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# Trusted Individual Retirement Accounts - Risk Management & Client Benefits in the Wake of Clark v. Rameker

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**TRUSTEED INDIVIDUAL RETIREMENT ACCOUNTS –  
RISK MANAGEMENT & CLIENT BENEFITS IN THE WAKE OF CLARK V. RAMEKER**

By

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I. Introduction

The June 2014 Supreme Court decision in *Clark v. Rameker* unanimously held that inherited Individual Retirement Accounts are not protected from creditors under the federal bankruptcy statutes.<sup>1</sup> Consequently, alternative arrangements for the dispositions of Individual Retirement Accounts are increasingly attractive for clients that wish to shelter their assets from their beneficiaries' creditors. This paper discusses the legal, financial, management, and communications challenges imposed by the *Clark*<sup>2</sup> case and advises attorneys and financial advisors: to communicate same to their clients;<sup>3</sup> to be cognizant of highly viable alternatives such as Trusteed Individual Retirement Accounts as a part of a well-managed financial plan;<sup>4</sup> to be prepared to discuss the positive impacts Trusteed Individual Retirement Accounts may have on intra-family and advisor/client relationships;<sup>5</sup> and to be aware of the managerial and financial implications such Trusteed Individual Retirement Accounts may have on the advisor's practice.<sup>6</sup>

II. The Decision - Clark v. Rameker

*Clark v. Rameker* was argued March 24, 2014 and decided June 12, 2014.<sup>7</sup> The unequivocal unanimous decision has direct impacts on investors and their legal and financial advisors. Our

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<sup>1</sup> 134 S.Ct. 2242 (2014).

<sup>2</sup> *Id.*

<sup>3</sup> See *infra* notes 48-57 and accompanying text.

<sup>4</sup> See *infra* notes 58-64 and accompanying text.

<sup>5</sup> See *infra* notes 65-78 and accompanying text.

<sup>6</sup> See *infra* notes 79-80 and accompanying text.

<sup>7</sup> *Clark*, 134 S.Ct. at 2244.

discussion of the *Clark* case focuses on: the underlying bankruptcy statutes; the factual background of the case; the federal circuit splits leading to the Supreme Court decision; and the Supreme Court decision itself.

#### A. *Bankruptcy Statutes*

A fundamental principle of the bankruptcy code is that with limited exceptions all of a debtor's property becomes part of the bankruptcy estate subject to distribution by the bankruptcy trustee to the bankrupt's creditors.<sup>8</sup> However, among those exemptions is 11 U.S.C. § 522(b)(3)(C), which exempts certain retirement funds from the bankruptcy estate.<sup>9</sup> This can be tremendously valuable to the bankrupt client/investor because their retirement funds in an IRA, Roth IRA, 401(k), 457 plan, 403(b) or a myriad of other common tax advantaged retirement accounts are protected for the future.<sup>10</sup>

#### B. *Factual Background*

The facts are straightforward. In the *Clark* case the Plaintiff, Heidi Heffron-Clark (hereinafter "Clark") was the beneficiary of a traditional IRA established by her mother in 2000.<sup>11</sup> The mother died in 2001, and the roughly \$450,000 IRA was transferred to Clark as an inherited IRA.<sup>12</sup>

The Supreme Court discussed the attributes of an inherited IRA. "An inherited IRA is a traditional or Roth IRA that has been inherited after its owner's death."<sup>13</sup>

Inherited IRAs do not operate like ordinary IRAs. Unlike with a traditional or Roth IRA, an individual may withdraw funds from an inherited IRA at any time, without paying a tax penalty. . . . Indeed, the owner of an inherited IRA not only may but must withdraw its funds: The owner must either withdraw the entire balance in the account within five years of the original owner's death or take minimum distributions on an annual basis. . . . And unlike with a traditional or Roth IRA, the owner of an inherited IRA may never make contributions to the account.<sup>14</sup>

In 2010 Clark and her spouse (also a party to the case) filed for Chapter 7 bankruptcy and classified the now-valued \$300,000 inherited IRA as exempt under 11 U.S.C. § 522(b)(3)(C).<sup>15</sup> The respondents objected that Clark's inherited IRA assets were not retirement funds covered by the

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<sup>8</sup> 11 U.S.C.A. § 541(a)(1) (2014); *see also* Rousey v. Jacoway, 544 U.S. 320, 325 (2005).

<sup>9</sup> U.S.C. § 522(b)(3)(C) (2014); provides that ("retirement funds to the extent that those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a) of the Internal Revenue Code of 1986."); *see also Clark*, 134 S.Ct. at 2244.

<sup>10</sup> *See* the discussion of retirement accounts at *Clark*, 134 S.Ct. at 2244-45; *see generally* Rousey v. Jacoway, 544 U.S. 320 (2005); *In re Brucher*, 243 F.3d 242 (6th Cir. 2001); *In re Trawick*, 497 B.R. 572 (C.D. Cal. 2013).

<sup>11</sup> *Clark*, 134 S.Ct. at 2245.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* (Citations Omitted).

<sup>15</sup> *Clark*, 134 S.Ct. at 2245

exemption.<sup>16</sup> The classification of that inherited IRA as exempt or un-exempt property under the bankruptcy code is the crux of the Supreme Court case.<sup>17</sup>

### C. Circuit Splits

The Supreme Court granted *certiorari* to resolve a circuit split between *Clark* and *In re Chilton*.<sup>18</sup> In *Chilton* the Fifth Circuit determined that inherited IRA funds constituted retirement funds under 11 U.S.C. § 522(b)(3)(C) and are thus exempt from attachment by the creditors of the bankrupt's estate.<sup>19</sup> The court explained that:

[t]he plain meaning of the statutory language refers to money that was “set apart” for retirement. Thus, the defining characteristic of “retirement funds” is the purpose they are “set apart” for, not what happens after they are “set apart.” Here, there is no question that the funds contained in the debtors’ inherited IRA were “set apart” for retirement at the time [the original owner] deposited them into an IRA.<sup>20</sup>

The court further held that inherited IRAs are contained in an “account” that is “exempt from taxation” as that phrase is used in the bankruptcy statutes.<sup>21</sup>

*Chilton* came to the opposite conclusion from the Seventh Circuit decision in *Clark*.<sup>22</sup> In *Clark* the Circuit Court noted that “[i]nherited IRAs represent an opportunity for current consumption, not a fund of retirement savings.”<sup>23</sup> It further explained that at the time of the bankruptcy, “[t]he money in the inherited IRA did not represent *anyone’s* retirement funds. They had been [the deceased mother’s], but when she died they became no one’s retirement funds.”<sup>24</sup> The court determined that an inherited IRA only “[r]emains a tax-deferral vehicle until the mandatory distribution is completed, but distribution precedes the owner’s retirement.”<sup>25</sup>

Thus, prior to the Supreme Court decision in June 2014 it was possible that one bankruptcy court could hold that inherited IRA’s were retirement funds exempt from the bankruptcy process, and another, in another circuit, could hold the opposite. Because inherited IRA assets can be substantial the impact on a client contemplating bankruptcy could be very consequential. The situation was ripe for resolution by the Supreme Court.<sup>26</sup> It did so clearly, without dissent or concurrences, and clarified the law nicely for attorney and financial advisors.

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<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 2244.

<sup>18</sup> 674 F.3d 486 (2012).

<sup>19</sup> *Id.* at 489.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 490.

<sup>22</sup> *In re Clark*, 714 F.3d 559 (2013), *aff’d*, *Clark*, 134 S.Ct. at 2250.

<sup>23</sup> *Id.* at 561.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> See generally Justin F. Polach, *Are Inherited IRAs Exempt From Creditors In Bankruptcy?*, 99 ILL. B.J. 628, 629 (2011) (discussing the state of case law until 2011. “Until recently, courts seemed assured that an inherited IRA, unlike the original IRA, is not an exempt asset from the debtor’s bankruptcy estate. They so held in Oklahoma, California, Alabama, Wisconsin, Texas, and even Illinois. But most recent decisions have gone the other way, finding inherited IRAs exempt from creditors under the bankruptcy code.”) (internal citations omitted).

*D. The Supreme Court Decision*

In its resolution of the circuit split the Supreme Court focused closely on whether or not “[a]s an objective matter [an inherited IRA is an account] set aside for the day when an individual stops working.”<sup>27</sup> If that was the case, then the Court would find that the funds were “retirement funds” under 11 U.S.C. § 522(b)(3)(C) and therefore exempt under the bankruptcy code.<sup>28</sup> In its analysis the court focused on three legal characteristics of inherited IRAs that distinguish them from other “retirement funds.”<sup>29</sup>

First, the owner of an inherited IRA cannot add funds to the account.<sup>30</sup> This distinguishes inherited IRAs from traditional and Roth IRAs.<sup>31</sup> In the Court’s view “[t]he entire purpose of traditional and Roth IRAs is to provide tax incentives for accountholders to contribute regularly and over time to their retirement savings.”<sup>32</sup> Those incentives are lacking by definition if the owner is barred from making contributions to his or her retirement within that account.

Second, there are specific withdrawal requirements imposed on the owner of an inherited IRA that are not tied to their retirement plans.<sup>33</sup> The court noted that “[t]he beneficiary of an inherited IRA must either withdraw all of the funds in the IRA within five years after the year of the owner’s death or take minimum annual distributions every year.”<sup>34</sup> Therefore the inherited IRA commonly is depleted over time “[r]egardless of their holders’ proximity to retirement, . . . hardly a feature one would expect of an account set aside for retirement.”<sup>35</sup>

Third, the Supreme Court noted that inherited IRAs are treated far differently from traditional or Roth IRAs.<sup>36</sup> In general, a withdrawal from those accounts prior to age 59 ½ is subject to a 10% tax penalty.<sup>37</sup> This encourages the account holder to leave those funds alone until they reach that age—presumably about the time they would be considering retirement.<sup>38</sup> In contrast, no such restraint is imposed on the holder of an inherited IRA.<sup>39</sup> Those inherited IRA funds can be utilized today, for current needs, without the 10% penalty.<sup>40</sup> That, according to the Court, is not an attribute of retirement funds.<sup>41</sup>

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<sup>27</sup> *Clark*, 134 S.Ct. at 2246.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* at 2247.

<sup>30</sup> *Id.*; *see also* 26 U.S.C. § 219(d)(4).

<sup>31</sup> *Clark*, 134 S.Ct. at 2247.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.* (citing § 408(a)(6); § 401(a)(9)(B); 26 CFR § 1.408-8 (Q-1 and A-1(a) incorporating § 1.401(a)(9)-3 (Q-1 and A-1(a))).

<sup>35</sup> *Clark*, 134 S.Ct. at 2247.

<sup>36</sup> *Id.*

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Id.*

The Court noted that because of these three legal characteristics, inherited IRAs are fundamentally distinct from traditional and Roth IRAs.<sup>42</sup> Those accounts (traditional and Roth IRAs) mirror the Bankruptcy Code's interest in shielding assets for the bankrupt's essential needs during retirement.<sup>43</sup> However, the inherited IRA does the opposite. Its legal characteristics do nothing to prevent the new owner "[f]rom using the entire balance of the account on a vacation home or sports car immediately after her bankruptcy proceedings are complete."<sup>44</sup>

The *possibility* that an owner would use an inherited IRA for retirement purposes was not persuasive to the Court.<sup>45</sup> "Were it any other way, money in an ordinary checking account (or, for that matter, an envelope of \$20 bills) would also amount to "retirement funds" because it is possible for an owner to use those funds for retirement."<sup>46</sup>

