

## Internal Revenue Service

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May 30, 2018

RE:

### Legend

Date	=
Grantor	=
Trust 1	=
Trust 2	=
Parent 1	=
Parent 2	=
Sibling 1	=
Sibling 2	=
Nephew	=
Niece	=
Trustee	=
Distribution Committee	=
State 1	=
State 2	=

Dear :

This responds to a letter dated November 21, 2017, requesting rulings under the Internal Revenue Code.

### Facts

The facts submitted and representations made are as follows. On Date, Grantor created an irrevocable trust, Trust 1, governed under the laws of State 1. The beneficiaries of Trust 1 are defined as a class consisting of Grantor, Grantor's parents

(Parent 1 and Parent 2), Grantor's siblings (Sibling 1 and Sibling 2), Grantor's Nephew and Niece, Trust 2, any issue of Grantor born or adopted after Date, and any mutual issue of Grantor's parents born or adopted after Date (collectively, the "beneficiaries"). A corporate trustee, Trustee, is the sole trustee of Trust 1. Grantor resides in State 2.

Article Six of Trust 1 provides for the creation of a Distribution Committee. The current members of the Distribution Committee are Parent 1, Parent 2, Sibling 1, and Sibling 2. Article Six, Section 6.02 provides that if at any time any member of Distribution Committee for any reason is unable to act, such member shall not be replaced. Article Six, Section 6.03 provides that there must be at least two members serving on the Distribution Committee at all times. If there are fewer than two members serving, then the Distribution Committee shall terminate and cease to exist. Upon the death of the Grantor, the Distribution Committee shall terminate and cease to exist.

Article Six, Section 6.08 provides that the Distribution Committee shall have the power (1) to appoint principal and income of Trust 1 in a non-fiduciary capacity to one or more beneficiaries by unanimous vote (Unanimous Member Power), and (2) to appoint principal and income of Trust 1 in a non-fiduciary capacity to one or more beneficiaries by a majority vote of the Distribution Committee and the affirmative consent of Grantor (Grantor's Consent Power).

During the lifetime of Grantor, the Trustee shall administer Trust 1 as provided in Article Eight. Article Eight, Section 8.01 provides that, during the lifetime of Grantor, Trustee shall retain all property held under this agreement in a single trust for the benefit of the trust beneficiaries. Using the procedures described in Section 6.08, the Distribution Committee may appoint the income and/or principal of any portion of trust property to the beneficiaries, in equal or unequal shares, either outright or in trust, even to the extent of exhausting principal, as the Distribution Committee determines from time to time is necessary or advisable. Any net income not distributed is to be accumulated and added to the principal of Trust 1.

Article Eight, Section 8.01(a)(1) provides that if there are no members of a Distribution Committee then serving, Trustee shall distribute as much of the income and/or principal of any portion of trust property to the beneficiaries, in equal or unequal shares, either outright or in trust as (i) Trustee determines from time to time for the beneficiaries' health, education, maintenance and support; and (ii) the Independent Trustee (as defined in Article Fourteen, Section 14.05(k)), in its sole and absolute discretion, determines is advisable for any purpose.

Article Eight, Section 8.02 provides that during the lifetime of Grantor, Grantor may, in a non-fiduciary capacity, direct Trustee to distribute as much of the principal of the trust (excluding taxable income that may be allocated to principal hereunder) to or among one or more persons or entities who are beneficiaries of Trust 1 (other than to Grantor),

outright or in trust, for such beneficiaries' health, education, support and maintenance, as Grantor may from time to time direct in writing ("Grantor's Sole Power").

After the death of Grantor, Trustee shall administer the remaining trust property as provided in Article Nine. Article Nine, Section 9.01 provides that Grantor shall have a limited testamentary power of appointment over the accrued and undistributed net income and principal of the trust remaining at the time of Grantor's death. Grantor may from time to time appoint by his last will, any part of the trust principal and accrued income remaining at the time of Grantor's death to any person or entity, either outright or in trust; provided however, that to no extent may such power be exercised in any way for the benefit of Grantor, Grantor's estate, Grantor's creditors, or the creditors of Grantor's estate ("Grantor's Testamentary Power").

