

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

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PLR-143524-04

Date: MARCH 24, 2005

In Re:

### Legend:

Decedent =

Spouse =

Child 1 =

Child 2 =

Child 3 =

Child 4 =

Year 1 =

Date 1 =

Date 2 =

Date 3

Date 4 =

Date 5 =

Date 6 =

County =

State =

Trust B =

Court =

x% =

y% =

z% =

Dear \_\_\_\_\_,

This is in response to your submission dated August 9, 2004, concerning the generation-skipping transfer (GST) tax consequences of proposed transfers from Remaining Trust.

According to the facts submitted, Decedent died on Date 2, leaving a will (Will) dated, Date 1. The Will was not thereafter amended. Date 2 is prior to January 1, 1987. Date 1 is prior to October 21, 1986. The Will was submitted for probate in Court, in State, the month of Decedent's death. An Order for Final Distribution in the probate proceeding was entered by Court on Date 3.

Under the terms of the Will, after certain specific bequests to Decedent's surviving spouse (Spouse) and the devise of certain property to be held in Trust A (a Marital Trust), the remainder of Decedent's estate was bequeathed to Trust B, an irrevocable trust. It is represented that no additions or constructive additions were made to Trust B after the initial funding in Year 1. The provisions of Decedent's Will relating to Trust B provide, in relevant part, as follows:

Under Article Fifth, Paragraph 6, the entire net income from Trust B is to be paid, so long as Spouse shall live: (a) First to Spouse, such net income in the sole discretion of the independent trustee as shall be needed or desirable to provide for Spouse's maintenance or support, due consideration being given to the income and other resources which may be then available to Spouse and known to the trustee; (b) Next to any children of Spouse and Decedent, such of the remaining income as in the sole discretion of the independent trustee is needed or desirable to provide for such one's maintenance and support, due consideration being given to the income and other resources which may be available to such one and which is known to the trustee; (c) Next, to any grandchild of Spouse and Decedent, such of the remaining income that in the sole discretion of the independent trustee is needed or desirable to provide for such one's maintenance, support or education, due consideration being given to the income and other resources which may then be available to such grandchild and known to the trustee; and (d) The balance of the net income, if any, is to be accumulated and added to the principal of the trust.

Article Fifth, Paragraph 7, provides that if, at any time or from time to time, in the sole discretion of the independent trustee, additional funds are needed to provide for the maintenance or support of Spouse, or the maintenance, support or education of any of Spouse's and Decedent's children, or the maintenance, support, or education of any grandchild of Spouse and Decedent, to preserve the health of or to provide necessary medical or similar services for Spouse, any such child, or any such grandchild, or to meet emergencies, due consideration being given to the income and other resources which may then be known to the trustee, the independent trustee is authorized and empowered to pay to or for the benefit of Spouse, any such child, or any such grandchild

out of the principal of Trust A as to Spouse and out of the principal of Trust B as to any child or grandchild, such sum or sums as may by such trustee be deemed necessary or desirable for the purpose of affording such assistance or relief. The independent trustee is to be the sole and final judge of any such necessity and of the amounts required for the purpose, and the decision of the trustee made in good faith to make or not make such payments shall be final and incontestable by anyone. However, expenditures of principal from Trust B for the benefit of any such grandchild of Spouse and Decedent, which such grandchild ultimately becomes entitled to share in the principal of Trust B, is to be treated as an advancement, without interest, to such grandchild against such one's share of the principal.

Under Article Fifth, Paragraph 9, upon the death of Spouse, the balance of the corpus of Trust B, and accrued and undistributed income thereof, if any, and the corpus of Trust A, and accrued and undistributed income thereof, if any, is to be divided by the trustee into four shares in percentage amounts of x% for Child 1, x% for Child 2, x % for Child 3, and y% for Child 4. Each share is to be distributed absolutely free and clear of all trusts to the respective child, if such child shall be living and shall have attained the age of 50 years or more; otherwise, if such child is living but has not attained the age of 50, such share is to continue in trust for such child for the uses and purposes described. If such child is not living but has died leaving issue surviving, such share is to continue in trust for such issue, for the uses and purposes described.

