A. Spousal Rollovers: In General

1. The Rules. Both Qualified Plans and Traditional IRAs are subject to the distribution rules of IRC § 401(a)(9) and the regulations thereunder. IRC §§ 401(a)(9) and Prop Reg 1.408-8A.

2. One or More IRAs. A surviving spouse may establish one or more rollover Traditional IRAs into which he or she rolls over a deceased spouse's Qualified Plan or Traditional IRA benefits. IRC § 402(c)(8) and (9).

   a. A Traditional IRA is an IRA that is not a Roth IRA.

   b. A Qualified Plan is a stock bonus, pension or profit sharing plan qualified under section 401(a).

3. Over 70½? What if the surviving spouse is over age 70½? No problem. A spouse can establish a Traditional IRA after his/her own RBD and roll the deceased spouse's Qualified Plan or Traditional IRA benefit into it. Who are the spouse's beneficiaries and are they measuring lives?

   a. In one private letter ruling, a spouse named her beneficiaries before the spouse's first required distribution date. The beneficiaries were treated as Designated Beneficiaries since the spouse named them on a timely basis even though that date was subsequent to the spouse's RBD. The spouse established the IRA in 1991 after she reached age 70½. She was not required to take a MRD until Dec. 31, 1992 based on the Dec. 31, 1991 account balance. Ltr Rul 9311037 (Dec 22, 1992). See also Ltr Rul 9534027 (June 1, 1995).

      i. The beneficiaries were treated as Designated Beneficiaries since the spouse named them on a timely basis even though that date was subsequent to the spouse's RBD. The spouse established the IRA in 1991 after she reached age 70½.

b. In another private letter ruling, a 93 year old surviving spouse rolled over the IRA of his deceased spouse into several IRAs, each of which named six beneficiaries. His "required distribution date" (note, not "RBD") was the Dec 31st of the calendar year following the year of the rollover. Ltr Ruls 199931048 and 199931049 (May 12, 1999, published Aug 1999).

4. **Decedent's IRA.** A private letter ruling allowed a surviving spouse to rollover her beneficial interest in a Qualified Plan to an IRA created by the decedent. Note that the ruling did not require that the surviving spouse create the IRA. The IRS stated that the spouse's rolling over a distribution from the decedent's Qualified Plan to the decedent's IRA was not a spousal election to treat the IRA as a spousal IRA. Ltr Rul 9418034 (Feb 10, 1994).

5. **Not Executor of Spouse.** An executor of a surviving spouse may not exercise the spouse's right to treat an IRA as such spouse's own IRA. Ltr Rul 9237038 (June 16, 1992).

**BUT**

6. **Maybe the Executor of Decedent.** A surviving spouse who was the executor of her deceased husband's estate could create an IRA for her deceased husband and rollover a lump sum distribution received by her husband before his death where the distribution was rolled over within 60 days after the date the husband received distribution. Ltr Rul 8351119 (Sept. 23, 1983).

7. **Not Children or Other Beneficiaries.** There is no tax-free rollover for any amount received from an "inherited IRA" by a beneficiary who is not a surviving spouse. An IRA is treated as inherited if the individual for whose benefit the IRA is maintained acquired it because of the death of the IRA owner. IRC § 408(d)(3)(C).

**B. Eligible Rollovers Distributions**

1. **Amount Allowed.** There is no limit on the amount which can be rolled over to an IRA. There are limitations on the kinds of distributions which can be rolled over to an IRA.

