How The SECURE Act Changes Retirement (and Other) Planning

9.30.2022 | FPA of Greater Indiana

Jeffrey Levine

CPA/PFS, CFP®, CWS®, AIF®, BFA

Advisor. Chief Planning Officer, Buckingham Wealth Partners

Blogger. Lead Financial Planning Nerd, Nerd's Eye View, kitces.com

Educator. Creator, Program Leader, Savvy IRA Planning®

Tweeter. @CPAPlanner, twitter.com/CPAPlanner

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Where We Stand

- SECURE Act enacted 12/20/2019
- Proposed Regulations released **2/23/2022**
- The regulations are NOT final
  - Prediction: Final Regulations will be released later in 2022

CHANGE #1

The 'Death' of the Stretch

‘Death’ of the Stretch

- New rules only apply to Designated Beneficiaries
  - No direct change to rules for Non-Designated Beneficiaries

- General rule is a new 10-Year Rule
  - Similar to 5-Year Rule for NDBs when death occurs prior to RBD
  - All funds must be distributed by the end of the 10th year after death
  - No RMDs during years 1-9???

Proposed Regs' Impact on Non-Eligible Designated Beneficiaries

- **ALL** Non-Eligible Designated Beneficiaries would be subject to the 10-Year Rule
- **ONLY** Non-Eligible Designated Beneficiaries inheriting from someone dying on or after their Required Beginning Date (RBD)
  - ALSO subject to 'regular' 'stretch' RMD rules

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'Death' of the Stretch

- Applies to IRAs and *most plans* for deaths occurring on or after January 1, 2020
- Exceptions:
  - Governmental plans have for deaths occurring on or before *January 1, 2022*
  - Applies to plans maintained per Collective Bargaining Agreement for deaths occurring on or after *January 1, 2022* (unless CBA ends sooner)
  - Annuitized annuities (life/joint life expectancy) and annuities in which a future lifetime income option has already been irrevocably selected

'Death' of the Stretch

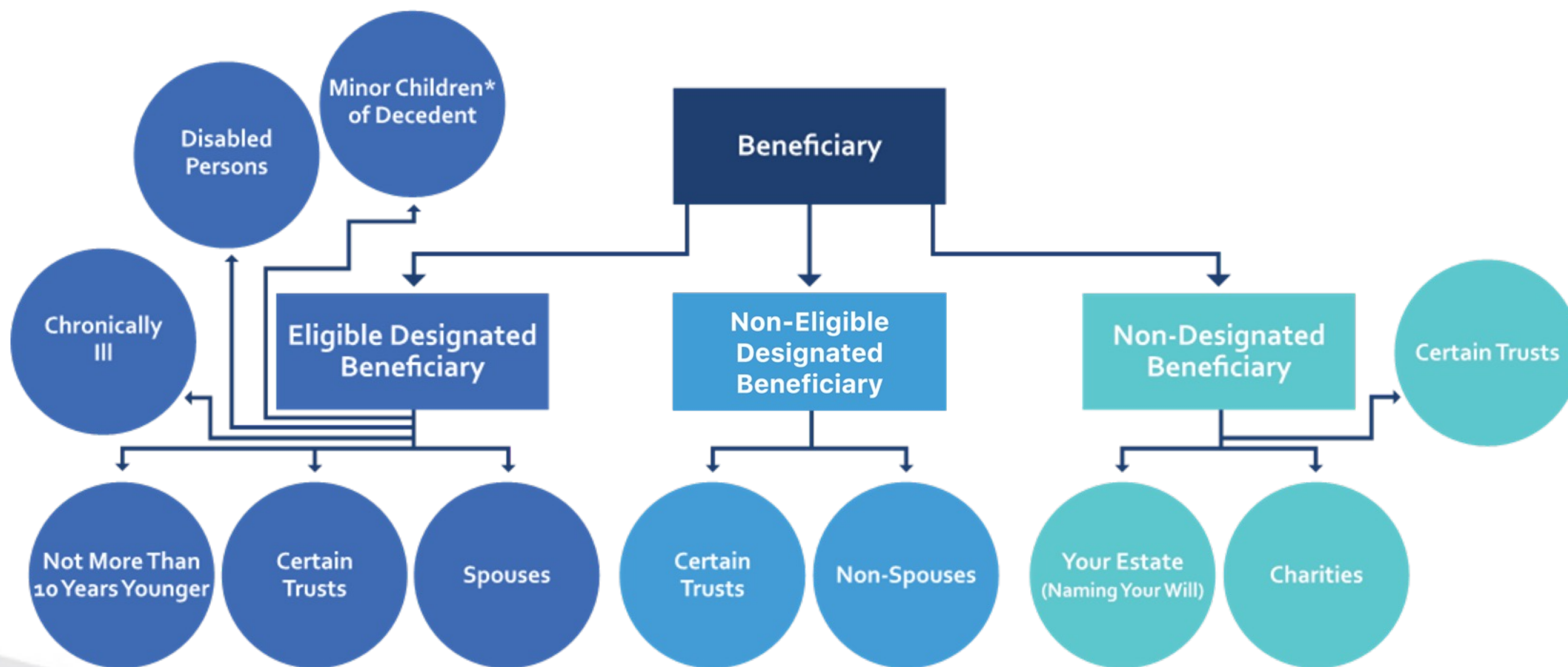
- Eligible Designated Beneficiaries (EDBs) are also exempt from the SECURE Act's changes.

