

The SECURE Act & Special Needs Trusts
Or
IRS Joins the Alphabet Soup of SNTs, SSA, DHCS & HUD
Scrabble Anyone?

SECURE Act Definitions

- “Eligible Designated Beneficiaries” (EDB)
 - Persons who are allowed to take RMDs from inherited retirement benefits using life expectancy method under IRC §401(a)(9)(B) and Treasury Regulations §1.401(a)(9)-5, A-5. Includes “disabled” and “chronically ill” beneficiaries as defined in IRC §§401(a)(9)(E)(ii), 72(m)(7) and 7702B(c)(2) and corresponding Regulations

Definitions

- Eligibility is determined as of date of death of the participant. Someone who becomes disabled or chronically ill later cannot switch over from the 10 year rule to life expectancy payout.

Definitions - "Disabled"

- SECURE Act: An individual is a disabled beneficiary if she is "unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or to be of long-continued and indefinite duration." IRC §72(m)(7), Regs. 4.72-17A(f).

Definitions - "Disabled"

- SSA: An individual shall be considered to be disabled for purposes of this subchapter if he is unable to engage in any substantial gainful activity by reason of any medically determinable physical or mental impairment which can be expected to result in death or which has lasted or can be expected to last for a continuous period of not less than twelve months. 42 U.S.C. §1382c(a)(3)(A) and (B).

Definitions - "Disabled"

- Note the difference - IRC §72(m)(7) requires an "indefinite" period of disability. This benefit, unlike SSDI or SSI is expected to last a lifetime.
- Further, IRC §72(m)(7) requires that proof of the disability must be provided. How and to whom and when is not addressed yet.

Definitions - "Chronically Ill"

- The definition of "chronically ill" generally tracks the criteria used to qualify for benefits under a long-term care contract as defined in IRC §7702B(c)(2)(A), *i.e.*

Definitions - Chronically Ill"

- Unable to perform (without substantial assistance from another individual) at least 2 of 5 ADLs of those listed in IRC §7702B(c)(2)(B) indefinitely;
- Have a disability similar to definition of "disability" above; or
- Require substantial supervision to protect the beneficiary from threats to health and safety due to severe cognitive impairment.

Definitions - "Chronically Ill"

- The determination of "chronically ill" must be certified as such by a licensed health care practitioner (as defined).
- Again, it is not clear to whom or when the certification must be given. IRS? Plan Administrator?

Practice Point

- Don't "knee jerk" to "disabled."
- "Chronically Ill" may be more helpful because it isn't based on an inability to work but rather on actual conditions and needs of someone who requires care and supervision.

SNTs - A Refresher

- First Party, Third Party & Pooled
- Which ones can we use with SECURE?
 - ◆ First Party? – unlikely
 - ◆ Third & Third Party Pooled? – yes
 - ◆ Testamentary Spousal SNT? –yes

Applicable Multi-Beneficiary Trusts - (AMBTs)

- Under IRC §§401(a)(9)(H)(iv) and (v) a revocable trust can hold retirement benefits for multiple beneficiaries. The separate account rule doesn't apply.

AMBTs

- Trust is named beneficiary of Plan; Trust provides separate share for beneficiaries 1 of whom is EDB. 10 year Rule applies to non-EDB beneficiaries but life expectancy applies to EDB. .SNT for EDB is an accumulation trust.
- At EDB's death, remainder beneficiaries are subject to the 10 year rule.

But Wait!!!!

- Under SSA there is the "sole benefit rule"
- First Party v Third Party

Is the Stretch-Out Worth It?

- Do the tax benefits of the stretch-out outweigh Quality-of-Life benefits of having access to funds?
- What is the "true" life expectancy?
- What is the projected timeline for a "Quality Life"? (whatever that means)

Miscellany

- What about disabled Plan participant with EDB beneficiary?
 - ◆ Durable Power of Attorney with authority to change beneficiaries?
 - ◆ Conservatorship with PC 2580 Petition to change beneficiary designation and create (or flow to existing) SNT for the benefit of the EDB.
 - ◆)What about PC 3604 *et seq.*?

Spouses with Disabilities

- Create Testamentary Trust for spouse
- Name Trustee of Testamentary Trust as beneficiary of IRA, not the Estate.

Resources

- Natalie Choate, "Planning for Retirement Benefits: Recent Developments: CARES, SECURE, New Life Expectancy Tables & IRS Notices 2020-50 and -51" (version 2020-3), www.ataxplan.com
- Nancy H. Welber, Esq., "Security for Disabled and Chronically Ill Beneficiaries", *Trusts & Estates Magazine*, April 2020, p.40.

Q&A