Under Article Fifth, Paragraph 11(b), if at the time any share of the trust estate is to be set aside for the issue of a child of Spouse and Decedent, there shall then be living any child of such child of Spouse and Decedent, then the trustee shall divide the said share into as many portions of equal market value (but the trustee shall not be required in so doing to make any physical segregation of assets) as there shall be children of such child of Spouse and Decedent then living plus the number of such children of such child of Spouse and Decedent who shall then be deceased but who shall have left issue then living, and the trustee shall set aside and designate one such portion as a separate trust fund for the benefit of each such living grandchild and one such portion for the benefit of such living issue of each such deceased grandchild.

Article Fifth, Paragraph 11(c) provides, with respect to each portion set off for a living child of such child of Spouse and Decedent, the trustee shall thereafter pay from the net income derived from such portion to or for the use and benefit of such grandchild such amounts as the trustee in its sole discretion shall deem reasonably necessary to provide for the care, maintenance, support and education of such grandchild, according to such one's station in life, and until such grandchild attains the age of 21 years; thereafter, the entire net income from such portion shall be paid to such grandchild for whose benefit the same has been set off until the final termination of the trust with respect to said portion as provided. When such grandchild attains the age of 25 years or when the share is to be divided into portions if such grandchild has already attained the age of 25 years but is less than 30 years of age, then the trust as to one-half of such portion is to

terminate, and thereupon the trustee is to pay and to distribute to such grandchild one-half of the principal of the portion then held for such grandchild, absolutely and free and clear of all trusts. The trust with respect to said portion shall finally terminate either (i) when such grandchild for whose benefit it has been set aside and designated attains the age of 30 years, if such grandchild has not yet attained such age when the share is to be divided into portions, or (ii) at the time the share is to be divided into portions if such grandchild has then already attained such age or (iii) upon the death of such grandchild, whichever of said events shall first occur; and thereupon the trustee shall pay and distribute said portion, together with all net income thereon then accrued and all net income of said portion then remaining in the hands of the trustee, absolutely and free and clear of trusts, to such grandchild, if such grandchild be then living, otherwise, to the issue then living of such grandchild by right of representation per stirpes among them.

Under Article Fifth, Paragraph 14, each and every trust, if any, still in existence in whole or in part on the day twenty-one years after the death of the last to survive of all beneficiaries of the will who are living at the date of my death shall forthwith terminate.

It is represented that the beneficiaries of Trust B had different personal and financial situations and disagreed on the proper investments for Trust B's assets and its management. To resolve this dispute, Trust B was divided into two separate subtrusts by a court order dated Date 4. Trust 1 was established for Child 4 and his issue and was allocated y% of the value of Trust B. The second trust, termed the Remaining Trust, was established for the benefit of Spouse and Decedent's remaining children (Child 1, Child 2, and Child 3) and their issue and was allocated the remaining z% of the value of Trust B. The values were determined as of the date of allocation. Each of Trust 1 and Remaining Trust are administered under the same terms as provided for Trust B except that the discretionary distributions of income and principal in Trust 1 are limited to Child 4 and such child's issue, and Child 4 and his issue have no rights to distributions of income or principal from Remaining Trust.

It is represented that the division of Trust B into two trusts was accomplished pursuant to applicable State law, with approval of a state court, to resolve a bona-fide controversy regarding the administration of Trust B. The dispositive terms of the resulting trusts: Trust 1 and Remaining Trust, are the same as Trust B, except as described above.

On Date 5, Spouse petitioned Court for a construction of Remaining Trust. On Date 6, Court issued an Order providing that the language, "to or for the benefit of" contained in Article Fifth, Paragraph 7 of Remaining Trust includes discretionary distributions during Spouse's lifetime to trusts for the benefit of the children and grandchildren of Decedent and Spouse.

Pursuant to the authority granted in Article Fifth, Paragraph 7 and the Court's Order, Spouse, as trustee of Remaining Trust, proposes to make distributions of

principal from Remaining Trust to Decedent's grandchildren (i.e., the children of Child 1, Child 2, and Child 3) or to new trusts (New Trusts) for their benefit.

It is represented that each New Trust that is established will be held for the benefit of one grandchild only and will continue for the grandchild's lifetime. New Trust will provide for distributions of income to the grandchild in the trustee's discretion for proper support, health, maintenance, and education. If the trustee deems that income is insufficient, the trustee is authorized to make distributions of principal under the same standard except that the trustee is to take into consideration any income or other resources that are available to the grandchild.