- The 5 types of EDBs are:
  1. Surviving spouses
  2. Disabled persons
  3. Chronically ill persons
  4. A beneficiary not more than 10 years younger than the decedent
  5. The *decedent's* minor child*

*Only applies until age of majority

'Death' of the Stretch

IRA Beneficiaries Post-SECURE Act



*Only applicable until the minor reaches the age of majority

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Proposed Regs' Impact on *Eligible* Designated Beneficiaries

- Eligible Designated Beneficiaries inheriting from decedents dying prior to their Required Beginning Date
  - Able to opt out of 'Stretch' and into 10-Year Rule

- Plans/Custodians can limit Eligible Designated Beneficiaries post-death distribution options
  - Allow for choice
  - Allow for only 'Stretch'
  - Allow for only 10-Year Rule

'Death' of the Stretch

- Impact to trust beneficiaries
  - General rule is still that trusts are Non-Designated Beneficiaries
  - Trusts can still be treated as Designated Beneficiaries if they meet the "See-Through Trust" rules
  - Certain "See-Through Trusts" may be treated as EDBs

- Conduit trusts benefiting a single EDB should be able to receive EDB treatment

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‘Death’ of the Stretch

- Discretionary Trusts will generally not qualify for EDB treatment

- Exception: Applicable Multi-Beneficiary Trusts
  - All trust beneficiaries must be designated beneficiaries
  - At least one trust beneficiary must be an EDB because they are either:
    - Disabled
    - Chronically ill

  - *Proposed Regulations create additional exceptions*

Proposed Regs' Impact on Trusts as Beneficiaries

- Regulations would provide for additional flexibility in post-death planning
  - Powers of Appointment
    - Previously general power of appointments were often fatal errors
    - Regs would allow POAs to be exercised by 9/30 of year after death in favor of an identifiable beneficiary
  - Post-death reformation of trusts
    - Would allow for removal of identifiable beneficiaries by 9/30 of year after death

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Proposed Regs' Impact on Trusts as Beneficiaries

- Would allow certain beneficiaries to be excluded when determining post-death distribution rules:
  - Remaindermen of a Conduit Trust (carryover from existing rules)
  - A beneficiary of a discretionary/accumulation trust who is conditioned on the death of a secondary beneficiary
  - If the trust is set up to pay out everything to a minor beneficiary by the end of the year they turn 31
    - i.e., 10 years after the age of majority

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'Death' of the Stretch

- What can we do?
  - "Crisis" Planning
    - Wait as long as possible?
    - Strategically time distributions by beneficiaries?
    - Turn the 10-Year Rule into an 11-Year Rule?
  - Proactive Planning
    - Nothing?
    - Name more beneficiaries?
    - More Roth conversions during lifetime?
    - Use charitable remainder trusts to 'recreate' the stretch?
    - Bypass a spouse at the first death to create two separate 10-Year windows (which may overlap)?
    - Life Insurance?
    - Treat beneficiaries unequally to make the more equal??????

Change #2

RMDs To Begin At Age 72

RMDs To Begin At Age 72

- RMD starting age is pushed back to age 72 for all IRAs and most plans (no change to Still-Working Exception)
  - RBD becomes April 1st of year after reaching age 72
  - *Proposed* Legislation push back RMDs to age 75

- Twice the benefit for first-half-of-year birthdays

- No impact to age at which QCDs can be made

RMDs To Begin At Age 72

- No one started RMDs in 2020!
- No change to the Life Expectancy Tables (used to determine factors)
    - NEW tables are effective for 2022 tax year
- Gives those who can afford to 'wait on the income' two extra 'semi-gap' years to utilize for planning purposes
- Is a meaningless change for the majority of IRA owners who are using their accounts to live on by that time anyway!

RMDs To Begin At Age 72

- ‘Side Effects’ of pushing back the age at which RMDs begin
  - Spouses who remain the beneficiary of deceased spouse’s account
    - Starting age for RMDs (as a beneficiary) decedent’s age 72
    - Surviving spouse beneficiaries treated as inheriting from an owner before decedent’s age 72
  - 5-Year Rule for Non-Designated Beneficiaries
    - Applies when an owner dies prior to April 1st of the year following the year that they reach age 72 (their Required Beginning Date)
  - Still working exception 5% ownership test shifted to plan year ending in year participant reaches age 72

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Change #3

Maximum Age For Traditional IRA Contributions Repealed

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Max Age For TIRA Contributions Repealed

- Traditional IRA contributions may now be made at any age
  - Must still have "compensation" (generally earned income)
- Effective beginning in 2020
- Don't forget about spousal Traditional IRA contributions!
- 'Regular' deductibility rules apply
  - Generally deductible
  - Deduction may be phased out w/ high income AND active participation of retirement account owner and/or spouse

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Change #4

Qualified Charitable Distribution (QCD) Anti-Abuse Rule

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QCD Anti-Abuse Rule

- *The amount of distributions not includible in gross income* ***by reason of the preceding sentence*** *for a taxable year (determined without regard to this sentence) shall be reduced (but not below zero) by an amount equal to the excess of—*

  'i) the aggregate amount of ***deductions*** *allowed to the taxpayer* ***under section 219*** *for all taxable years ending on or after the date* ***the taxpayer*** *attains age* ***70 ½****, over*