Article Nine, Section 9.03 provides that if Grantor is survived by issue, then the remaining balance of the trust property shall be allocated into shares as follows: one share for each then living child of Grantor and one share for each group of then-living issue of each deceased child of Grantor. Each share shall be retained and administered by Trustee in a separate trust for the benefit of issue. Article Nine, Section 9.04 provides that if Grantor is not survived by issue, then the remaining balance of the trust property shall be allocated into two shares: (1) a share for Parent 1 and Parent 2, or the survivor of them, and (2) the remaining balance divided and set apart, *per stirpes*, in trusts for the living descendants of Parent 1 and Parent 2. If both Parent 1 and Parent 2 do not survive Grantor then their share shall be allocated along with the remaining balance.

Under Article Fourteen, Section 14.05(k), "Independent Trustee" is defined as the Trustee of the trust that: (i) is not a person (referred to as "a beneficiary") having a beneficial interest in the income or principal of the trust; (ii) is not a person (referred to as "a contributor") who makes or is deemed to make a gratuitous transfer to the trust; and (iii) is not "related or subordinate" (as such term is defined in § 672(c)) to any beneficiary of the trust or any contributor to the trust. Whenever a power or discretion is granted exclusively to an Independent Trustee, then any Trustee who is then serving as the Trustee and who is not an Independent Trustee is prohibited from participating in the exercise of the power or discretion.

No distribution by Trustee to a beneficiary, and no distribution to a beneficiary pursuant to the exercise of a power of appointment, shall discharge any the Grantor's legal obligation to support any beneficiary.

You have requested the following rulings:

1. During the period the Distribution Committee is serving during the life of Grantor, no portion of the items of income, deductions, and credits against tax of Trust 1 shall be

included in computing the taxable income, deductions, and credits of Grantor or any member of the Distribution Committee under § 671.

2. The contribution of property to Trust 1 by Grantor is not a completed gift subject to federal gift tax.
3. Any appointment of trust property by the Distribution Committee to Grantor will not be a completed gift, subject to federal gift tax, by any member of the Distribution Committee.
4. Any appointment of trust property by the Distribution Committee from Trust 1 to any beneficiary of Trust 1, other than Grantor, will not be a completed gift subject to federal gift tax, by any member of the Distribution Committee.
5. No member of the Distribution Committee, upon his or her death, will be considered to have a general power of appointment within the meaning of § 2041 over any property held in Trust 1.

#### Ruling 1

Section 671 provides that where it is specified in subpart E of part I of subchapter J that the grantor or another person shall be treated as the owner of any portion of a trust, there shall then be included in computing the taxable income and credits of the grantor or the other person those items of income, deductions, and credits against tax of the trust which are attributable to that portion of the trust to the extent that such items would be taken into account under chapter 1 in computing taxable income or credits against the tax of an individual.

Section 672(a) provides, for purposes of subpart E, the term “adverse party” means any person having a substantial beneficial interest in the trust which would be adversely affected by the exercise or nonexercise of the power which he possesses respecting the trust.

Sections 673 through 677 specify the circumstances under which the grantor is treated as the owner of a portion of a trust.

Section 673(a) provides that the grantor shall be treated as the owner of any portion of a trust in which the grantor has a reversionary interest in either the corpus or the income therefrom, if, as of the inception of that portion of the trust, the value of such interest exceeds five (5) percent of the value of such portion.

Section 674(a) provides, in general, that the grantor shall be treated as the owner of any portion of a trust in respect of which the beneficial enjoyment of the corpus or the

income therefrom is subject to a power of disposition, exercisable by the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(b) provides that § 674(a) shall not apply to the powers described in § 674(b) regardless of by whom held.

Section 674(b)(3) provides that § 674(a) shall not apply to a power exercisable only by will, other than a power in the grantor to appoint by will the income of the trust where the income is accumulated for such disposition by the grantor or may be so accumulated in the discretion of the grantor or a nonadverse party, or both, without the approval or consent of any adverse party.

Section 674(b)(5) provides that § 674(a) shall not apply to a power to distribute corpus to or for a beneficiary, provided that the power is limited by a reasonably definite standard.

Under § 675 and applicable regulations, the grantor is treated as the owner of any portion of a trust if, under the terms of the trust agreement or circumstances attendant on its operation, administrative control is exercisable primarily for the benefit of the grantor rather than the beneficiary of the trust.

Section 676(a) provides that the grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under any other provision of part I, subchapter J, chapter 1, where at any time the power to revest in the grantor title to such portion is exercisable by the grantor or a nonadverse party, or both.

Section 677(a) provides, in general, that the grantor shall be treated as the owner of any portion of a trust, whether or not he is treated as such owner under § 674, whose income without the approval or consent of any adverse party is, or, in the discretion of the grantor or a nonadverse party, or both, may be (1) distributed to the grantor or the grantor's spouse; (2) held or accumulated for future distribution to the grantor or the grantor's spouse; or (3) applied to the payment of premiums on policies of insurance on the life of the grantor or the grantor's spouse.

Section 678(a) provides that a person other than the grantor shall be treated as the owner of any portion of a trust with respect to which: (1) such person has a power exercisable solely by himself to vest the corpus or the income therefrom in himself, or (2) such person has previously partially released or otherwise modified such a power and after the release or modification retains such control as would, within the principles of §§ 671 to 677, inclusive, subject a grantor of a trust to treatment as the owner thereof.

Based solely on the facts submitted and representations made, we conclude that an examination of Trust 1 reveals none of the circumstances that would cause Grantor to

be treated as the owner of any portion of Trust 1 under § 673, 674, 676, or 677 as long as the Distribution Committee remains in existence and serving. Because none of the members of the Distribution Committee have a power exercisable by himself to vest trust income or corpus in himself, none shall be treated as the owner of Trust 1 under § 678(a).

We further conclude that an examination of Trust 1 reveals none of the circumstances that would cause administrative controls to be considered exercisable primarily for the benefit of Grantor under § 675. Thus, the circumstances attendant on the operation of Trust 1 will determine whether Grantor will be treated as the owner of any portion of Trust 1 under § 675. This is a question of fact, the determination of which must be deferred until the federal income tax returns of the parties involved have been examined by the office with responsibility for such examination.

## Ruling 2

Section 2501(a)(1) provides for the imposition of a gift tax for each calendar year on the transfer of property by gift during such calendar year by any individual. Section 2511(a) provides that the gift tax applies whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

Section 25.2511-2(b) of the Gift Tax Regulations provides that a gift is complete as to any property, or part thereof or interest therein, with respect to which the donor has so parted with dominion and control as to leave the donor with no power to change the disposition of the property, whether for the donor's own benefit, or for the benefit of another. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Section 25.2511-2(b) provides an example, where the donor transfers property in trust to pay the income to the donor, or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among the donor's descendants. The regulation concludes that no portion of the transfer is a completed gift. However, if the donor had not retained a testamentary power of appointment, but had instead provided that the remainder should go to X or his heirs, the entire transfer would be a completed gift.

Section 25.2511-2(c) provides that a gift is incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself or herself. A gift is also incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the

beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard.

Under § 25.2511-2(e), a donor is considered as possessing a power if it is exercisable by the donor in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. A trustee, as such, is not a person having an adverse interest in the disposition of the trust property or its income.

Section 25.2511-2(f) provides that the relinquishment or termination of a power to change the beneficiaries of transferred property, occurring otherwise than by death of the donor, is regarded as the event which completes the gift and causes the gift tax to apply.

Section 25.2511-2(g) provides that if a donor transfers property to himself as trustee (or to himself and some other person, not possessing a substantial adverse interest, as trustees), and retains no beneficial interest in the trust property and no power over it except fiduciary powers, the exercise or nonexercise of which is limited by a fixed or ascertainable standard, to change the beneficiaries of the transferred property, the donor has made a completed gift.

Section 25.2511-2(e) does not define “substantial adverse interest.” Section 25.2514-3(b)(2) provides, in part, that a taker in default of appointment under a power has an interest that is adverse to an exercise of the power. Section 25.2514-3(b)(2) also provides that a co-holder of a power is considered as having an adverse interest where he may possess the power after the possessor’s death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate.