2. **From Where?**

   a. **In General.** Amounts can be rolled over to a Traditional IRA from another Traditional IRA, a SEP-IRA, a SIMPLE IRA (subject to a two year wait), a Qualified Plan, an IRC §§ 403(a) plan or 403(b) plan. IRC §§ 401(a)(31), 402(c), 403(a)(4) and (5), 403(b)(8) and 10, and 408(d)(3). There currently is no authority for rolling over any distribution to a
Roth IRA other than a distribution from a Traditional IRA.

b. Withholding Tax on Rollovers from Qualified Plans. Rollovers from Qualified Plans must be made directly to a Traditional IRA or they are subject to a 20% withholding tax. The 20% withholding tax does not apply to distributions from IRAs. IRC § 3405(c)(1) and (2); IRC § 402(c)(1)(A). Distributions from Qualified Plans may not be rolled over directly to a Roth IRA. They must first be rolled over to a Traditional IRA and then to a Roth IRA.

i. The 20 percent withholding tax does not apply to distributions from IRAs. §3405 (c)(1) and (2); §402(c)(1)(A).

ii. Distributions from Qualified Plans may not be rolled over directly to a Roth IRA. They must first be rolled over to a Traditional IRA and then to a ROTH IRA.

3. Exceptions to Eligible Rollover Distributions. IRC § 402(c)(2). An eligible rollover distribution is any distribution from a Qualified Plan which is includable in income (i.e. does not include nondeductible contributions) or from an IRA EXCEPT:

a. MRDs under §401(a)(9)--§402(c)(4)(B). Any amount which is paid before Jan 1 of the year in which the employee attains (or would have attained) age 70½ is not treated as required under IRC § 401(a)(9) and, thus is an eligible rollover distribution. Reg § 1.402 (c)-2 Q&A 7. The surviving spouse is treated as if he or she is the employee if a distribution attributable to the employee is paid to the spouse after the employee’s death. IRC § 402(c)(9).

b. Periodic Payments. One of a series of substantially equal periodic payments made over a term certain of 10 years or more; or over life, life expectancy, or joint lives or joint life expectancies. See Temp Reg § 1.402(c)-2T, Q&A 5 for rules if the amount of payments change. IRC § 402(c)(4)(A).


d. Corrective Distributions. Corrective distributions of excess deferrals, contributions and income thereon.

e. Loans. Loans treated as distributions.

f. Dividends. Dividends paid on employer securities pursuant to IRC § 404(k).

g. PS 58 Costs. Cost of life insurance coverage (P.S. 58 Costs).

h. Hardship. Hardship distributions from a Qualified Plan.§§402(c)(4) and (9); IRC § 408 (d)(3)(E).
i. CAVEAT: A distribution of after-tax contributions from a Qualified Plan can not be rolled over to an IRA. IRC § 403(c)(2). A distribution of designated nondeductible contributions (i.e. after-tax contributions) from an IRA can be rolled over to an IRA. Q: Why do the rules have to be so illogical and confusing?

4. To Where? A surviving spouse may only rollover Qualified Plan or Traditional IRA benefits to a Traditional IRA or to an individual retirement annuity under Code § 408(b). A surviving spouse may not rollover the benefits to a Qualified Plan under Code § 401(a) or a Qualified Annuity under Code § 403(a).

5. Form Allowed: Two Different Rules.

   a. From a Qualified Plan. A distribution from a Qualified Plan in the form of money or other property may be rolled over tax free to a Traditional IRA as long as the transfer occurs within 60 days of receipt of the property. IRC § 402(c).
       i. If the distribution consists of property other than money, the amount transferred must consist of the property transferred.
       ii. However, if the property is sold before the rollover, the proceeds (including any increase in value) are treated the same as property received in the distribution and can be rolled over to a Traditional IRA. IRC § 402(c)(6).

