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Department of the Treasury

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Date: June 10, 1999

Re:

Legend:

Taxpayer	=
Decedent	=
Trust	=
Date 1	=
Date 2	=
Date 3	=
Court Order	=
Court	=

This is in response to a letter dated December 30, 1998, and subsequent correspondence, in which a ruling was requested concerning the federal gift and estate tax consequences of the Court Order construing and modifying Trust.

Facts:

The Taxpayer and her spouse, the Decedent, executed a revocable trust (Trust), naming themselves as co-trustees. Taxpayer and Decedent transferred certain community property to Trust.

Under the terms of Trust, at the death of the first settlor to die, the trustee is to divide the Trust assets into two separate trusts, the "Survivor's Trust" and the "Residual Trust." The Survivor's Trust is to consist of the surviving settlor's separate property and interest in the community property.

The Residual Trust is to consist of the balance of the trust estate.

Under Article NINTH of Trust, during the life of the surviving settlor, the trustee is to pay the settlor the net income of both trusts at least quarterly. In addition, the surviving settlor has a noncumulative right to withdraw principal from the Residual Trust not to exceed, in any calendar year, the greater of \$5,000 or 5 percent of the value of the trust principal on the date of the first request for withdrawal.

Article NINTH further provides:

If the Trustee considers the income insufficient, the Trustee shall also pay to or apply for the benefit of the Surviving Settlor such sums out of the principal of both trusts as the Trustee in the Trustee's discretion shall consider necessary.

Article NINTH also creates in the surviving settlor a lifetime special power to appoint any part of the Survivor's and Residual Trusts to any issue of the Decedent and the Taxpayer. Under Article ELEVENTH, the surviving settlor has the power to appoint by will, outright or in trust, any part of both trusts for the benefit of any issue of the Decedent and the Taxpayer. Under Article TWELFTH, any part of each trust not appointed under this power is to be held in trust or distributed outright to then living issue of the Decedent and the Taxpayer.

Article EIGHTEENTH provides that on the death of the first settlor to die, the surviving settlor shall have the power to amend, revoke, or terminate the Survivor's Trust but not the Residual Trust.

On Date 1, the Decedent died. On Date 2, Taxpayer requested that the scrivener of Trust review the language of Article NINTH. The scrivener found that language had been inadvertently omitted from the Article.

On Date 3, the Taxpayer, as trustee of Trust, petitioned the Court to reform Article NINTH of Trust. It was represented to the Court that Article NINTH contained a scrivener's error in that under the Article as drafted the surviving settlor, as trustee of the trust, possessed a general power of appointment over the trust corpus. It was the settlors' intent that the surviving settlor have only a special power of appointment. It was further represented that this error thwarted the settlors' intent to exclude the assets of the Residual Trust from the gross estate of the survivor for federal estate tax purposes.

The Court issued Court Order declaring that the power in the trustee to invade principal of either trust for the surviving

settlor in Article NINTH was never intended to be a general power of appointment and that the scrivener and the settlors believed that provision of Article NINTH as drafted created a special power of appointment when the document was executed. The Court, accordingly, ordered a modification of Article NINTH, nunc pro tunc, to include "the inadvertently omitted language." As modified, the provision in Article NINTH provides as follows:

If the Trustee considers the income insufficient, the Trustee shall also pay to or apply for the benefit of the Surviving Settlor such sums out of the principal of both trusts as the Trustee in the Trustee's discretion shall consider necessary for the Surviving Settlor's health, education, support and maintenance. [Emphasis added.]

You have requested a ruling that, the power of appointment in Article NINTH of the Trust as construed and modified by the Court Order to correct the scrivener's error so that it is exercisable only based on an ascertainable standard will not be considered a general power of appointment under § 2041, nor will the Court's reformation of the Trust result in the release of a general power of appointment resulting in a gift under § 2514 or inclusion of the Residual Trust corpus in the Taxpayer's gross estate under § 2041.

Law and Analysis:

Section 2041(a)(2) of the Internal Revenue Code 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 of appointment by a disposition that 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.

Section 2041(b)(1) defines "general power of appointment" as a power which is exercisable in favor of the decedent, his estate, his creditors, or creditors of his estate. However, under § 2042(b)(1)(A), 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 is not a general power of appointment.

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. A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard. In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised.

Under § 2514(b), the exercise or release of a general power of appointment created after October 21, 1942, is a transfer of property by the individual possessing such power.

Under § 2514(c), a "general power of appointment" is defined as a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or creditors of his estate. However, under § 2514(c)(1), a power to consume, invade, or appropriate property for the benefit of the possessor which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the possessor is not a general power of appointment.

Section 25.2514-1(c) contains rules similar to § 20.2041-1(c)(2), defining a general power of appointment for purposes of § 2514. Thus, the rules governing when a power of appointment is limited by an ascertainable standard under § 2041 also apply under § 2514. In addition, the term "power of appointment" has the same meaning for purposes of both the gift and estate tax. See, Rev. Rul. 76-547, 1976-2 C.B. 302.

In Commissioner v. Estate of Bosch, 387 U.S. 456 (1967), the Court considered whether a state trial court's characterization of property rights conclusively binds a federal court or agency in a federal estate tax controversy. The Court concluded that the decision of a state trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter. If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving "proper regard" to the state trial court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

Based on an analysis of facts submitted and the representations made, we conclude that the Court Order modifying the instrument based on scrivener's error is consistent with

applicable state law, as it would be applied by the highest court of the state. Accordingly, we rule as follows:

The power of appointment in Article NINTH of the Trust as modified by the Court Order to correct the scrivener's error so that it is only exercisable as necessary for the Taxpayer's health, education, support, and maintenance, will not be considered a general power of appointment under § 2514 or under § 2041. Taxpayer will not be treated as releasing a general power of appointment for purposes of § 2041 or § 2514, by reason of the Court Order. The Court Order will not subject Residual Trust corpus to inclusion in the gross estate of Taxpayer under § 2041(a)(2).

In accordance with the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

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.

This 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 yours,

George L. Masnik
Chief, Branch 4

Enclosure

Copy for section 6110 purposes