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# Tax Practice and Accounting News



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## Surviving Spouse's IRA Rollover Fails; Relief Granted Posthumously

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In LTR 200516022, *Doc 2005-8472* [[PDF](#)], *2005 TNT 78-16* , the IRS granted relief from the requirement that an individual retirement annuity must be rolled over within 60 days of distribution. Relief was granted under the authority of section 408(d)(3)(I)<sup>1</sup> and Rev. Proc. 2003-16, 2003-4 IRB 359, *Doc 2003-881* [[PDF](#)], *2003 TNT 6-8* . This letter ruling is notable for its unusual facts, which include a surviving spouse who died before completion of a spousal rollover, a durable power of attorney exercised in an attempt to effect a rollover, and a Form 1099R that was issued untimely.

The ruling notes that the IRS would have granted a waiver to the surviving spouse during that spouse's lifetime, then goes on to grant the waiver on the basis that the rollover was not completed specifically because of the death of the surviving spouse.

### The Decedent and His IRA

The IRA at issue was an individual retirement annuity of an individual who predeceased his spouse. The IRA was purchased shortly before his death in 2003. The spouse was the named beneficiary of the entire IRA. The taxpayer died after the date prescribed for beginning required minimum distributions, having been born in 1928.

The IRA owner was survived by his spouse and two daughters, referred to in the ruling as "Individual C" and "Individual D." For purposes of this article, we will call them Chris and Denise. The IRA account was maintained by "Company G."

### The Surviving Spouse and the Rollover Attempt

Because the decedent's surviving spouse was named beneficiary of the decedent's entire IRA, she could have rolled it over to an IRA held in her name. Such a rollover is an exception to the general rule that an inherited IRA may not be rolled over.<sup>2</sup>

The surviving spouse suffered from Alzheimer's disease, a form of dementia involving loss of memory, beginning in 2001. While the surviving spouse was still living, a rollover to an IRA in her name was attempted on her behalf, under a durable power of attorney (POA) executed in 1995. The named attorney-in-fact had been her husband, to be followed by their two daughters. Because the surviving spouse had been widowed, the two daughters became coattorneys-in-fact. The ruling noted a specific provision of the POA that appears to have authorized the attempted rollover.

A new account was opened with "Company H" and the IRA was transferred to it. Chris alone was named beneficiary of the new account. Unfortunately, the new account was not an IRA.

### **How the Attempted IRA Rollover Failed**

Chris met with her financial adviser. Acting within her authority under the POA, a new account was opened and the IRA was transferred to it. The financial adviser filled out the application for the new account. Although Chris made it clear that the new account was intended to be an IRA and the financial adviser acknowledged he understood that,<sup>3</sup> the application was inconsistent with that intention. After consulting with Denise, the application was signed by Chris, as attorney-in-fact, and the financial adviser, as her agent. The surviving spouse did not sign the account application.

The ruling noted two errors on the application. First, a section on the application entitled "Owner" should have been left blank, but it was filled in. Second, in a different section entitled "Plan," a number of options appeared, including "IRA." Instead of selecting "IRA," a different option, "Other-Annuity," was selected.

The surviving spouse then died. Her death occurred after the 60-day period for making an IRA rollover had expired. Also, the surviving spouse died after the date that would have been her required beginning date for purposes of required minimum distributions.

### **Postmortem Communications**

After the surviving spouse died, Chris became the administrator of her estate. Chris contacted an employee of Company H, asking what distribution options were available for the IRA. Two actions followed on the part of Company H. First, Company H determined that the [P. 426] account was never an IRA because of how the application was filled out and sent a letter to Chris to that effect. Second,

Company H determined that it had failed to timely issue a Form 1099R reporting distribution of the decedent's IRA, then promptly did so. The Form 1099R was issued "several months" after the expiration of the 60-day rollover period had expired.

**Comment:** It is unclear why it was the responsibility of Company H to issue a Form 1099R. The facts of the ruling indicate that the IRA of the predeceased husband was an account of Company G.

### **Authority for Granting Relief**

The authority to grant relief from the 60-day rollover requirement is found in section 408(d)(3)(l). The 60-day requirement may be waived "where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster, or other events beyond the reasonable control of the individual subject to such requirement." That provision expires on December 31, 2010, along with the rest of the Economic Growth and Tax Relief Reconciliation Act of 2001 (EGTRRA).<sup>4</sup>

Rev. Proc. 2003-16 provides:

The Service will issue a ruling waiving the 60-day rollover requirement in cases where the failure to waive such requirement would be against equity or good conscience, including casualty, disaster or other events beyond the reasonable control of the taxpayer. In determining whether to grant a waiver, the Service will consider all relevant facts and circumstances, including: (1) errors committed by a financial institution, other than as described in Section 3.03 [of Rev. Proc. 2003-13]; (2) inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error; (3) the use of the amount distributed (for example, in the case of payment by check, whether the check was cashed); and (4) the time elapsed since the distribution occurred.

The committee reports accompanying the legislation enacting section 408(d)(3)(l) state, in part:

The Conference Report to EGTRRA provides examples of situations that may justify waiver of the 60-day rollover requirement, such as during a period in which a distribution in the form of a check was not cashed, or for errors committed by a financial institution, or in cases of inability to complete a rollover due to death, disability, hospitalization, incarceration, restrictions imposed by a foreign country or postal error. (H.R. Rep. No. 84, 107th Cong., 1st Sess. 252 (2001).)

The above statement is acknowledged in Rev. Proc. 2003-16.

## **Findings and Holdings**

Dealing first with what happened during the lifetime of the surviving spouse, the IRS found that the failure to make a rollover came to the attention of Chris only after it was too late to take corrective action. A rollover was intended. Form 1099R, if it had been supplied in a timely manner, would have put Chris on notice in time to take corrective action, but the form was untimely.

The ruling goes on to state that relief from the 60-day rollover requirement would have been waived while the surviving spouse was still living.

The surviving spouse died before corrective action was taken. Because death prevented the surviving spouse from completing the intended rollover, through her attorneys in fact, the IRS granted relief from the 60-day rollover requirement.

Finally, the ruling dealt with required minimum distributions. It was not possible to name a designated beneficiary for the new IRA because it did not, in fact, exist at the time the surviving spouse died. Based on that, the IRS found that there was no designated beneficiary for purposes of required minimum distributions. The ruling concluded that required minimum distributions had to be taken over a single life term, based on the age the surviving spouse attained or would have attained in the year of her death.<sup>5</sup>

**Comment:** The term for making required distributions is found in reg. section 1.401(a)(9)-9, Q&A 1. The ruling makes no mention of whether the terms of the IRA itself fill the void when the IRA owner fails to designate a beneficiary. In many cases, the life expectancy of the default beneficiary may be used for purposes of required minimum distributions.

## **Conclusion**

LTR 200516022 shows that it is possible to complete an IRA rollover after the death of the surviving spouse when a rollover was initiated during the lifetime of the surviving spouse, but was not completed because of death. It also demonstrates yet again the value of competent advice about IRAs and careful attention to detail in making rollovers or transfers.

## **FOOTNOTES**

<sup>1</sup> All section references are to the Internal Revenue Code of 1986, as amended, and related regulations, unless otherwise indicated.

<sup>2</sup> Section 408(d)(3)(C).

<sup>3</sup> The financial adviser provided an affidavit to the IRS to that effect.

<sup>4</sup> Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. 107-16.

<sup>5</sup> Reg. section 1.401(a)(9)-5, Q&A 5(a).

**END OF FOOTNOTES**

**Relevant Code Sections**

Section 408 -- IRAs