Under each New Trust, each grandchild will possess an inter vivos limited power of appointment in favor of the grandchild's then living issue, spouse, and/or Registered Domestic Partner. Upon the grandchild's death, the trustee is to divide the balance of the grandchild's trust into as many equal shares as there are children of the grandchild then living and children of the grandchild then deceased leaving issue then living. grandchild's issue, if any, or if none, one-half to the Decedent's heirs and one-half to Spouse's heirs. Pursuant to Article Fifth, Paragraph 14 of Decedent's will, New Trust will terminate no later than twenty-one years after the death of the last to survive of all the beneficiaries named in Decedent's Will who were living at the time of Decedent's death.

The following ruling is requested.

Distributions of principal from Remaining Trust to New Trusts will not cause Remaining Trust or New Trusts to be subject to the provisions of chapter 13.

Section 2601 imposes a tax on every generation-skipping transfer (GST), which is defined under section 2611 as a taxable distribution, a taxable termination, or a direct skip. Section 26.2601-1(b)(2)(i)(A) of the Generation-Skipping Transfer Tax Regulations, provides that the provisions of chapter 13 do not apply to any generation-skipping transfer under a will or revocable trust executed before October 22, 1986, provided that the document in existence on October 21, 1986, is not amended at any time after October 21, 1986, in any respect which results in the creation of, or an increase in the amount of, a GST transfer, and the decedent dies before January 1, 1987.

In this case, Decedent's Will was executed on Date 1, and was not amended thereafter. Date 1 is prior to October 22, 1986. Pursuant to § 26.2601-1(b)(2), the generation-skipping transfer tax does not apply to any generation-skipping transfer under a will or revocable trust executed before October 22, 1986. It is represented that no additions to Trust B have been made since the initial funding in Year 1. Accordingly, Trust B is exempt from GST tax. Trust B was divided into Trust 1 and Remaining Trust pursuant to a court order. The dispositive terms of Trust B and Remaining Trust are the same, except that Child 4 and his issue have no rights to distributions of income or principal from Remaining Trust.

Section 26.2601-1(b)(4)(i)(A) provides that the distribution of trust principal from an exempt trust to a new trust or retention of trust principal in a continuing trust will not cause the new or continuing trust to be subject to the provisions of chapter 13, if (1) Either – (i) The terms of the governing instrument of the exempt trust authorize distributions to the new trust or the retention of trust principal in a continuing trust, without the consent or approval of any beneficiary or court; or (ii) at the time the exempt trust became irrevocable, state law authorized distributions to the new trust or retention of principal in the continuing trust, without the consent or approval of any beneficiary or court; and (2) The terms of the governing instrument of the new or continuing trust do not extend the time for vesting of any beneficial interest in the trust in a manner that may postpone or suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date the original trust became irrevocable, extending beyond any life in being at the date the original trust became irrevocable plus a period of 21 years, plus if necessary, a reasonable period of gestation.

In the present case, under Article Fifth, Paragraph 7 of Remaining Trust, the independent trustee is authorized and empowered to pay “to or for the benefit of” any grandchild of Decedent and Spouse out of the principal of Remaining Trust, for the maintenance, support, or education of any such grandchild, to preserve the health of or to provide necessary medical or similar services for such grandchild, or to meet emergencies, due consideration being given to the availability of other sources available. The independent trustee is to be the sole and final judge of the amounts required for this purpose. As described above, the Court’s Date 6 Order construed the language, “to or for the benefit” to include discretionary distributions of principal during Spouse’s lifetime to trusts for the benefit of the children and grandchildren of Decedent and Spouse.

Based upon the facts presented and the representations made, we conclude that distributions of principal from Remaining Trust to a New Trust, will not cause Remaining Trust or any New Trust to be subject to the provisions of chapter 13.

This ruling is based on the facts presented and the applicable law in effect on the date of this letter. If there is a change in material fact or law (local or federal) before the transactions considered in this ruling take effect, the ruling will have no force or effect.

Except as we have specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions of the Code or under any other provisions of the Code.

This letter ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent

Sincerely,

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Lorraine E. Gardner  
Senior Counsel  
Branch 4  
(Office of Passthroughs  
and Special Industries)

Enclosure: Copy for section 6110 purpose

cc: