Share B), this savings obviously will be largely offset by the additional tax reporting cost for the two shares.

The funding of Share A with the right to receive the qualified employee plan or IRA benefits should not cause the acceleration of IRD to the MAT, since the funding is accomplished in conjunction with the right of Share A to receive such amount "by bequest, devise or inheritance from the decedent."[10]

---

[10] I.R.C. § 691(a)(2).

If the client is concerned that the MAT will generate more income tax (i.e., because of the compressed trust income tax brackets) than the standard conduit trust, it is a simple matter to mitigate this issue by granting the primary current beneficiary of the trust a Section 678 withdrawal power over income of the trust which would otherwise be taxed in the maximum trust income tax bracket (subject to the requisite Section 2514 five percent limitation in order to avoid annual taxable gifts). This system of taxing trust income to the primary current beneficiary of the trust, without actually requiring payment of the same to the beneficiary, could also result in a significant reduction in estate taxes at the beneficiary's death,[11] and in many states will also provide a greater level of asset protection than that afforded by the conduit trust and its attendant required outright distribution of the annual retirement plan and IRA benefit payments.

Application of MAT to Nonqualified Annuities

Authorities and insurance companies differ regarding whether the above-described rules applicable to qualified plans and IRAs payable to trusts also apply to nonqualified annuities payable to trusts. Two co-authors have recently stated that they believe nonqualified annuities cannot be paid to a trust over the lifetime of the trust beneficiary, primarily because, to date, the Internal Revenue Service has not specifically ruled (through the issuance of regulations or otherwise) that nonqualified annuities can

[11] *See* Blase, *Recent Tax Acts Require Focus on Income Tax Aspects of Estate Planning,* 30 Estate Planning Vol 12, at 617 (December 2003).

be paid in such fashion, as the Service has in the case of qualified plans and IRAs.[12] According to the co-authors, because I.R.C. Section 72(s)(2)(A) provides that stretched annuity payments after the death of the holder may only be paid "to (or for the benefit of) a designated beneficiary," and because Section 72(s)(4) in turn provides that, "[f]or purposes of this subsection, the term 'designated beneficiary' means any *individual* designated a beneficiary by the holder of a contract" (emphasis added), currently only outright payments to individuals qualify for deferral under Section 72(s)(2)(A).

The problem with this narrow analysis of the current tax law is that the Internal Revenue Code section on which the above-described qualified plan and IRA trust regulations are based[13] employs language which is virtually identical to the Code language of Section 72(s)(2)(A). Both sections employ the phrase "payable to (or for the benefit of) a designated beneficiary." By choosing to narrowly define the circumstances under which nonqualified annuities payable to trusts can be deferred after the death of the holder, the co-authors are basically ascribing no meaning to the words "or for the benefit of," or to the fact that the overall structure of I.R.C. Section 401(a)(9)(B) is virtually identical to Section 72(s). The co-authors do correctly point out, however, that regardless of whether Section 72(s) permits stretched annuity payments to trusts, the issue is moot as to those insurance companies which do not allow payments to trusts to be stretched, under their contracts.

---

[12] J. Olsen and M. Kitces, *The Annuity Advisor* at 135-142 (2nd ed. 2009).
[13] I.R.C. §401(a)(9).

So what does this discussion on nonqualified annuities mean for our drafting as well as for our advice to clients relative to the payment of nonqualified annuities to trusts? The basic drafting rules should be the same as those described above for retirement benefits generally. However, because not all insurance carriers will permit the payment of nonqualified annuities to trusts on a deferred basis after the death of the holder, the estate planner must study all relevant nonqualified annuity contracts of his or her clients to first ensure that payment of the nonqualified annuity to a trust after the death of the holder, on a deferred basis will in fact be permitted by the insurance carrier. If payment to a trust on a deferred basis will not be permitted, the estate planner must then decide whether it is better to name outright beneficiaries (which may require the establishment of a court guardianship or conservatorship for minors or other beneficiaries under a legal incapacity) or pay to the trust on a lump sum basis. Regardless of the option chosen, the trust document should specify that annuity payments which may not be made to the trust on a deferred basis, pursuant the annuity contract or otherwise (e.g., under the tax law), should not be divided on the separate Share A and Share B MAT basis described above, since such division would not be necessary.

<u>Situations Where Full MAT is Not Necessary</u>

In addition to the situation just described where, under the nonqualified annuity contract, payout of the nonqualified annuity may not be made over the lifetime of the

beneficiary of the trust, there are other situations where consideration should be given to not employing the MAT for particular retirement benefits or nonqualified annuities. One such example is where a company retirement plan does not permit payout other than on a lump sum (or five-year maximum) basis, and also does not permit payment to be made to an inherited IRA. Under such circumstances, the MAT format would not provide any tax deferral benefit, and would therefore not be necessary. It is important to note, however, that if other retirement benefits or nonqualified annuities are also payable to the trust, and if the payout of one or more of those other benefits or annuities is otherwise eligible to be made over the life expectancy of the trust beneficiary, the MAT format should not be eliminated merely because of the ineligible benefit or annuity.