  (ii) the aggregate amount of reductions under this sentence for all taxable years preceding the current taxable year. [Emphasis Added]

QCD Anti-Abuse Rule

- Otherwise valid QCDs 'rejected' until rejected amount = deductible Traditional IRA contributions made during/after owner's 70 ½ year
  - Rejected amounts treated as 'regular' distribution + 'regular' charitable contribution

- Greatly reduces the benefit of the repeal of the maximum age for making Traditional IRA contributions (if QCDs are desired)

QCD Anti-Abuse Rule

- Strategies to ‘beat’ the QCD anti-abuse rule
  - Make deductible contributions using employer-sponsored retirement plans (including SEP IRAs and SIMPLE IRAs)
  - Make Roth IRA contributions
  - Skip the deduction for the Traditional IRA contribution
  - Deductible Traditional IRA contributions for one spouse, QCDs from the other

CHANGE #5

10% Penalty Exception For Childbirth/Adoption

10% Penalty Exception For Childbirth/Adoption

- Applies to IRAs and to employer-sponsored retirement plans
- Up to $5,000 per parent per qualifying event
  - May be spent as parent's see fit (no list of "qualifying expenses")
- Distribution must be taken within one year *after* child's (live) birth or adoption (adopted child must be < 18)
- Distributions may be repaid

Change #6

Other Changes To Qualified Plans

Other Changes To Qualified Plans

- Maximum contribution % for 401(k) auto-enrollment increased
  - Increased to 15% in any year after the first full year in which the employee's compensation is automatically deferred into the plan
- Long-term part-time workers provided greater access to 401(k)s
  - Old rule = Must work at least 1,000 hours in a year before it becomes mandatory for an individual to be eligible to participate
  - New rule = Old rule still applies, but individuals must also be eligible to participate after 3 or more consecutive years of 500+ hours
    - 500-hour years don't have to be counted until plan years beginning in 2021
  - Participants in a plan solely due to new rule may be excluded from plan testing for nondiscrimination and "top-heavy" status

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Other Changes To Qualified Plans

- No more 401(k) debit/credit cards
  - Certain plans previously issued such cards, which created loans against the participant's plan balance
- More plans can be established after tax-year-end
  - Plan must be employer-funded plan
    - Stock bonus plan
    - Pension plan
    - Profit sharing plan
    - Qualified annuity plan
  - Plans may be established up until due date of employer's return (including extensions)
  - Effective ***for*** 2020 and later

Change #7

Expansion Of 529 Plans

Expansion Of 529 Plans

- Fees, books, supplies, and required equipment for Apprentice Programs (must be certified w/ the Department of Labor)

- New "Qualified Education Loan Repayment" distributions
  - Lifetime limit of up to $10,000
  - May be used for principal and/or interest
  - Interest paid w/ such distributions is not eligible for the above-the-line student loan interest deduction
  - Up to $10,000 can be distributed to satisfy student debt of 529 beneficiary's siblings (each)

The "S" Stands for "SECURE Act Guy"

Questions?

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Estate Planning For The Merely Affluent

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Overview of 2022 Estate Tax Planning Rules

“Basic Exclusion Amount”

- Currently $12,060,000 for 2022
- Was doubled by the Tax Cuts and Jobs Act
  – Reverts to “old” rules after 2025
- Applies to:
  – Estate tax and gift tax (aggregate exclusion)
  – GSTT

Annual Gift Exclusion

- $16,000 per person, per donee for 2022
- Calendar-year exclusion
- Gift-splitting still ok
  - May need to file Gift Tax return

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Portability

- Allows spouses to “combine” unused exemption amounts without the use of a trust
- Applies to:
  - Gift tax during life
  - Estate tax at death (DSUEA)
    - “Locked in” at death (no increases via inflation)
  - But NOT to the GSTT

The Portability “Trap”

- Transfer of DSUEA is NOT automatic
  - Requires the timely filing of Form 706
    - Rev. Proc. 2022-32 may allow “timing filing” for up to 5 years.
  - Most estates are not *required* to file Form 706!

- Consider the DSUEA’s potential benefits if there are future changes
  - To client’s estate
  - To the law

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Complications of a Higher Exemption Amount

- Estate tax documents should be revisited

- Pay special attention to credit shelter trusts with funding level tied to the federal estate tax exemption
  - Potential for an *increase* in the amount of state tax
  - Potential to disinherit certain beneficiaries

Essential Documents

- Will
  - What's actually covered by the will?
  - Will the estate be sufficiently capitalized?
- Power of attorney
  - Springing vs. durable
- Living will
- Health care proxy (aka "health care power of attorney)
  - *HIPAA
- Beneficiary forms

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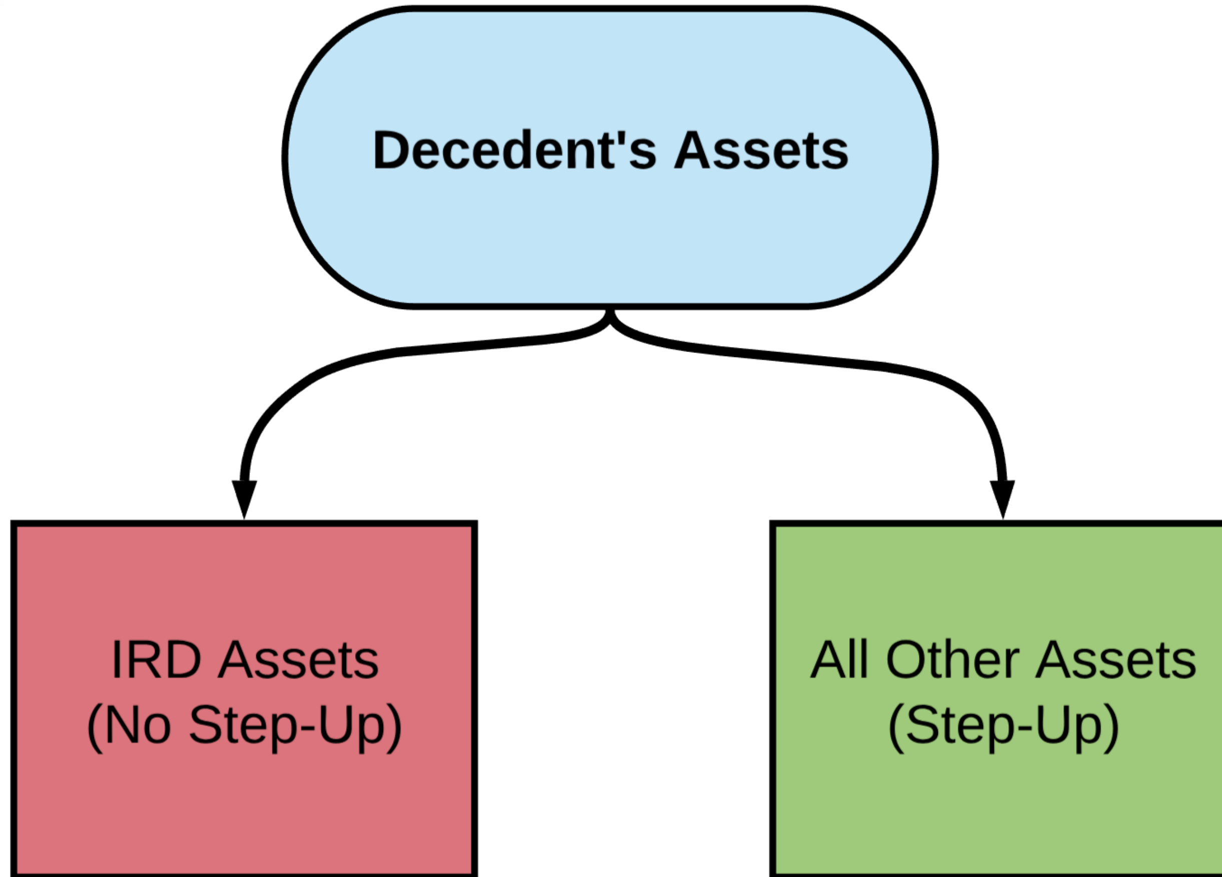
Planner's Review of Essential Documents

- When were they last updated?
- Are the people named as (potential) fiduciaries (still) good choices?
  - Competency
  - Health
  - Age
- Are back-up fiduciaries named?
- Does the client understand what their documents say?

End-Of-Life Basis Planning

Two Classes Of Assets At Death



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Income In Respect Of A Decedent (IRD)

- Income earned during life, but not yet taxed
- Subject to income tax (no step-up) and estate tax
- Common IRD assets include:
  - Account Receivables
  - NUA
  - Pre-tax retirement accounts
  - Final bonus (not paid before death)
  - Installment sale gains
  - Embedded gain on U.S. savings
  - Final paycheck (not paid before death)
  - Gain on NQ Annuities

Understanding The IRD Deduction

- Mitigates "double taxation"
- Income tax deduction for Federal estate tax paid
  - No similar deduction for state estate taxes paid
- Recipient of IRD is entitled to the deduction
- Two question test:
  - Did you inherit an item of IRD?
  - Did the estate owe Federal estate tax?

Step-Up-In-Basis Assets

- Everything other than IRD
- Beneficiary's basis is "stepped up" to the fair market value on the date of death
  - FMV on alternate valuation date (when AVD is elected)
  - Future gain/loss receives long-term capital gains treatment
- Allows beneficiary to sell asset income-tax-free
  - Also eliminates the need to know the decedent's basis
- No cap!

The Door Swings Both Ways! Step-Down in Basis

- Everything other than IRD
- Beneficiary's basis is stepped down to the fair market value on the date of death
  - FMV on alternate valuation date (when AVD is elected)
  - Future gain/loss receives long-term capital gains treatment
- Unrealized gain is lost

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Step-up in Basis Rules For Joint Accounts (Separate Property States)

- "Qualified Joint Interest"
  - Joint tenants with rights of survivorship
  - Joint tenants by the entirety
- Each spouse presumed to own 50% of the assets in the account
- Surviving spouse receives a step-up in basis on deceased spouse's 50% "share" of the joint account

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Step-up in Basis Rules For Joint Accounts (Community Property States)

- General rule: Property acquired during marriage is community property
  - Other property can be voluntarily "converted" to community property
- Treated as though each spouse owns 100% of the assets in the joint account
  - "Full step-up" (-down) upon both deaths!
- Community property states: Arizona, California, Idaho, Louisiana, Nevada, New Mexico, Texas, Washington, and Wisconsin

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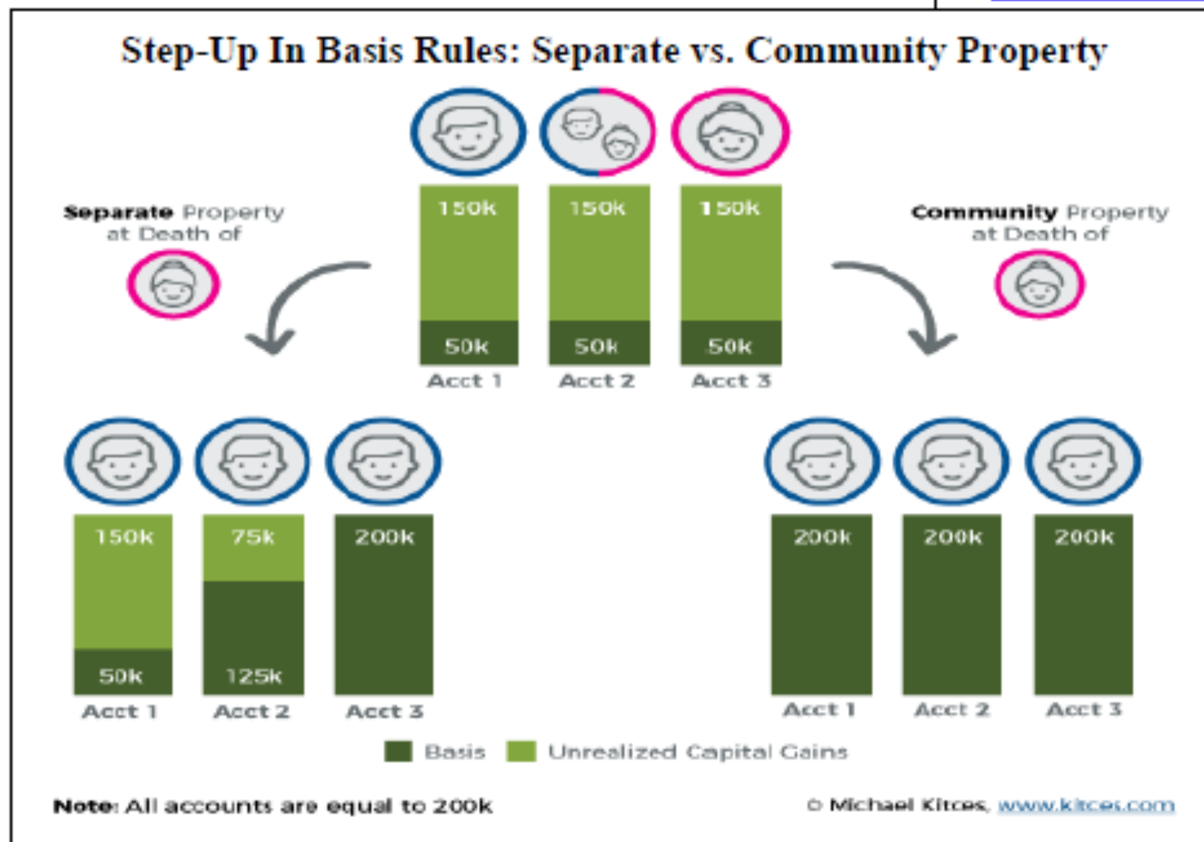
Step-up in Basis Rules For Joint Accounts (Comparative example)



Maximizing Step-Up In Basis Using Pre-Death Asset Transfers

- Goal: Allow couple in separate property state to get a "full" step-up at both deaths
- Shift assets out of joint accounts and into first-to-die spouse's individual account
- Leave assets back to surviving spouse

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Challenges When Using Pre-Death Asset Transfers

- One-year "Boomerang Rule" (IRC 1014(e))
  - Step-up is "voided"
  - Applies when gifted assets pass back to original donor (or original donor's spouse) on account of donee's death, within one year of gift.
- Loss of control over gifted assets
- Medicaid eligibility may be impacted

The Importance Of Identifying The Owner of Capital Losses

- Joint tax returns report the combination of each spouse's separate income, deduction, credits, etc.
  - Joint tax return ≠ all tax items belong to both spouses

- Realized capital loss carryforwards of a decedent "die" with them
  - Last joint return in year of death

- Whose loss is it????
  - Schedule D does not distinguish!!

The Importance Of Identifying The Owner of Capital Losses

- Revenue Ruling 1974-175

- "In the absence of any express statutory language, only the taxpayer who sustains a loss is entitled to take the deduction. See Calvin v. United States, 354 F. 2d 202 (10th Cir. 1965). Therefore, the business loss and the capital loss sustained by the decedent for the period ending with the date of his death are deductible only on his final income tax return. Thus, no part of such net operating loss or capital loss is deductible by the decedent's estate or carried over to subsequent years." (emphasis added)

Making The Most Of Already-Realized Capital Losses

- Already-realized capital losses include:
  - Carryover capital loss
  - Year-of-death capital realized losses
- Sell gain-laden assets of the surviving spouse
  - Generally OK to repurchase after sale (must have economic substance)
- Give preference to:
  - Assets likely to be sold w/ short-term gain
  - Assets surviving spouse was likely to sell soon anyway