Therefore, based on this reasoning, and as noted *infra*, the Supreme Court in *Clark* unanimously held that inherited Individual Retirement Accounts are not protected from creditors under the exemptions provided in the federal bankruptcy statutes.<sup>47</sup>

#### E. *Clark's Implications for the Client*

In the wake of *Clark* attorneys and financial planners are faced with challenges that directly impact their clients' plans. It is the responsibility of both groups of advisors to coordinate.<sup>48</sup>

"An IRA is a "generic" retirement vehicle that can be opened by an individual and contain almost any type of investment. Individuals have great power over an IRA, including the right to liquidate, pledge, or gift the funds."<sup>49</sup> Commonly traditional IRAs and Roth IRAs have named individual beneficiaries. Who those beneficiaries are directly informs *Clark's* ramifications for the client.

If the beneficiary is a surviving spouse, he or she may elect to treat his or her interest in the deceased's IRA as the spouse's own IRA.<sup>50</sup> "The spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA."<sup>51</sup> This is directly relevant as "[t]he result of an election . . . is that the surviving spouse shall then be considered the IRA owner

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<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* at 2248.

<sup>45</sup> *Id.* at 2250.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*

<sup>48</sup> See generally Andrew Huber & Lester Law, *Asset Location: Why Attorneys Should Bridge the Perceived Investment Gap*, 84 Fla. B.J. 46, 48 (2010) (discussing the need for coordination between attorneys and financial planners with regard to tax liability. The principle extends to the need for the two groups to communicate with regard to other potential creditors aside from the government. "The solution to proper asset location begins with robust communication between the client's legal and financial advisors. Specifically, you, as the attorney, can provide guidance on the tax characteristics and implications of the various entities you design for your clients. Additionally, the attorney should become as well-versed as possible in asset allocation methodologies (*e.g.*, pretax and after-tax) that are utilized by particular investment advisors. In short, the attorney is an integral part of the investment planning process.")

<sup>49</sup> In Re: Estate of Sandra L. Neiderhiser, Deceased, 2003 WL 23874020 at \*6 (2003).

<sup>50</sup> 26 C.F.R. § 1.408-8, Treas. Reg. § 1.408-8 (A-5.(a)).

<sup>51</sup> *Id.*

for whose benefit the trust is maintained for all purposes under the Internal Revenue Code.”<sup>52</sup> Because the spouse’s IRA by definition is *not* an inherited IRA, the *Clark* decision is inoperative. Therefore, the funds within that IRA are subject to the exemptions in 11 U.S.C. § 522(b)(3)(C), which exempts certain “retirement funds” from the bankruptcy estate.<sup>53</sup> The surviving spouse may also elect to treat the deceased spouse’s assets as his or her own by initiating a rollover “[i]nto a traditional IRA, or to the extent it is taxable, into a: a. Qualified employer plan; b. Qualified employee annuity plan (section 403(a) plan); c. Tax-sheltered annuity plan (section 403(b) plan); [or] d. Deferred compensation plan of a state or local government (section 457(b) plan).”<sup>54</sup> These rollovers have the same impact<sup>55</sup> and make the assets exempt “retirement funds.”<sup>56</sup> The client should be advised accordingly.

If, however, the beneficiaries include any individual aside from the spouse, then *Clark*’s holding applies. If at any time after the client’s death his or her beneficiaries enter the bankruptcy system, then their inherited IRA, which would have been sheltered if passed wholly to a surviving spouse, is a part of the bankruptcy estate and subject to distribution to creditors.<sup>57</sup> Again, the client should be advised accordingly.

This may not be an overriding issue for many, or most, clients. However, for those clients with spendthrift or unreliable beneficiaries, or clients who merely wish to insure against the unknown, the *Clark* case could be telling as they make their disposition elections for their IRAs. This is so because *Clark* has removed some of the spendthrift advantages from inherited IRAs that are available within other “retirement funds” under the bankruptcy statutes. Due diligence requires the advisor to communicate same to the client.

### III. Legal Structure of Trusteed Individual Retirement Accounts

One relatively simple method to avoid this negative treatment of an inherited IRA in bankruptcy is to avoid creating an IRA that has the three legal characteristics of inherited IRAs as discussed in *Clark*.<sup>58</sup> Trusteed Individual Retirement Accounts (hereinafter “TIRAs”) are ideal for this purpose.

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<sup>52</sup> *Id.* at (A-5.(c)).

<sup>53</sup> *See generally supra* notes 27-47 and accompanying text.

<sup>54</sup> Internal Revenue Service, *Retirement Topics-Beneficiary*, <http://www.irs.gov/Retirement-Plans/Plan-Participant,-Employee/Retirement-Topics-Beneficiary> (last visited January 5, 2015).

<sup>55</sup> *See* 26 C.F.R. § 1.408-8, Treas. Reg. § 1.408-8 (A-7).

<sup>56</sup> *See generally supra* notes 27-47 and accompanying text.

<sup>57</sup> *Id.*

<sup>58</sup> *See Clark*, 134 S.Ct. at 2247.

TIRAs are established under 26 U.S.C.A. § 408(a).<sup>59</sup> “Ideally, the account owner is able to build in spendthrift protections to protect IRA assets from beneficiary creditors.”<sup>60</sup> The account owner can provide, within the account agreement itself, many if not all of the terms for dispositions to later beneficiaries. “To provide maximum protection from creditors, a third-party trustee should be appointed and given broad discretion to distribute or accumulate income and principal.”<sup>61</sup> TIRAs avoid the requirement, costs and administrative burden of separate trusts that would otherwise receive the IRA funds.

Because the original account owner (and later the trustee) can control the disposition, they can short circuit the *Clark* analysis. For instance, *Clark* focused in its analysis on the possibility that a beneficiary may use an inherited IRA for current consumption.<sup>62</sup> By prohibiting unauthorized withdrawals except as required to avoid minimum distributions requirements, a competent planner can use a TIRA to protect assets from the beneficiary’s creditors. “For instance, trustees under these IRAs are often required to distribute a set minimum to a beneficiary, thus sacrificing creditor protection up to these amounts.”<sup>63</sup>

#### IV. Trusteed Individual Retirement Accounts, Intra-Family & Advisor/Client Relationships

The TIRA offers the client the ultimate control over the disposition of his or her assets and can provide peace of mind that the client’s beneficiary’s financial needs will be met in a tax-efficient manner. Through the TIRA instrument, clients can control the amount of money distributed to the beneficiaries, to whom the money is distributed, or extend the TIRA’s benefits across multiple generations. Moreover, the TIRA can ensure that the client’s wishes are carried out even in the event of the client’s or a beneficiary’s incapacity, as well as protect a beneficiary’s inherited assets from attachment by a former spouse in divorce or creditors in a lawsuit. In addition, the trustee is responsible for tax filings, administrative paperwork and the like, thus removing that burden from the client and the beneficiaries. These assurances can offer the client peace of mind while also mitigating the inevitable family disputes that arise around inheritance.

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<sup>59</sup> 26 U.S.C.A. § 408(a) provides that : “(a) Individual retirement account.--For purposes of this section, the term “individual retirement account” means a trust created or organized in the United States for the exclusive benefit of an individual or his beneficiaries, but only if the written governing instrument creating the trust meets the following requirements: (1) Except in the case of a rollover contribution described in subsection (d)(3) in1 section 402(c), 403(a)(4), 403(b)(8), or 457(e)(16), no contribution will be accepted unless it is in cash, and contributions will not be accepted for the taxable year on behalf of any individual in excess of the amount in effect for such taxable year under section 219(b)(1)(A). (2) The trustee is a bank (as defined in subsection (n)) or such other person who demonstrates to the satisfaction of the Secretary that the manner in which such other person will administer the trust will be consistent with the requirements of this section. (3) No part of the trust funds will be invested in life insurance contracts. (4) The interest of an individual in the balance in his account is nonforfeitable. (5) The assets of the trust will not be commingled with other property except in a common trust fund or common investment fund.” (6) Under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.”

