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Person To Contact:

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Telephone Number:

Re:

Refer Reply To:

CC:PSI:04 – PLR-139067-04

Date: MAY 10, 2005

Legend

Testator =  
Granddaughter =  
Trust =

Bank =  
Descendants' Trust =

Date 1 =  
Trustee =  
X =  
Y =  
Z =

Dear :

This is in response to a letter dated July 15, 2004, requesting rulings with respect to federal estate and generation-skipping transfer (GST) tax consequences of the proposed exercise of a power of appointment.

The facts and representations submitted are summarized as follows: Testator died on Date 1. Date 1 is prior to September 25, 1985. Pursuant to Paragraph 5 of Testator's will, all the rest, residue, and remainder of Testator's estate, was divided into as many parts of equal value as Testator had children surviving. For the purposes of such division, any child who shall predecease Testator leaving issue who survives Testator shall be considered as surviving Testator. Thereupon, each part shall be divided into as many shares of equal value as the child for whom such part was created have children surviving Testator; provided, however, that for the purposes of such

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subdivision into shares any of Testator's grandchildren who predecease Testator leaving issue who survive Testator shall be considered as surviving.

Paragraph 6 provides that the shares created under Paragraph 5 are given to the trustees in trust as provided in Testator's will. The trusts created by the provisions of this paragraph are sometimes referred to as the "Residuary Trusts".

Paragraph 9 provides that each share of Testator's residuary estate given to the trustees under the provisions of Paragraph 6 shall constitute the trust estate of a separate trust for each of Testator's grandchildren including a predeceased grandchild who leaves issue surviving Testator. It is Testator's intent that by the gifts under Paragraph 6, Testator shall create a Residuary Trust for each of her grandchildren on a per stirpes basis as if all of Testator's children had predeceased her.

Trust is a Residuary Trust created for the benefit of Granddaughter created under Paragraphs 5, 6, and 9 of Testator's will. The trustee of Trust is Bank.

Pursuant to Paragraph 10 of Testator's will, during the period from the date of Testator's death until x years and y months thereafter, the trustee of Trust shall distribute, currently and periodically, and at least semi-annually, the net income of the trust estate for charitable purposes. After x years and y months have expired from the date of Testator's death, the income of the trust estate of Trust may be accumulated and retained, in whole or in part, or trustee, from time to time, may distribute to any one or more of the members of a class of persons composed of Granddaughter, Granddaughter's spouse, Granddaughter's issue, and the spouse of Granddaughter's issue, such amounts of the Trusts as, in the sole discretion of the trustee, may be in the best interest of the distributees. Such distributions may be made without regard to any requirement of equality among distributees, or to the fact that any ancestor of a distributee may be eligible to receive distributions. All distributions of corpus made under the provisions of this paragraph shall be subtracted, without interest, from the share, if any, of the recipient, or the persons taking such recipient's place by right of representation, on termination of Trust unless such person is the only one entitled to share in such distribution.

Trust shall terminate x years and y months from the date of Testator's death or upon the death of Granddaughter, whichever is later. Upon termination, the trust estate shall be distributed to one or more persons or corporations in such shares, manner and proportion as Granddaughter may appoint by will, but if such power of appointment shall not be exercised, to the issue of Granddaughter. If Granddaughter has no issue then living, then the trust estate shall be distributed to the issue of the closest lineal ancestor of Granddaughter, which ancestor was one of Testator's issue and has issue then living, but if none of such issue is then living, to Testator's issue.

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Paragraph 35 provides that the powers of appointment granted in Testator's will shall be exercised by a separate clause in the last will of the donee of such power, which clause identifies such power of appointment by specific reference and disposes only of property subject to such power of appointment. Such donee shall not make such appointment in favor of himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate.

It is represented that no additions, actual or constructive, have been made to Trust subsequent to September 25, 1985.

Granddaughter intends to exercise her testamentary special power of appointment in Paragraph 1(b) of her will. Paragraph 1(b)(i) of Granddaughter's will appoints specific cash amounts from Trust to each of Granddaughter's five children. Paragraph 1(b)(ii) of Granddaughter's will appoints the remainder of the property held in Trust to the trustee in its capacity of trustee of Descendants' Trust. Descendants' Trust is a revocable trust with no assets and the trustee is directed to refuse to accept any property other than that received through Granddaughter's exercise of her power of appointment. Descendants' Trust was initially executed by the trustee upon receipt of a non-refundable inception fee of \$z.

Upon Granddaughter's death, in addition to the specific exercise of her power of appointment to Granddaughter's children in her will, Paragraph 2(a) of the Descendants' Trust provides for additional outright cash distributions which are distributable from the Descendants' Trust to Granddaughter's children. Paragraphs 2(b) and 3 create and fund, with respect to the remainder of the Descendants' Trust, a number of separate equal trusts, each of which is irrevocable and is for the respective primary benefit(s) of certain of Granddaughter's grandchildren and descendants of any grandchild who may be deceased at the time of Granddaughter's death. During the term of each trust, the trustee may distribute to the beneficiary of such trust, such amounts of the trust estate (including the net income thereof) as the trustee may determine to be sufficient to provide for the health, education, maintenance and support of the beneficiary in a standard of living equivalent to that to which the beneficiary was accustomed at the date of the death of Granddaughter.

Pursuant to Paragraph 4 of Descendants' Trust, each of Granddaughter's grandchildren is given a testamentary special power of appointment with respect to the trust estate of the Descendants' Trust created for his or her benefit exercisable only in favor of one or more members of a class of persons comprised of the then living described grandchildren or more remote issue of Granddaughter or to the trustee of any Trust created hereunder for such person's benefit (but, in no event, shall such power be exercisable by the beneficiary in favor, or for the benefit, of the beneficiary, the creditors of the beneficiary, the beneficiary's estate or the creditors of the beneficiary's estate).

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Paragraphs 4 and 6 of Descendants' Trust provide that no trust or power of appointment (including a power contained in a trust that itself may be created through the exercise of a power) shall continue in effect for longer than one day prior to the expiration of twenty-one years after the death of the last to die of all of the issue of Testator who were living at Testator's death on Date 1.

The sole trustee of Descendants' Trust is Bank. Paragraph 7(c)(ii) of the Descendants' Trust provides for (a) a beneficiary's removal of the corporate trustee only for good cause as defined in the trust instrument, (b) the beneficiary's appointment of a successor corporate trustee, (c) the removal by the beneficiary of any non-corporate successor trustee, and (d) further prohibits the appointment, as successor trustee, of (i) any beneficiary of any trust created in the Descendants' Trust, (ii) a person owing any duty of support or other financial obligation to any such beneficiary or (iii) a related or subordinate person with respect to the beneficiary within the meaning of section 672(c) of the Code.

You have asked for the following rulings:

- 1) The power of appointment granted Granddaughter in Testator's will is not a general power of appointment under section 2041.
- 2) The exercise by Granddaughter of such power of appointment will not result in the inclusion in Granddaughter's gross estate, for federal estate tax purposes, of the property subject to such power pursuant to section 2041(a)(2).
- 3) The exercise by Granddaughter of such power of appointment will not create other powers of appointment which can be exercised to postpone the final vesting of any property interest subject to such power for a period of time without regard to the date of the creation of Granddaughter's power of appointment under section 2041(a)(3).
- 4) The exercise of Granddaughter's power of appointment will not constitute an actual or constructive addition to Granddaughter's Trust under section 1433(b)(2)(A) of the Act and section 26.2601-1(b)(1)(v)(B) of the Generation-Skipping Transfer Tax Regulations.
- 5) The existence, exercise, or release of the testamentary powers of appointment granted to Granddaughter's grandchildren in the Descendants' Trust will not subject such property which is subject to such powers of appointment to GST tax pursuant to section 1433(b)(2)(A) of the Act and section 26.2601-1(b)(1)(v)(B) of the regulations.
- 6) The existence, exercise, or release of the powers of appointment granted to Granddaughter's grandchildren in the Descendants' Trust will not result in inclusion in

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such grandchildren's estates, for federal estate tax purposes, of the property interests in such Trusts as are subject to such powers of appointment under sections 2041(a)(2) or (3).

Section 2041(a)(2) provides, in part, 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 his 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 of appointment 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 sections 2035 to 2038, inclusive.

Section 2041(a)(3) provides that to the extent of any property with respect to which the decedent by will or by 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 section 2035, 2036, or 2037, exercises a power of appointment created after October 21, 1942, by creating another power of appointment which under the applicable local law can be validly exercised so as to postpone the vesting of any estate or interest in such property, or suspend the absolute ownership or power of alienation of such property, for a period ascertainable without regard to the date of the creation of the first power.

Section 2041(b)(1) provides that the term "general power of appointment" means a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. Section 2041(b)(1)(A) provides that a power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Sections 20.2041-1(c)(1)(a) and (b) of the Estate Tax Regulations provide that a power of appointment is not a general power if by its terms it is either exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of his estate, or expressly not exercisable in favor of the decedent or his creditors, or the decedent's estate or the creditors of his estate.

Under 20.2041-1(c)(2), a power is limited by an ascertainable standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). The words "support" and "maintenance" are synonymous and their meaning is not limited to the bare necessities of life.

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Section 2601 imposes a tax on every generation-skipping transfer, which is defined under section 2611 as a taxable distribution, a taxable termination, or a direct skip.

Under section 1433(a) of the Act and section 26.2601-1(a), the generation-skipping transfer (GST) tax is generally applicable to generation-skipping transfers made after October 22, 1986. However, under section 1433(b)(2)(A) of the Act and section 26.2601-1(b)(1)(i), the tax does not apply to any generation-skipping transfer under a trust that was irrevocable on September 25, 1985, and no addition (actual or constructive) was made to the trust after that date. This rule does not apply to a transfer of property pursuant to the exercise, release, or lapse of a general power of appointment that is treated as a taxable transfer under chapter 11 or chapter 12. The transfer is made by the person holding the power at the time the exercise, release, or lapse of the power becomes effective, and is not considered a transfer under a trust that was irrevocable on September 25, 1985.