The MAT format is arguably also unnecessary when the client owns little in the way of retirement benefits and nonqualified annuities. The word "little," of course, is subject to individual interpretation. In any event, the estate planner should bear in mind that the only complexity of the MAT is that it must contain two separate accounts. Although this in turn will likely also necessitate two separate sets of annual income tax return filings for the trust, as discussed above there may actually be an income tax benefit associated with the separate filings. Furthermore, what may only be a small retirement benefit or nonqualified annuity today may of course grow to be significant in the future, and the planner must be mindful of this fact.

Another scenario where the MAT separate share approach may not be necessary or advisable involves a married individual who is already beyond the required beginning

date under the retirement plan or IRA or beyond the annuity starting date under the nonqualified annuity, and who desires to pay the balance of his or her account after death to a trust for the benefit of his or her surviving spouse. Because the rules applicable to both retirement plans and nonqualified annuities would permit the payments after the account owner's death to be made at least as rapidly as they were under the method of distribution being used as of the date of the account owner's death, and since in most situations the surviving spouse is close in age to the account owner, the MAT will normally generate very little additional tax benefit to the clients under such circumstances, and the separate Share A and Share B will therefore probably not be necessary or advisable.

The MAT will normally not be necessary or advisable if, assuming the lifetime beneficiary of the trust died immediately after the death of the grantor, (i) no outright remainderman of the trust would be a non-individual (including a trust) or an individual older than the grantor's oldest living descendant at the time of his or her death, and (ii) neither any individual other than a descendant of the grantor nor any non-individual (including a trust) would be a permissible appointee of all or a portion of the trust assets under a testamentary power of appointment in favor of the lifetime beneficiary of the trust. The reason for this final recommended exclusion from MAT treatment is that even the Internal Revenue Service's recent narrow private letter ruling posture would not create a problem under such circumstances.

Finally, a much simpler form of MAT may be required where the client has numerous children and grandchildren. In these fairly frequent situations, the chances that the contingent gift to heirs-at-law under the client's estate planning documents will actually take effect are negligible. It is thus normally not necessary under such circumstances to protect potentially disinherited heirs through the full Share A/Share B form of MAT. The "oldest beneficiary" issue can easily be addressed by providing in the contingent gift clause that all heirs-at-law older than the client's oldest living descendant at the time of the client's death are deemed to be deceased. Where the client wishes to bestow upon the trust beneficiaries a limited testamentary power to appoint to potentially older individuals (including a surviving spouse) and/or charity, however, the full Share A/Share B form of MAT will still be required.

Except for the "small account" and "multiple descendant" scenarios described above, all of the foregoing situations where the MAT may prove not to be necessary or advisable have been incorporated into the Sample Form language set forth immediately below.

Sample Form

Adhering to the above general guidelines, drafting attorneys may of course choose to draft the MAT in any manner which they deem best. The following represents just one

attorney's attempt at two of the additional trust clauses intended to accomplish the goals of a MAT:[14]

Separate Accounting for Qualified Retirement Arrangements

Except as otherwise provided in paragraph 3, below, if any trust hereunder shall have the right to receive retirement assets (as defined in ARTICLE ____, below) or the proceeds from the same, the trustee shall set aside and maintain as a separate share (hereinafter referred to as "Share A") from the remainder of the trust assets (hereinafter referred to as "Share B"), the trust's said right to receive all retirement assets, together with the proceeds from the same, and with respect to any such separate shares created hereunder, the following rules shall apply notwithstanding any other provision of this instrument to the contrary:

1. No testamentary power of appointment in Share A may be exercised in favor of the primary current beneficiary of the trust's surviving spouse (other than a surviving spouse who is no more than _____ years older than the primary current beneficiary of the trust), any creditor of the primary current beneficiary of the trust's estate, the primary current beneficiary's estate or any charitable organization. If, as a result of the application of the immediately preceding sentence, an otherwise permissible appointee or appointees in Share A has or have been eliminated, and if there is a percentage ceiling on the proportion of the

[14]These sample trust clauses should not be relied on by the reader as guaranteed to produce the intended result.

original trust which the primary current beneficiary of the trust may appoint to said appointee or appointees, then said percentage ceiling shall be raised over the remaining principal and accrued income of Share B to the extent necessary to allow the primary current beneficiary of the trust to exercise his or her testamentary power of appointment over Share B in favor of said appointee or appointees who or which where eliminated as a permissible appointee or appointees in Share A, to the full extent of the ceiling over the original trust, recognizing that it may not be possible to fully achieve the percentage ceiling over the original trust.