In *Estate of Sanford v. Commissioner*, 308 U.S. 39 (1939), the taxpayer created a trust for the benefit of named beneficiaries and reserved the power to revoke the trust in whole or in part, and to designate new beneficiaries other than himself. Six years later, in 1919, the taxpayer relinquished the power to revoke the trust, but retained the right to change the beneficiaries. In 1924, the taxpayer relinquished the right to change the beneficiaries. The Court stated that the taxpayer’s gift is not complete, for purposes of the gift tax, when the donor has reserved the power to determine those others who would ultimately receive the property. Accordingly, the Court held that the taxpayer’s gift was complete in 1924, when he relinquished his right to change the beneficiaries of the trust. A grantor’s retention of a power to change the beneficial interests in a trust causes the transfer to the trust to be incomplete for gift tax purposes, even though the power may be defeated by the actions of third parties. *Goldstein v. Commissioner*, 37 T.C. 897 (1962). See also *Estate of Goelet v. Commissioner*, 51 T.C. 352 (1968).

In this case, Grantor retained the Grantor’s Consent Power over the income and principal of Trust 1. Under § 25.2511-2(e), a donor is considered as himself having a

power if it is exercisable by him in conjunction with any person not having a substantial adverse interest in the disposition of the transferred property or the income therefrom. The Distribution Committee members are not takers in default for purposes of § 25.2514-3(b)(2). They are merely co-holders of the power. Under § 25.2514-3(b)(2), a co-holder of a power is considered as having an adverse interest where he may possess the power after the possessor's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. In this case, the Distribution Committee ceases to exist upon the earlier of such time as there are fewer than two members serving or the Grantor's death. Accordingly, the Distribution Committee members do not have interests adverse to the Grantor under § 25.2514-3(b)(2) and for purposes of § 25.2511-2(e). Therefore, the Grantor is considered as possessing the power to distribute income and principal to any beneficiary himself because he retained the Grantor's Consent Power.

Grantor also retained the Grantor's Sole Power over the principal of Trust 1. Under § 25.2511-2(c), a gift is incomplete if and to the extent that a reserved power gives the donor the power to name new beneficiaries or to change the interests of the beneficiaries as between themselves unless the power is a fiduciary power limited by a fixed or ascertainable standard. In this case, the Grantor's Sole Power gives Grantor the power to change the interests of the beneficiaries. Even though Grantor's power is limited by an ascertainable standard, *i.e.*, health, education, maintenance and support, Grantor's power is not a fiduciary power. Accordingly, the retention of the Grantor's Consent Power and the Grantor's Sole Power causes the transfer of property to Trust 1 to be wholly incomplete for federal gift tax purposes.

Further, Grantor retained Grantor's Testamentary Power to appoint the property to any persons, other than Grantor's estate, Grantor's creditors, or the creditors of Grantor's estate. Under § 25.2514-3(b)(2), the retention of a testamentary power to appoint the remainder of a trust is considered a retention of dominion and control over the remainder. Accordingly, the retention of this power causes the transfer of property to Trust 1 to be incomplete with respect to the remainder of Trust 1 for federal tax purposes.

Finally, the Distribution Committee members possess the Unanimous Member Power over income and principal. This power is not a condition precedent to Grantor's powers. Grantor's power over the income and principal is presently exercisable and not subject to a condition precedent. Grantor retains dominion and control over the income and principal of Trust 1 until the Distribution Committee members exercise their Unanimous Member Power. Accordingly, this power does not cause the transfer of property to be complete with respect to the income interest for federal gift tax purposes. See *Goldstein v. Commissioner*, 37 T.C. 897 (1962); *Estate of Goelet v. Commissioner*, 51 T.C. 352 (1968).



Accordingly, based on the facts submitted and the representations made, we conclude that the contribution of property to Trust 1 by Grantor is not a completed gift subject to federal gift tax. Any distribution from Trust 1 to Grantor is merely a return of Grantor's property. Further, upon Grantor's death, the fair market value of the property in Trust 1 is includible in Grantor's gross estate for federal estate tax purposes.

#### Rulings 3, 4 and 5

Section 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power.

Section 2514(c) provides that the term "general power of appointment" means a power which is exercisable in favor of the individual possessing the power (possessor), the possessor's estate, the possessor's creditors, or the creditors of the possessor's estate.

Section 2514-1(c)(1) provides, in part, that a power of appointment is not a general power if by its terms it is exercisable only in favor of one or more designated persons or classes other than the possessor or his creditors, or the possessor's estate or the creditors of the estate.

Section 2514(c)(3)(A) provides that, in the case of a power of appointment created after October 21, 1942, if the power is exercisable by the possessor only in conjunction with the creator of the power, such power is not deemed a general power of appointment.

Section 2514(c)(3)(B) provides that, in the case of a power of appointment created after October 21, 1942, if the power is not exercisable by the possessor except in conjunction with a person having a substantial interest in the property subject to the power, which is adverse to the exercise of the power in favor of the possessor, such power shall not be deemed a general power of appointment. For purposes of § 2514(c)(3)(B), a person who, after the death of the possessor, may be possessed of a power of appointment (with respect to the property subject to the possessor's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the possessor's power.

Section 2514-3(b)(2) provides, in part, that a co-holder of a power of appointment has no adverse interest merely because of his joint possession of the power nor merely because he is a permissible appointee under a power. However, a co-holder of a power is considered as having an adverse interest where he may possess the power after the possessor's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. Thus, for example, if X, Y, and Z held a power jointly to appoint among a group of persons which includes themselves and if on the death of X the power will pass to Y and Z jointly, then Y and Z are considered to have interests adverse to the exercise of the power in favor of X. Similarly, if on Y's death the

power will pass to Z, Z is considered to have an interest adverse to the exercise of the power in favor of Y.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has at the time of death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive.

Under § 2041(b)(1), the term "general power of appointment" is defined, in relevant part, to mean a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate.

Section 2041(b)(1)(C)(i) provides that in the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person, if the power is not exercisable by the decedent except in conjunction with the creator of the power, such power shall not be deemed a general power of appointment.

Section 2041(b)(1)(C)(ii) provides, however, that in the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person, if the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to the exercise of the power in favor of the decedent - such power shall not be deemed a general power of appointment. For purposes of § 2041(b)(1)(C)(ii), a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

Section 20.2041-3(c)(2) of the Estate Tax Regulations provides, in part, that a co-holder of a power of appointment has no adverse interest merely because of his joint possession of the power nor merely because he is a permissible appointee under a power. However, a co-holder of a power is considered as having an adverse interest where he may possess the power after the decedent's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. Thus, for example, if X, Y, and Z held a power jointly to appoint among a group of persons which includes themselves and if on the death of X the power will pass to Y and Z jointly, then Y and Z are considered to have interests adverse to the exercise of the power in favor of X. Similarly, if on Y's death the power will pass to Z, Z is considered to have an

interest adverse to the exercise of the power in favor of Y.

The powers held by the Distribution Committee members under the Grantor's Consent Power are powers that are exercisable only in conjunction with the creator, Grantor. Accordingly, under §§ 2514(b) and 2041(a)(2), the Distribution Committee members do not possess general powers of appointment by virtue of possessing this power. Further, the powers held by the Distribution Committee members under the Unanimous Member Power are not general powers of appointment for purposes of §§ 2514(b) and 2041(a)(2). As in the examples in §§ 25.2514-3(b)(2) and 20.2041-3(c)(2), the Distribution Committee members have substantial adverse interests in the property subject to this power. Accordingly, any appointment of Trust 1 property to a beneficiary, other than Grantor, pursuant to the exercise of these powers (Grantor's Consent Power and the Unanimous Member Power), are not gifts by the Distribution Committee members. Instead, such appointments are gifts by Grantor.

Based on the facts submitted and the representations made, we conclude that any appointment of trust property by the Distribution Committee to any beneficiary of Trust 1, other than Grantor, will not be a completed gift subject to federal gift tax by any member of the Distribution Committee; rather, any such appointment will be a completed gift by Grantor. Further, we conclude that the powers held by the Distribution Committee are not general powers of appointment for purposes of § 2041(a)(2) and, accordingly, no property held in trust will be includible in the gross estate of any member of the Distribution Committee upon his or her death under § 2041.

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code. Specifically, we express no opinion on the trust provisions permitting Trustee to distribute income or principal to trustees of other trusts (decanting) or any other trust provisions not referenced in this private letter ruling.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your authorized representative.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by an appropriate party.

While this office has not verified any of the material submitted in support of the request for rulings, it is subject to verification on examination.

Sincerely,

*Karlene M. Lesho*

Karlene M. Lesho  
Senior Technician Reviewer, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs & Special Industries)

Enclosures (2)