   b. From an IRA. A distribution from a Traditional IRA in the form of money and other property may be rolled over tax free to a Traditional IRA as long as the transfer occurs within 60 days of receipt of the property and the entire amount received (including money and other property) is paid into the Traditional or Roth IRA. IRC § 408(d)(3).
       i. A Hard Lesson: An Example to Avoid. A self employed accountant withdrew $480,000 from his Keogh and IRA accounts and used it to purchase certain stock. Within 60 days of the withdrawal, he deposited the stock in an IRA. The Tax Court held that the taxpayer’s reinvestments of his Keogh and IRA distributions did not constitute rollover contributions and were taxable. Lemishow v. Commissioner, 110 TC No. 11 (Feb 18, 1998).
       ii. Moral: Although this example applies to an owner, it also applies to a spousal rollover because if a distribution attributable to an employee is paid to the employee’s surviving spouse, the spouse is treated as the employee for purposes of the rollover rules. IRC § 402(c)(9).
       iii. Consequently, if a spouse wants to change investments, the spouse should first arrange for a direct rollover of the cash or property from an IRA to a self-directed Traditional or Roth IRA. Then, the spouse should direct the trustee or custodian to make the appropriate investments.
C. Methods of Spousal Rollover from a Qualified Plan

1. Rollover the IRA Assets. The surviving spouse may withdraw the Qualified Plan assets and transfer them to a new or existing Traditional IRA titled in the name of the surviving spouse. The transfer must be completed within 60 days of the withdrawal from the Qualified Plan in order to be tax-free. Ltr Rul 9005071 (Nov 13, 1989).

CAVEAT: There will be a 20% withholding tax. See above.

2. Trustee-to-Trustee Transfer. The surviving spouse may direct the trustee or custodian of the Qualified Plan to transfer the decedent's Qualified Plan assets directly to the trustee or custodian of a new or existing Traditional IRA titled in the name of the surviving spouse.

D. Methods of Spousal Rollover from an IRA

1. In General. There are three methods to transfer Traditional IRA assets without income tax from a decedent to the decedent's surviving spouse. Prop Reg § 1.408-8, Q&A-4(b). These transfer methods are set forth below.

2. First Method: Elect to Treat as Own.
   a. Change the Owner's Name. The surviving spouse may elect to treat the Traditional IRA as the spouse's own account and change the name of the owner of the Traditional IRA on the records of the financial institution from the decedent to the surviving spouse.

   b. Rollover the IRA Assets. The surviving spouse may withdraw the Traditional IRA assets and transfer them to a new or existing Traditional IRA titled in the name of the surviving spouse. The transfer must be completed within 60 days of the withdrawal from the IRA in order to be tax-free.

      i. CAVEAT: Only one tax-free withdrawal is allowed from a Traditional IRA in a twelve month period. IRC § 408(d)(3)(B).

      ii. Planning is critical. A rollover contribution from a Traditional IRA to a Roth IRA is disregarded for purposes of this rule. IRC § 408A(e).

   c. Trustee-to-Trustee Transfer. The surviving spouse may direct the trustee or custodian of the Traditional IRA to transfer the decedent's Traditional IRA assets directly to the trustee or custodian of a new or existing Traditional IRA titled in the name of the surviving spouse. GOOD NEWS: There are no limitations to the number of tax-free trustee-to-trustee transfers allowed.

3. Second Method: Deemed Election because of Failure to Take.
a. The Rule. An election will be considered to have been made by the surviving spouse if the spouse is beneficiary and if the MRD has not been distributed "within the appropriate time period applicable to the decedent." Prop Reg § 1.408-8, Q&A-4(b).

b. A Letter Ruling. In Ltr Rul 9713005 (Jan 3, 1997), the surviving spouse was the beneficiary and was deemed to have elected to treat the decedent's IRA as her own because the full amount of the decedent's MRDs had not been distributed as of the Dec 31st of the year of the decedent's death.

   i. The decedent died after his RBD in 1995 having received two quarterly installments of his MRD. The final two quarterly payments were not made because the local probate court would not provide the appropriate tax release on a timely basis. The payments should have been made on or before December 31, 1995. They were paid in June 1996 to the surviving spouse as beneficiary. Prior to that time on January 20, 1996, the surviving spouse had rolled the assets from the Decedent's IRA into an IRA in the surviving spouse's own name.