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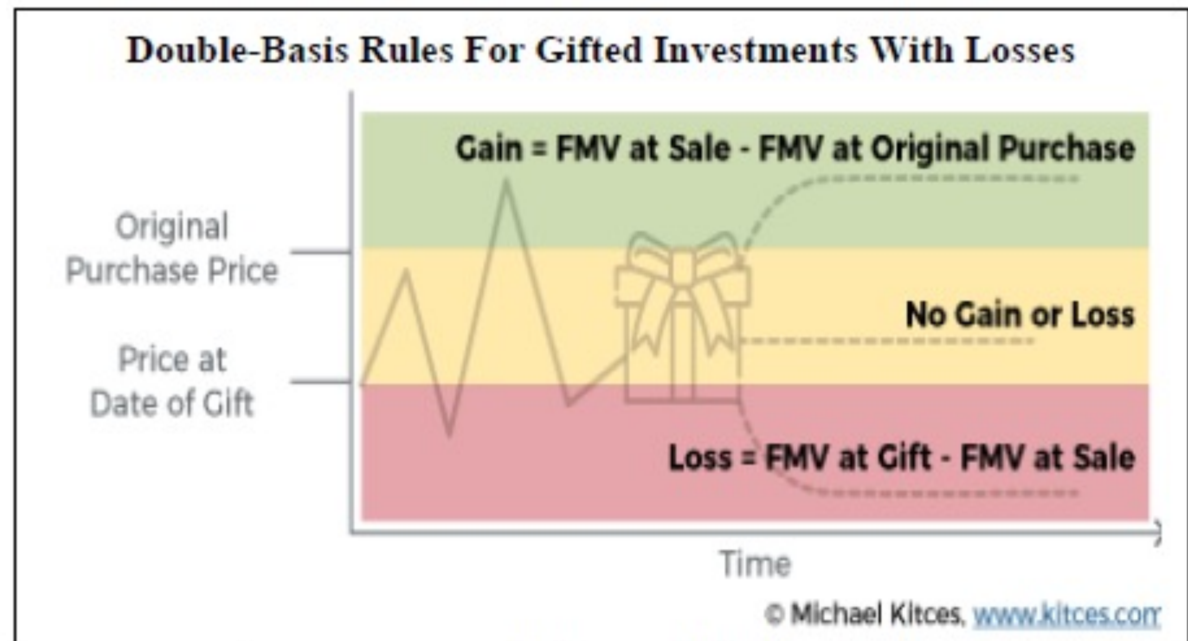
Maximizing Unrealized Losses Earmarked For A Non-Spouse Beneficiary

- Gift to non-spouse beneficiary prior to death
- Subject's non-spouse beneficiary to "double basis" rules
- Shields future growth, up to the decedent's basis at the time of the gift, from taxation

Understanding The "Double Basis Rules"

- Recipient of gift has two separate basis amounts
  - Fair market value on date of gift to determine a loss
  - Donor's basis at time of gift to determine a gain



Maximizing Unrealized Losses Earmarked For A Spouse Beneficiary

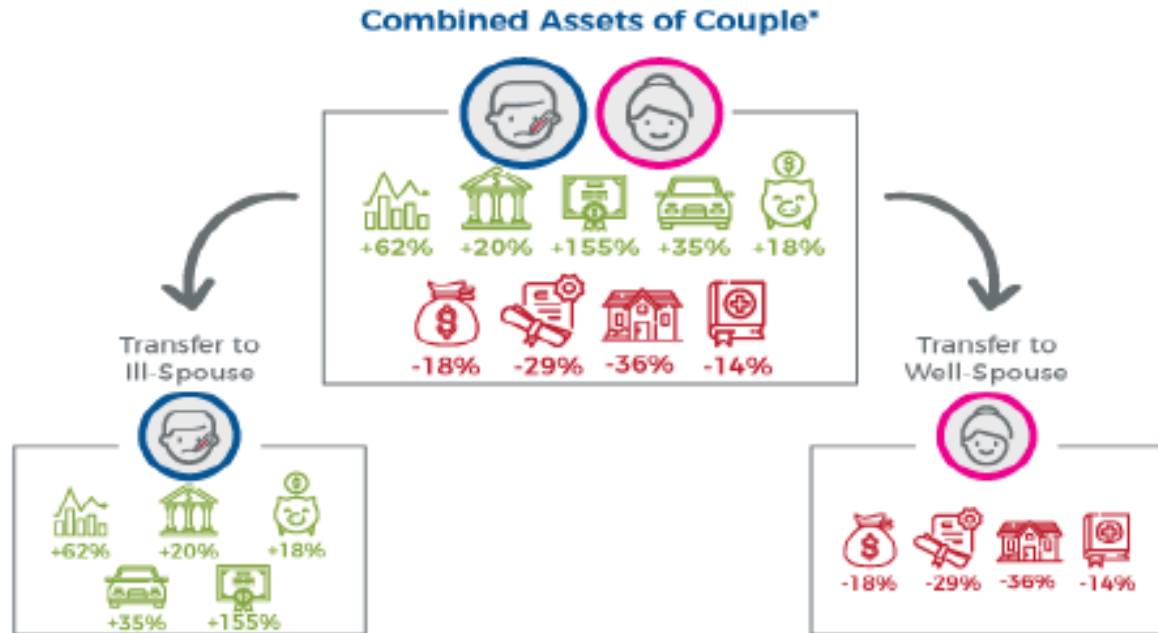
- Same strategy. Even better result!
  - Gift to non-spouse beneficiary prior to death
  - "Full" unrealized capital loss is preserved

- Recipient spouse retains donor spouse's basis

- IRC Section 1015(e), entitled "Gifts between spouses", states: "In the case of any property acquired by gift in a transfer described in section 1041(a), the basis of such property in the hands of the transferee shall be determined under section 1041(b)(2) and not this section".

