It is typically the case that the custodian or plan administrator will require the use of its own form for designating or changing the beneficiary of any retirement plan or individual retirement account. This form often does not have the option, or enough space, to allow a practitioner to designate a trust as a beneficiary in the manner required to achieve the income tax objectives desired in such planning. Accordingly, this Form [1240?] is designed to provide additional language which can be attached to a beneficiary designation or change of beneficiary form.

INDIVIDUAL RETIREMENT ACCOUNT BENEFICIARY DESIGNATION SAMPLE LANGUAGE

The following sample language may be included in

The following is sample language designed for a family situation where there is a spouse and/or one or more children who are minors, and where a significant portion of the decedent's assets consist of retirement plan assets such as qualified defined contribution retirement accounts or individual retirement accounts (both traditional and Roth). This beneficiary designation is designed to be used in connection with Form 531 – Will with Contingent Trust (Couple) in Orange Book Forms Chapter 5 – Non-Taxable Estates – Married Couples, to create a conduit pot trust for retirement accounts held in trust

the sample language comprising a Designated Retirement Benefit Trust under Form 15___, "Drafting for Retirement Assets." This language may not be appropriate for clients with tax planning wills or trusts which contain a marital deduction trust for the benefit of the surviving spouse.

Primary Beneficiary: My spouse, _____________, if my spouse survives me.

Contingent Beneficiary: My descendants, by representation (defined below); provided, however, that if a separate Deferrable Retirement Benefit Trust is created under my last will and testament dated ___________, or under the [NAME OF REVOCABLE TRUST] dated _____________, to the trustee of such Deferrable Retirement Benefit Trust.

By representation means that the property is to be divided into as many shares as there are then-living descendants in the nearest degree of kinship and then-deceased descendants in the same degree who left then-living descendants. Each then living descendant in the nearest degree shall receive one share and the share of each then-deceased descendant in the same degree shall be divided among his or her descendants in the same manner.

<u>Notes on Use</u>

[INSERT OR REFERENCE EMILY BOWMAN ARTICLE DRAFTED FOR THIS SUBCOMMITEE?]

In planning for the devolution of a client's retirement plan assets, it is recommended that a practitioner familiarize himself or herself with the specific tax planning requirements associated with retirement accounts under the Internal Revenue Code of 1986, specifically Code section 401(a)(9) and its associated Treasury Regulations. For a further discussion of these requirements, please see Natalie Choate, *Life and Death Planning for Retirement Benefits*, Seventh Ed. (2011).

1) This form designates the surviving spouse as primary beneficiary, mainly for purposes of preserving certain rights granted to a surviving spouse with respect to retirement benefits for which such spouse is the designated beneficiary. *See generally* Choate for a discussion of these benefits, including but not limited to the right of the spouse to rollover the account to an individual retirement account for which the surviving spouse is treated as the "owner" instead of the "beneficiary" under Section 408 of the Internal Revenue Code of 1986.

2) In designating a Designated Retirement Benefit Trust for a client's descendant as the beneficiary of retirement benefits, the form of the Designated Retirement Benefit Trust provides for mandatory distributions, at least annually, of the "minimum required distribution" as determined under Section 401(a)(9) of the Internal Revenue Code of 1986, plus any retirement benefits withdrawn by the trustee of such trust above and beyond the minimum required distribution for a particular tax year. This distribution scheme is commonly referred to as a "conduit" trust. Special attention should be given to the practical effects of providing a guaranteed stream of distributions to a descendant of a client. Depending on the client's age, health status, and other factors requiring additional asset protection and management (such as addiction or debt problems), a conduit trust may not be appropriate for such descendant. In such a case, the practitioner should review alternatives to balance the need for asset protection and/or preservation of the income and principal of the trust with the tax objectives inherent in this type of planning.

3) The practitioner should also refer to the notes on use for Form 1230, "Life Insurance Beneficiary Designation Sample Language," for a discussion of the practical effects and choices associated with naming a trust for a minor child as a beneficiary versus naming the child as beneficiary, and the option to use a per capita distribution scheme as opposed to a per stirpital division.