<sup>60</sup> Polach, *supra* note 26, at 629.

<sup>61</sup> *Id.* (internal citations omitted).

<sup>62</sup> See *Clark*, 134 S.Ct. at 2247.

<sup>63</sup> Polach, *supra* note 26, at 629.



TIRAs can protect beneficiaries from significant tax liability by limiting beneficiary's withdrawals to only required minimum distributions, or otherwise controlling the withdrawal amount.<sup>64</sup> By managing beneficiary's distributions, the trustee can ensure that the TIRA assets remain tax deferred for as long as possible.<sup>65</sup> It also gives the client – through the trustee – the power to control the disposition of assets long after death, and potentially to stretch the value of the TIRA over multiple generations.<sup>66</sup> To provide further reassurance to the client, the trustee can be granted discretion to make supplementary payments to the beneficiary for health, welfare or education expenses, or upon the beneficiary's attainment of a certain age.<sup>67</sup> All of these tools permit the trustee to make discretionary financial decisions that a beneficiary may not be able to make due to lack of financial discipline or sophistication. Furthermore, when these decisions are made by an institutional trustee-with an arm's length relationship to the beneficiary-the potential for family quarrels is reduced, potentially preserving interpersonal relationships among family members.

In addition to providing long-term control over asset distribution, TIRAs can also help to protect a beneficiary's assets in the event of divorce.<sup>68</sup> A well-written TIRA can specify successor beneficiaries. This is a significant difference from a traditional inherited IRA where, once inherited, the new owner controls beneficiary designation.<sup>69</sup> The opportunity afforded by the TIRA to select specific beneficiaries provides the client with assurance that the client's investments will continue to benefit the family lineage even after life's foibles-death, incapacity, divorce or bankruptcy-inevitably occur.<sup>70</sup> This long-term planning tool can reduce the uncertainty and angst that often accompany family transitions. TIRAs can also contain an incapacity provision.<sup>71</sup> As a client's age and the risk of incapacity increases, this provision can give the client confidence that if they are no longer able to make financial decisions a professional trust committee can act on the client's behalf.<sup>72</sup>

The benefits of the TIRA extend to the client's cost. While a trust instrument can be complex and therefore expensive to establish, a TIRA is generally considerably cheaper and may even reduce attorney liability.<sup>73</sup> Using the pre-prepared, pre-vetted "boilerplate" trust language provided by the trustee firm reduces costs and avoids drafting errors.

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<sup>64</sup> Julie Jason, *Voices: Julie Jason, on the Benefits of Trusteed IRAs*, WALL ST. J. (July 18, 2013), available at <http://online.wsj.com/news/articles/SB10001424127887324448104578613991409053454>.

<sup>65</sup> *Id.*

<sup>66</sup> See generally Kelly Greene, *Trusteed IRAs Can Help Heirs Manage Their Inheritance*, WALL. ST. J. (December 15, 2013), available at <http://online.wsj.com/news/articles/SB10001424052702303281504579220501897614552>.

<sup>67</sup> American Institute of CPAs, *What You Should Know About Trusteed IRAs*, <http://www.360financialliteracy.org/Topics/Investor-Education/Beneficiary-Designations/What-you-should-know-about-trusteed-IRAs> (last visited January 5, 2015).

<sup>68</sup> Julie Jason, *More Investors Should Consider Trusteed IRAs*, WALL ST. J. (updated February 9, 2014), available at <http://online.wsj.com/news/articles/SB10001424127887323968704578649770300341976> (last visited January 5, 2015).