- 1041(b)(2) states "the basis of the transferee in the property shall be the adjusted basis of the transferor."

Maximizing Unrealized Losses Earmarked For A Spouse Beneficiary



Digital Estate Planning

What Are "Digital Assets?"

COMMON TYPES OF DIGITAL ASSETS

Email Accounts

Social Media Accounts

Cloud Storage

Digital Photos

Digital Music

Word Documents

Spreadsheets

Digital Medical Images & Files

Cryptocurrency Files

Subscription Accounts (e.g. Netflix, Hulu, Prime)

Website Gateways to Financial Assets (e.g. online access to bank & brokerage accounts, cryptocurrency exchanges)

Apps

Blogs

Website Domains

Digital Calendars

Contact Lists

Digital Storefronts (e.g. Ebay, Etsy)

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Are You a Hacker?

- Hacking is gaining access to information without proper authorization

- Many Terms of Service Agreements (TOS):
  - Restrict rights after death
  - Prohibit the creation/use of "joint" accounts
    - BobAndClaire@gmail.com

- You can't just "give a password" to someone else!

TOS Example: Oath

"With the exception of AOL accounts, all Oath accounts are non-transferable, and any rights to them terminate upon the account holder's death."

UFADAA

- Uniform Fiduciary Access to Digital Assets Act
- Granted executor same access to digital assets as decedent had during life
- Intended to allow executor to:
  - Pass on photos, emails, etc.
  - Pay final expenses through bill-pay (when applicable)
  - Delete or modify Social Media accounts
  - Delete or modify other online data

UFADAA

- Faced *intense* opposition from large tech companies *and* privacy rights organizations
  - Created potential conflicts with federal privacy laws
  - Infringe upon the rights of third parties
  - Raised liability concerns for companies who promised users information secure/private
  - Potentially allow access to data in ways that the decedent had not intended
  - Contrary to many Terms of Service provisions

UFADAA

- Proposed by over half of all state legislators in 2015
- Adopted by only one state
  - Delaware

Back to the Drawing Board

- Uniform Commission on Laws (ULC)
- Helps to create laws that are widely adopted by states
- No requirement for states to adopt
  - States may modify
  - States generally control property law, tort law, family law
- Examples
  - Uniform Transfers to Minors Act
  - Uniform Probate Code
  - Uniform Commercial Code

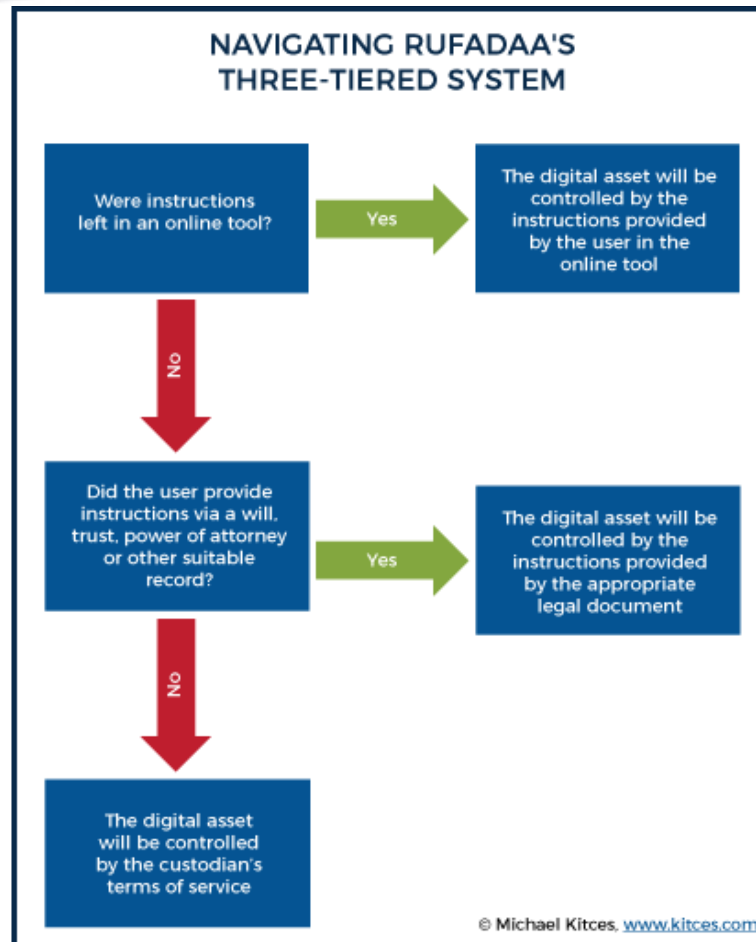
RUFADAA

- Revised Uniform Fiduciary Access to Digital Assets Act
- Use of an "online tool" supersedes other documents
  - Legally enforceable
- If online tool is not available or is not used, instructions may be provided in a will, trust, power of attorney or other legal record

