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**Wills, Trusts and Estates
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Estate Planning and IRA's

A retirement account can be the key to long-term financial security. It also can be a person's largest financial asset, if not in the present at least in the future. After recovering from the dramatic downturn in the stock market in 2001, investors regained their optimism as stock prices climb. Over the long term IRA's are probably one of the best ways a person can provide for a more secure future and possibly avoid inflation eating into the real value of his or her wealth.

Estate planning as to a retirement account starts from two basic features: (1) at death the account passes to a designated beneficiary and (2) income tax has been deferred for a retirement account (except for Roth IRA's). It must be paid when money is distributed from the account, whether that happens before or during retirement, or after the death of the account holder.

A note as to terminology: In this discussion I am going to use IRA's to refer collectively to all tax deferred retirement accounts because (1) the law is generally the same for IRA's and these other accounts; and (2) an employee upon retirement or leaving a job can usually convert a 401(k) and other pension accounts to an individual IRA. Most experts suggest rolling over a 401(k) or other employer-provided account to an IRA upon retirement or changing employers.

The Federal Estate Tax is less of a threat to large IRA's as it was in previous years. As of January 1, 2006 each person can pass \$2.0 million of assets to the next generation free of the death tax. That protection increases to \$3.5 million in 2009. The Federal Estate Tax (sometimes referred to as the "death tax") is imposed on a person's wealth, their retirement accounts and any life insurance death benefits from policies owned or controlled by the decedent. Any assets going to a surviving spouse are usually protected by an unlimited marital deduction, which simply means that imposition of the death tax is postponed until the "second death."

A surviving spouse has the option of rolling over an IRA into his or her own IRA account, thus postponing the income taxes until money is withdrawn from the new account. No other beneficiary can do a rollover.

Thus it is usually a no-brainer for a person to name their spouse as primary beneficiary of their IRA. But what about the "backup" beneficiary? If the account holder has minor children, there can be problems. Minors cannot own such property in their own name. This "disability" is why people create trusts to hold assets for their children until they are older and (hopefully) wiser.

If you go to the trouble of setting up a trust for the children (even if it is only through your will in a "testamentary trust"), why shouldn't you name that trust as beneficiary of the IRA? The answer, as usual, is taxes. Naming a trust as the beneficiary of an IRA can trigger a premature imposition of income taxes on the account. Unless the trust has certain tax-oriented provisions, regulations are likely to require distribution of 100% of the account within five years of the account owner's death and payment of all income taxes.

Some people are not in the clear even after their children are grown up because they have "blended families," with children from previous marriage(s). Naming a surviving spouse as the beneficiary creates

a risk that step-children will never see any of the IRA money because the surviving spouse can rollover the account and name new beneficiaries. If the IRA is large enough it might be worthwhile to name a trust specifically drafted to pay all IRA distributions to the surviving spouse and upon his or her death then to the children.

One iron-clad rule in this area is fairly simple: do not name "my estate" as an IRA beneficiary. That will trigger the fastest and greatest income taxes on the account.

Now that I have covered the problems, what is the solution? It would take a fairly thick book to discuss plans for the most common scenarios. I know because I have such a book on my shelf. A list of possible beneficiaries is the following: surviving spouse, custodian for minor children, children outright, a specially drafted trust and/or a charity. Most people will use a combination of some of these. As the sergeant used to say on the TV series *Hill Street Blues*, "Be careful out there."

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Patrick J. Gibbs practices law in Roswell, Georgia with a concentration on Wills, Trusts and Estates. This article is intended to be educational. Legal advice should be obtained as to individual needs before taking any action.