2. For purposes of construing the provisions of the "CONTINGENT GIFT OF REMAINDER INTERESTS" under ARTICLE ____ hereof which will potentially apply at the termination of Share A, all potential heirs-at-law of the grantor who are older than the oldest living descendant of the grantor at the time of the grantor's death (assuming all such descendants were alive at the termination of the trust) shall be deemed to be deceased, and all non-individual potential takers shall be deemed to be not then in existence; PROVIDED, HOWEVER, if one or more descendants of the grantor's parents are living at time of the grantor's death, and if the application of the foregoing provisions of this paragraph 2 shall result in all such descendants who are also living at the time of the termination of the trust being deemed to be deceased, then the

youngest such descendant of the grantor's parents who is living at the time of the grantor's death, as well as at the time of the termination of the trust, shall not be deemed to be deceased pursuant to the foregoing provisions of this paragraph 2, but all other heirs-at-law of the grantor shall be deemed to be deceased. If, as a result of the application of the immediately preceding sentence, an individual or individuals and/or a non-individual or non-individuals who and/or which would have otherwise received a portion of Share A as a contingent taker or takers under ARTICLE ____ hereof is or are deemed to be deceased or otherwise not then in existence, only these individual(s) and/or non-individual(s) (other than any ancestors of the individual takers in Share A pursuant to the immediately preceding sentence, who shall be deemed to be deceased[15]) shall be deemed to be then living and/or designated for purposes of determining contingent takers of Share B under said ARTICLE ____ hereof, until such time as said individual(s) and/or non-individual(s) receive the same share(s) in Share B which they would have received in Share A had they not have been deemed to be deceased or not then in existence pursuant to the application of the immediately preceding sentence, after which point the

[15]The ancestors are still deemed to be deceased for two reasons. First, if they are not deemed to be deceased the result may be that some members of a particular generation may be included as contingent takers while others are not. Second, it makes more estate tax sense not to unnecessarily increase the taxable estates of individuals in older generations.

provisions of said ARTICLE ____ hereof shall apply normally to the balance of Share B.

3. The foregoing provisions of this Section shall not apply to the trust if either of the following circumstances exists:

(A) (i) all retirement assets payable to the trust consist of either or both (I) nonqualified annuities which in the hands of the holder immediately before the grantor's death were beyond the annuity starting date or (II) other retirement assets which as to the owner or participant immediately before the grantor's death were after the required beginning date, and (ii) the primary current beneficiary of the trust is the grantor's spouse; or

(B) assuming the primary current beneficiary of the trust died immediately after the grantor's death, (i) no heir-at-law of the grantor who is living on the date of the grantor's death, as determined under ARTICLE ____ hereof, would be older than the grantor's oldest living descendant at the time of the grantor's death, (ii) no non-individual (including a trust) would be a potential taker under ARTICLE ____ , and (iii) neither any individual other than a descendant of the grantor nor any non-individual (including a trust) would be a permissible appointee over all or a portion of the trust assets under a testamentary power

of appointment in favor of the primary current beneficiary of the trust.

4. If the foregoing provisions of this Section apply to the trust, said provisions shall continue to apply to any other trust which is subsequently funded utilizing assets of the original trust, in whole or in part.

Definition of Term “Retirement Assets”

The term "retirement assets" shall mean any asset classified as part of a qualified plan pursuant to Section 401 of the Internal Revenue Code, or any successor section thereto, as part of a nonqualified annuity, as part of an annuity payable under Section 403(a) or 403(b) of the Internal Revenue Code, or any successor sections thereto, as part of an individual retirement account (including a simplified employee pension) pursuant to Section 408 of the Internal Revenue Code, or any successor section thereto , as part of a ROTH IRA pursuant to Section 408A of the Internal Revenue Code, or any successor section thereto, as part of a retirement plan pursuant to Section 457 of the Internal Revenue Code, or any successor section thereto, or as part of any similar qualified retirement arrangement under the Internal Revenue Code; PROVIDED, HOWEVER, that any of the aforementioned assets shall not be deemed to be a “retirement asset” for purposes of this agreement if it is not permissible

(other than as a result of this proviso), under the governing instrument or otherwise, to make payments to the trust in a form other than in a lump sum or over a maximum term certain (other than a maximum term certain based on the life expectancy of any of the grantor's descendants, of any heir of the grantor, or of any actual or hypothetical spouse of any of the grantor's descendants).

## Conclusion

Standard "conduit trusts" and "accumulation trusts" designed to provide maximum deferral of income taxes on qualified plan and IRA benefits each carry with them numerous negative characteristics which will upset many of the estate planning objectives trusts for the benefit of the client's spouse and/or descendants are otherwise designed to achieve. The modified accumulation trust, or "MAT," solves each of these estate planning concerns while preserving the maximum possible deferral of income taxes on the qualified plan or IRA benefits payable to the trust after the participant's or account owner's death. A similar approach should apply to nonqualified annuities payable to trusts after the holder's death, provided the particular nonqualified annuity contract in question permits payments to a trust after the holder's death over the life expectancy of the trust beneficiary.