<sup>69</sup> John Bock, *Estate Planning: The Trusteed IRA*, (July 26, 2010) <http://www.thinkadvisor.com/2010/07/26/estate-planning-the-trusteed-ira> (last visited January 5, 2015).

<sup>70</sup> *Id.*

<sup>71</sup> Jason, *supra* note 68.

<sup>72</sup> *Id.*

<sup>73</sup> Greene, *supra* note 66; Bock, *supra* note 69.

The downside, however, to this lesser-used planning tool is that “there are not many firms willing to act as trustee, which makes the portability of these accounts a short-term concern...”<sup>74</sup> An additional risk is that trust tax rates in some circumstances may be higher than individual income tax rates—which means the beneficiary’s tax liability could in certain circumstances be greater.<sup>75</sup> Further, experts warn that “[t]he IRS could decide that [an ineptly drawn custom trust] doesn’t qualify as a ‘see-through’ or ‘conduit’ trust, meaning [the client’s] heirs wouldn’t qualify to take stretched-out withdrawals—even though [the client] may have set up the trust in the first place to make sure they did just that.”<sup>76</sup> To guard against this risk, experts suggest naming people as beneficiaries instead of an institution or charity and instructing the preparer to set up a “conduit” or “see-through” trust.<sup>77</sup> Again, professionally pre-prepared, pre-vetted “boilerplate” trust language provided by the trustee firm sidesteps these problems.

Generally, these potential pitfalls can be successfully addressed by a qualified financial planner or attorney, rendering the TIRA not only a useful vehicle by which to direct inheritance, but also a positive tool to manage the difficult family issues that surround inheritance.

#### V. Trusteed Individual Retirement Accounts & Advisors’ Business Models

While TIRAs offer a number of unique, cognizable client benefits, there are potential drawbacks to the legal and financial professional. First, many financial practitioners do not offer TIRAs. This situation places the financial advisor in the undesirable position of referring the client to another advisor and losing the opportunity to manage the asset.<sup>78</sup> As a result, some advisors may be reluctant to discuss this option with their clients and therefore risk losing the client’s on-going business.<sup>79</sup> Legal professionals also stand to lose revenue if they move clients to a TIRA, as they will not have the opportunity to draft the more complex (and therefore more lucrative) trust instrument<sup>80</sup> or to help administer the same upon the client’s passing.

#### VI. Conclusion

The June 2014 Supreme Court decision in *Clark*<sup>81</sup> that strips creditor protection from inherited IRAs has implications for advisors and clients that plan for the ultimate disposition of an IRA. A financial planner or attorney is obligated to discuss alternative arrangements for clients to shelter their assets from their beneficiaries’ creditors in light of *Clark*. Despite the potential loss of revenue to the financial planner or attorney, those alternatives should include Trusteed Individual Retirement Accounts because of their ease of drafting, their relatively low cost, the increased and

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<sup>74</sup> Bock, *supra* note 69.

<sup>75</sup> Greene, *supra* note 66.

<sup>76</sup> *Id.*

<sup>77</sup> *Id.* (citing Natalie Choate, an estate planning attorney, who states that “Trusts that fail to qualify typically include those with beneficiaries who aren’t people, such as the estate, a charity or another trust. Since those entities don’t have life expectancies, stretched-out withdrawals would not be allowed for any of the other beneficiaries involved.”)

<sup>78</sup> Jason, *supra* note 68.

<sup>79</sup> *Id.*

<sup>80</sup> Charles Sharpe, Christopher Holtby & Nicole Cassidy, *The Trusteed IRA: One Tested Method to Maintain Assets Under Management Through Generations*, <http://www.riabiz.com/a/4782114834743296/the-trusteed-ira-one-tested-method-to-maintain-assets-under-management-through-the-generations> (last visited January 5, 2015).

<sup>81</sup> See *supra* notes 27-47 and accompanying text.

extended control afforded to the client, the creditor protections extended to the beneficiaries, the simplification of the paperwork burden, and the potential to reduce inter-family disputes.