   ii. The ruling also held that the surviving spouse was deemed to own the IRA as of December 31, 1995 and not as of January 20, 1996 when she actually rolled it over.

   iii. Furthermore, the surviving spouse's RBD for minimum distributions from her rollover IRA was December 31, 1996 and her child was the designated beneficiary of the rollover IRA because the child was named as the beneficiary before the surviving spouse's first required distribution date of December 31, 1996.

c. Questions for the IRS:

   ■ Q: In a "deemed election," the MRD which should have been distributed to the spouse as beneficiary remains in the IRA as well as any MRD which the decedent may have been required to take. Does this mean that a surviving spouse is deemed to have rolled over the MRD which the decedent should have taken in the year of death? If so, must the surviving spouse report and pay excise taxes because the MRD was not distributed and because of an ineligible rollover, that is, because an MRD was rolled over?

   ■ A: According to Marjorie Hoffman (Sr. Technician Reviewer for EB&EO, IRS), no excise tax will be due. See ALI-ABA Video Law Review, Estate Planning for Distributions from Qualified Plans & IRAs, May 18, 2000.

   ■ Q: Does this mean that the surviving spouse must withdraw any MRDs which were not made in the year of the decedent's death as beneficiary on or before
December 31st of such year in order to avoid being treated as the owner of the account? This is very important if the surviving spouse is under age 59½ and wants to take as a beneficiary.

■ **A:** Yes, according to Marjorie Hoffman. See ALI-ABA Video Law Review, Estate Planning for Distributions from Qualified Plans & IRAs, May 18, 2000.

■ **Q:** If the surviving spouse is deemed to own the IRA, is the spouse deemed to have accepted the benefits of the account and, therefore, precluded from disclaiming it after December 31st without gift tax consequences?

■ **A:** No, according to George Masnick (Chief Branch 4, Passthrough & Special Industries, IRS). See ALI-ABA Law Review, Estate Planning for Distributions from Qualified Plans & IRAs, May 18, 2000.

4. **Third Method: Deemed Election because of Addition.** The surviving spouse will be deemed to have elected to treat the Traditional IRA as his or her own if the surviving spouse makes a contribution to the account.

**E. Timing**

1. Does it matter when the surviving spouse rolls over a decedent’s Qualified Plan or Traditional IRA benefits to a spousal Traditional IRA?

2. **Beneficiary then Owner.** One letter ruling approved a surviving spouse taking as a beneficiary of an IRA in one year and as an owner in the next year.

   a. The decedent died in 1994 after his RBD. MRDs based on joint life expectancies not recalculated were made to the surviving spouse in 1994 and 1995.

   b. In 1995, the surviving spouse who had reached age 70½ transferred the decedent’s Traditional IRAs by a trustee-to-trustee transfer to her own Traditional IRA. In 1996, she began taking her first required distribution from her own Traditional IRA. See Ltr Rul 9534027 (June 1, 1995).

   **BUT**

3. Irrevocable Election Not to Rollover. Other letter rulings have ruled that a surviving spouse’s receipt of a distribution as a beneficiary on which she does not pay the 10% additional income tax imposed by IRC § 72(t)(1) is an irrevocable election NOT to treat the Traditional IRA as her own. See Ltr Rul 9418034 (Feb 10, 1994), and Ltr Rul 9608042 (Dec 1, 1995).
The Problem. Under those rulings, a surviving spouse who was not yet 59½ years old took a distribution from a decedent's IRA and did not pay the 10% penalty tax. The surviving spouse was treated as having made an irrevocable decision not to treat the IRA as her own. She was foreclosed from ever rolling over any part of the account.

b. A solution? The surviving spouse could arrange a trustee-to-trustee transfer to transfer the decedent's Traditional IRA to two Traditional IRAs in the decedent's name. A spouse who has not reached age 59½ could then take as a beneficiary from one Traditional IRA and avoid the 10% additional income tax and roll the other Traditional IRA over to his/her own spousal rollover Traditional IRA and postpone distributions until age 59½.

