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## Strategy Note on Navigating the SECURE Act in Trusts & Estates Litigation

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## Summary

This Strategy Note addresses how to navigate the SECURE Act in the context of trusts and estates litigation.


Counsel should check the appropriate state court websites to verify the most recent local rules, standing orders, and other relevant information.

For further discussion of the SECURE Act generally, see [Estate Planning and California Probate Reporter, Vol. 41, No. 4, February 2020]().

## I. Understand the Key Provisions of the Setting Every Community Up For Retirement Enhancement (SECURE) Act of 2019

Three key provisions of the SECURE Act, effective January 1, 2020, are summarized below, namely, (1) the change to the start date of required minimum distributions, (2) the new ability to contribute to the plan after age 70½, and (3) the loss of the "Stretch Individual Retirement Account (Stretch IRA)" in most cases, and how these changes are likely to affect trusts and estates litigation.

## II. Change to Age for Required Minimum Distributions (RMDs)

For participants who reach age 70½ after December 31, 2019, the age at which their RMDs start has been increased from age 70½ to age 72. As before, participants can delay taking their first RMD until April 1 of the year following the calendar year in which they attain age 72 (the required beginning date), while all subsequent RMDs must be taken by December 31 of that year. (26 U.S.C. § 401(a)(9)(C)(i)(I).)

Conservators and agents with power-of-attorney for a person who must begin withdrawing RMDs should take note of this change, as well as any trusts and estates litigators and counsel who frequently handle accountings. Practically, the delay will allow the account to grow for a longer period, increasing the amount available to distribute to beneficiaries and heirs of older decedents, thereby increasing the likelihood of litigation simply by raising the stakes. (Note that RMDs are not required in 2020, and those that have been taken might be put back. See [Internal Revenue Service (IRS), Notice 2020-51]().)

## III. Ability to Make Contributions After Age 70½

The SECURE Act also allows contributions to traditional IRAs at any age, so long as the participant or the participant's spouse is still working, eliminating the previous prohibition on contributions after age 70½. Note, however, that any such post-age 70½ contribution will reduce

the benefit of any qualified charitable distribution (QCD) from the participant's IRA, dollar for dollar, on a cumulative basis. After a participant attains age 70½, the participant may instruct the IRA custodian to make a payment from the IRA to one or more qualified charities, and the QCD will be counted in satisfaction of the RMD, up to $100,000, for the year in question. Such a QCD is not included in the taxable income of the participant, and the participant does not receive a charitable contribution deduction. The QCD will also not be counted for purposes of determining the maximum amount of charitable contributions that may be made by the the participant for that taxable year—*i.e.*, the QCD will not be counted for purposes of the 50 percent or 60 percent (100 percent in 2020) adjusted gross income (AGI) limitation. However, as noted above, the SECURE Act prevents any so-called "double dipping" of post-age 70½ contributions and QCDs, so that to the extent the participant makes post-age 70½ deductible contributions to the IRA, they will cumulatively reduce any amount intended as a QCD and cause it to be included in gross income, and counting only the balance left over (if any) toward your RMD. If the participant is considering future QCDs, to avoid these limitations, any post-age 70½ retirement plan contributions should be made to an employer-sponsored plan or to a Roth IRA.

As with the first change discussed above, the ability to make post-age 70½ contributions opens up a new savings opportunity for those working past age 70½, which will result in many older decedents leaving larger retirement accounts than they otherwise would.

## IV. Elimination of Most "Stretch IRAs"

Most significantly, the SECURE Act eliminates "Stretch IRAs" from qualified retirement plans/IRAs to anyone who is not an "eligible designated beneficiary" (EDB). Specifically:

- If there is no "designated beneficiary," pre-SECURE Act rules remain. Namely, if the participant dies before the RBD, the entire account balance must be distributed within 5 years of the participant's death. (26 U.S.C. § 401(a)(9)(B)(ii).) If the participant dies after the RBD, the plan/IRA may continue to be distributed over the balance of the (now deceased) participant's life expectancy as determined under the general IRS tables set out in the Treasury Regulations. (26 U.S.C. § 401(a)(9)(B)(i).)
- If there is a "designated beneficiary," but they are not an EDB, the entire balance must be paid on or before the 10th year following the participant's death ("10-year rule").
- An EDB is any one or more of the surviving spouse of the participant, a minor child of the participant, a disabled person (within the meaning of 26 U.S.C. § 72(m)(7)), a chronically ill person (within meaning of 26 U.S.C. § 7702B(c)(2)), or a person who is less than 10 years younger than the participant. (26 U.S.C. § 401(a)(9)(E)(ii)–(iii).)
- If there is an EDB, the EDB may use their life expectancy as determined under the general IRS tables set out in the Treasury Regulations. Following the EDB's death, the 10-year rule will apply to any further payments from the plan/IRA. For minor children, the exemption from the 10-year rule ends when the child reaches the age of majority, which may include completing a specified course of education. Therefore, in any state where 18 is the age of majority, the IRA funds must be fully withdrawn by the time the beneficiary reaches age 28 (or 10 years after completing a specified course of education). Generally these new rules only apply to beneficiaries of participants who die after 2019.

One result of these changes is that many see-through trusts created before the SECURE Act, which were intended to receive and distribute the benefits of a Stretch IRA, will no longer function as intended (the exception being for EDBs as noted above). "See-through" trusts are either

accumulation trusts or conduit trusts. A conduit trust is one from which the trustee immediately gives the beneficiary any distributions the trustee receives from the IRA. In many cases, conduit trusts were intended to be long-lasting trusts, paying a modest income stream over the lifetime of young beneficiaries, generally until they reached their 80s, providing a source of long-term financial security. Under the SECURE Act, however, trusts for non-EDBs will distribute the entire plan within 10 years of the participant's death, defeating the goal of long-term security, and injecting beneficiaries with large amounts of cash much sooner than intended.

Such conduit trusts with the primary goal of long-lasting payments should be updated before the participant's death, replacing the conduit trust provision for automatic distribution of retirement benefits in the year they were received with accumulation or discretionary trust language—affording trustees the discretionary power to accumulate retirement benefits and make distributions as appropriate, based on the intention of the grantor. This allows the trustee to continue to accumulate the IRA distributions inside the trust, so that a grantor who planned to provide beneficiaries with a modest income stream for life is able to keep the trust's protection in place for longer than the 10 years that generally would apply to conduit trusts. Beware, however, that income accumulated in a trust is subject to much higher income tax than income distributed to a beneficiary, so one needs to consider whether the trust's protection is worth the higher taxes—sometimes it is, and sometimes it is not.

When such trusts are not properly updated before the participant's death, the trustee or other interested party has a limited window in which to obtain a court order to make such changes—*i.e.*, **until September 30 of the year following the calendar year of the participant's death**. Meeting that deadline may be complicated by beneficiaries who disagree with any proposed changes that reduce their short-term access to cash. Additionally, even if the trust is appropriately modified prior to the participant's death, there is always a greater likelihood of beneficiary versus trustee litigation when it comes to the exercise of the trustee's discretion, compared to automatic mandatory distributions. This is even more true if the trust was posthumously modified, as the grantor's true intention is easier for a beneficiary to argue.

## V. Conclusion

Under the SECURE Act, plans/IRAs are afforded more time to grow and more opportunities for participants to contribute to them, resulting in larger retirement accounts and an even greater concentration of wealth in retirement assets. This fact coupled with the widespread existence of estate planning vehicles which anticipate long-lasting Stretch IRAs, rather than the relatively short 10 year pay-outs now required in most cases, portends a spike in court appearances, whether on petitions to modify irrevocable trusts, or fights over the grantor's intention or the exercise of the trustee's discretion. Trusts and estates litigators should understand the key provisions of the SECURE Act and how they are likely to surface in the courtroom; and in particular, they should be keenly aware of the September 30 deadline to make changes to the trust.


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