Section 26.2601-1(b)(1)(v)(A) provides that, except as provided under section 26.2601-1(b)(1)(v)(B), where any portion of a trust remains in the trust after the post-September 25, 1985, release, exercise, or lapse of a power of appointment over that portion of the trust, and the release, exercise, or lapse is treated to any extent as a taxable transfer under chapter 11 or chapter 12, the value of the entire portion of the trust subject to the power that was released, exercised, or lapsed is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise, or lapse. The creator of the power will be considered the transferor of the addition except to the extent that the release, exercise, or lapse of the power is treated as a taxable transfer under chapter 11 or chapter 12.

Section 26.2601-1(b)(1)(v)(B) provides a special rule for certain powers of appointment. This section provides that the release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in section 2041(b)) is not treated as an addition to a trust if -- (1) such power of appointment was created in an irrevocable trust that is not subject to chapter 13 under section 26.2601-1(b)(1); and (2) in the case of an exercise, such power of appointment is not exercised 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 of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years.

In the present case, Trust was created under Testator's will effective on Testator's date of death on Date 1. Thus, Trust was irrevocable before September 25, 1985 and is exempt from GST tax. A representation was made that there have been no constructive or actual additions to Trust since September 25, 1985.

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Paragraph 35 of Testator's will expressly limits and restricts the exercise of the power of appointment by providing that the power holder "shall not make such appointment in favor of himself or herself, his or her creditors, his or her estate, or the creditors of his or her estate." Accordingly, Granddaughter's testamentary power of appointment is not a general power of appointment as described in section 2041. Further, any discretionary distributions made under Trust are specifically limited to the trustee. No beneficiary may participate, even if the beneficiary is acting as a trustee, in the exercise of any discretionary distribution to or for his or her benefit.

Moreover, under the terms of Testator's will, Trust shall remain in force and effect for no longer than 21 years after the death of the last to die of all of Testator's issue living at her death. In exercising the power of appointment granted Granddaughter, Granddaughter's will provides that if Granddaughter's exercise of her power of appointment creates another power of appointment (the 'other power'), the other power shall not be exercisable or exercised, directly or indirectly to postpone the final vesting of any estate or interest in, or suspend the absolute ownership or power of alienation of, any property with respect to which Granddaughter exercised the exercised power for longer than one day prior to the expiration of 21 years after the death of the last to die of all of the issue of Testator who were living on the date of Testator's death on Date 1. Descendants' Trust also provides that no power of appointment shall be exercised that shall cause or permit the vesting of any property interest for a period beyond 21 years after the last to die of all of the issue of Testator who were living at her death on Date 1. Thus, under Granddaughter's will, Granddaughter's power is not being exercised in a manner that may postpone or suspend vesting of the Trust corpus for a period measured from the date of creation of the Trust extending beyond any life in being plus 21 years.

Further, the testamentary exercise of Granddaughter's limited power of appointment under her will will not create another power which can be exercised in a manner that postpones the vesting of any estate or interest or suspends the absolute ownership or power of alienation of the property of any trust held under the terms of the proposed will for a period without regard to the date of the creation of Granddaughter's power and of Trust.

Consequently, Granddaughter's testamentary exercise of her power of appointment will not result in the generation-skipping transfer tax becoming applicable to the property passing pursuant to the appointment to the Descendants' Trust.

Accordingly, based on the facts submitted and representations made, we rule as follows:

1) The power of appointment granted Granddaughter in Testator's will is not a general power of appointment as defined in section 2041(b)(1) .

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2) The exercise by Granddaughter of such power of appointment will not result in the inclusion in Granddaughter's gross estate, for federal estate tax purposes, of the property subject to such power pursuant to section 2041(a)(2).

3) The exercise by Granddaughter of such power of appointment will not create other powers of appointment which can be exercised to postpone the final vesting of any property interest subject to such power for a period of time without regard to the date of the creation of Granddaughter's power of appointment under section 2041(a)(3).

4) The exercise of Granddaughter's power of appointment will not constitute an actual or constructive addition to Granddaughter's Trust under section 1433(b)(2)(A) of the Act and section 26.2601-1(b)(1)(v)(B).

5) The existence, exercise, or release of the testamentary powers of appointment granted to Granddaughter's grandchildren in the Descendants' Trust will not subject such property which is subject to such powers of appointment to GST tax pursuant to section 1433(b)(2)(A) of the Act and section 26.2601-1(b)(1)(v)(B).

6) The existence, exercise, or release of the powers of appointment granted to Granddaughter's grandchildren in the Descendants' Trust will not result in inclusion in such grandchildren's estates, for federal estate tax purposes, of the property interests in such Trusts as are subject to such powers of appointment under sections 2041(a)(2) or 2041(a)(3).

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter. We are specifically not ruling on the gift tax and income tax consequences of the transaction.

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.

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.



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In accordance with the power of attorney on file with this office, a copy of this letter is being sent to the taxpayer.

Sincerely,

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

Enclosures

Copy for section 6110 purposes  
Copy of this letter