c. The Inconsistency. The surviving spouse is deemed the owner under Ltr Rul 9713005 (where the deceased husband died after his RBD and failed to take the entire MRD in the year of death) but is foreclosed from being an owner under Ltr Ruls 9418034 and 9608042 if the spouse withdraws any funds and fails to pay the 10% excise tax.

d. A Change! Marjorie Hoffman indicated that the "irrevocable election not to rollover" was no longer the IRS' ruling provision. See ALI-ABA Law Review, Estate Planning for Distributions from Qualified Plans & IRAs, May 18, 2000.

3. Irrevocable Election. The election to treat a contribution of an eligible rollover distribution to an IRA is irrevocable. Reg § 1.402(c)-2 Q&A 13. Is the opposite true? That is, the election to take as beneficiary is revocable?

- **Q**: Can a surviving spouse who is 75 years old take as a beneficiary over the remaining joint life expectancies of herself and her deceased husband and rollover the balance remaining at age 80 after first taking an MRD for the year of the rollover? If not, what is the authority for denying the rollover?

- **A**: Marjorie Hoffman indicated that there was no authority for the position that a surviving spouse could rollover a decedent's IRA at any time and obtain new measuring lives.

  i. Ms. Hoffman has not completely developed her thinking on the issue. In an informal discussion, she indicated that the spouse could rollover a decedent's IRA at anytime.

  ii. However, she indicated there would be no new measuring lives unless the rollover was made by December 31 of the year following the year of the participant's death.

c. When asked whether an IRA which was rolled over "late" should be titled in the spouse's name or in the decedent's name, Ms. Hoffman said she did not know.

  i. When we pointed out to her that the spouse would be taking as a beneficiary if there were no new measuring lives available, she indicated that the IRA could be in the
spouse's own name and maybe the spouse could use a single life expectancy.

ii. She said we could apply for a Private Letter Ruling if we wanted an answer.

d. The IRS ruling position as explained by Marjorie will come as a great surprise to IRA sponsors which accept spousal rollovers and make new measuring lives available at all times. See ALI-ABA Law Review, Estate Planning for Distributions from Qualified Plans & IRAs, May 18, 2000.

F. Planning Suggestions

1. *Create a New IRA*. A Surviving Spouse should *not* rollover amounts from a decedent's IRA to an existing spousal IRA if the spouse is over 70½ because the measuring life is already established as of the spouse's RBD and no new measuring lives are available. Instead, a surviving spouse should create a new spousal IRA with new beneficiary designations and, hence, new measuring lives. For example, if the existing IRA had named the now deceased spouse as beneficiary as of the surviving spouse's RBD, only the surviving spouse's life would be a measuring life if both life expectancies were being recalculated. A new spousal IRA must be created to have new measuring lives for the rollover amount.

2. *Roth IRA*. If the surviving spouse is the sole beneficiary of a Roth IRA, the spouse is treated as the owner unless the Roth IRA provides otherwise. This is the result if the Roth IRA sponsor uses the IRS provided forms without changing this provision. See paragraph 3, Article V of Forms 5305-R and 5305-RA. The results is an automatic rollover. This could create additional income tax if the spouse has not reached age 59½ and wishes to withdraw earnings. This client may want to shop around for a Roth IRA which allows the spouse to be a beneficiary and not the owner.

3. *Accelerated MRDs*. Consider also that if a spouse is older than the decedent, a rollover will cause MRDs to occur earlier that they need to occur, that is— at the spouse's (and not the decedent's) RBD.

1. A Traditional IRA is an IRA which is not a Roth IRA.

2. A Qualified Plan is a stock bonus, pension or profit sharing plan qualified under IRC § 401(a).


4. Remember: Private Letter Rulings have no precedential value. Only the taxpayer who requested the Private Letter Ruling can rely upon it.