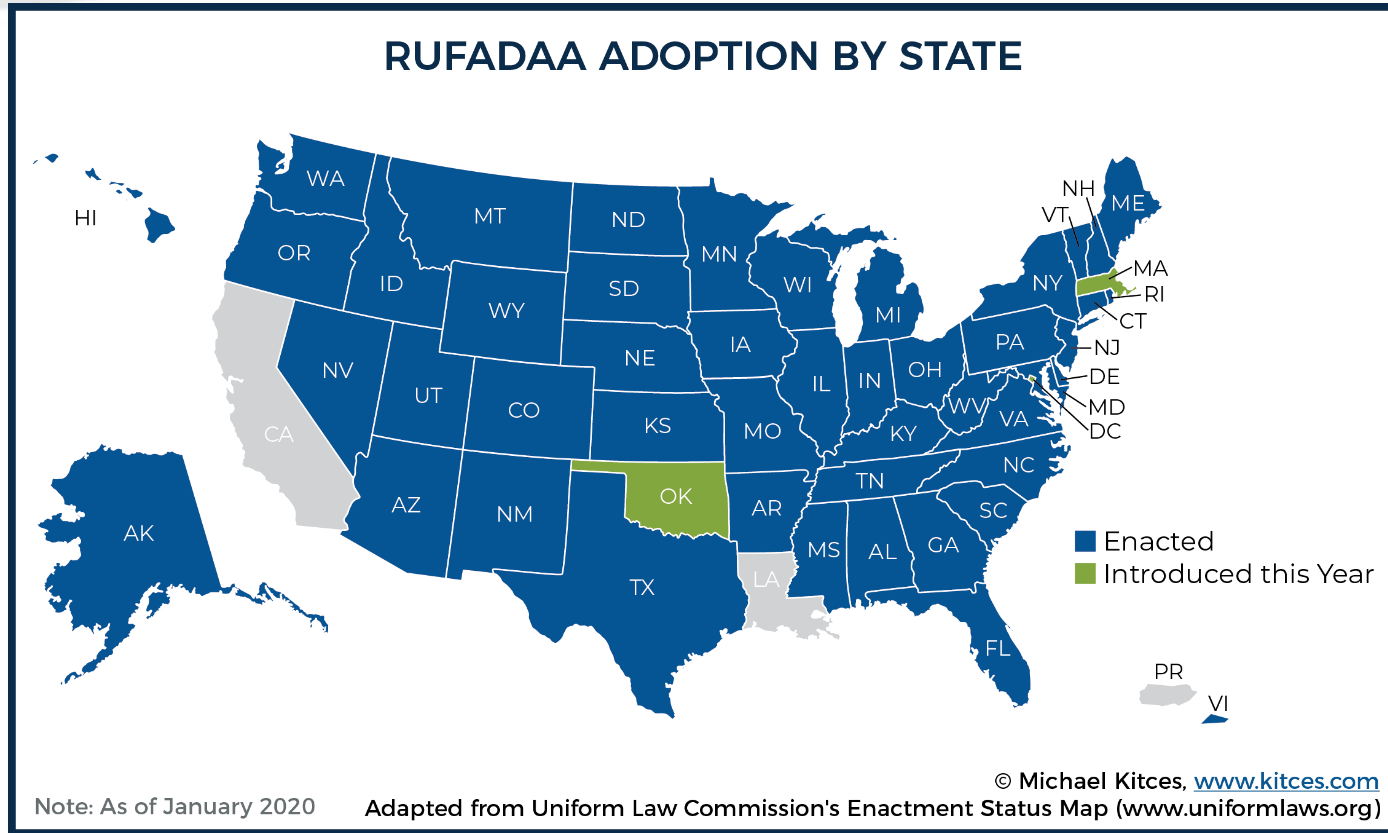
RUFADAA

- Absent any instruction, the TOS will prevail
- Without any instruction, RUFADAA imposes default rule
  - Content vs. Catalogue

RUFADAA



RUFADAA Widely Adopted



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What to Consider Doing Now

- Consider a digital fiduciary
  - Does not have to be the same person as a client's executor/trustee
  - Update legal documents

- Utilize online tools provided by websites
  - FaceBook's Legacy Contact
  - Google "Inactive Account Manager"

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What to Consider Doing Now

- Create a digital asset inventory

- Create a master list of accounts and passwords
  - Average employee using LastPass has 191 accounts
  - Be careful of inadvertent custody!

- Consider the use of a password manager
  - Use multi-factor authentication when possible
  - Common options
    - Dashlane
    - Sticky Password
    - LastPass
    - Keeper
    - Password Boss

What to Consider Doing Now

- Leave specific instructions for specific accounts
  - "Please share all these pictures with _______"

    vs.
  - "Please make sure to delete the pictures in the folder marked 'Delete after I'm dead.'"

- Make sure that your digital fiduciary will have the info necessary to access desired info
  - LastPass Emergency Access or equivalent service?
  - A written list of passwords?
  - A death certificate and a copy of the document naming them as your digital fiduciary?

What to Consider Doing Now

- Third-party commercial services have started to pop up and more are likely to come:
  - Directive Communications Systems
  - Estate Map
  - AssetLock
  - My Wonderful Life
  - SecureSafe

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What Can You Do to Help?

- Begin to have discussions about digital assets
- What does the client want to happen with each asset?
  - Review regularly
- Continue to follow-up with clients to make sure plans don't "die on the vine"

What Can You Do to Help?

- Recommend an attorney to help update your clients' estate planning documents
- Provide you access to a "digital vault" where your clients can securely store information
- Help your clients to understand digital estate planning options, tools and services

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