

## Internal Revenue Service

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Department of the Treasury  
Washington, DC 20224

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PLR-156791-04

Date:

September 30, 2005

## LEGEND

Husband	=
Wife	=
State	=
Date 1	=
Trust 1	=
Trust 2	=

Dear . :

This is in response to your authorized representative's letter of September 29, 2004, requesting estate and gift tax rulings regarding proposed amendments to trusts.

## FACTS

The facts presented and representations made are as follows: Husband and Wife are residents of State. On Date 1, Wife created Trust 1 and Husband created Trust 2. Trust 1 and Trust 2 are revocable living trusts. Husband and Wife propose to amend Trust 1 and Trust 2.

### Trust 1

Pursuant to the amended Trust 1, during Wife's lifetime the trustee shall pay to Wife such portion of the income from and principal of the trust as Wife may from time to time request. Further, during Wife's lifetime, the trustee may from time to time distribute to or for the benefit of Husband or Wife so much of the net income and sufficient principal which, together with income available from other sources known to the trustee, will maintain Husband and Wife as nearly as possible in their accustomed manner of living.

Upon Wife's death, the trustee shall distribute the assets of Trust 1, other than Wife's personal and household effects, to Husband outright. However, Husband shall

have the right to disclaim the assets and have them held by the trustee in a credit shelter trust for his benefit, pursuant to which Husband would be entitled to quarterly distributions of income and discretionary distributions of principal for Husband's health, education, maintenance, and support. If Husband does not survive Wife, the remaining assets of Trust 1 will be held in a single trust for the benefit of Husband's and Wife's children until the youngest child attains the age of 25 years.

In addition, Trust 1 provides that if Wife is living at the time of Husband's death, Husband shall have a testamentary general power of appointment equal to the amount of Husband's remaining applicable exclusion amount set forth in § 2010 of the Internal Revenue Code ("Code") minus the value of Husband's taxable estate (determined by excluding the amount of those assets subject to this power).

### Trust 2

Pursuant to the amended Trust 2, during Husband's lifetime the trustee shall pay to Husband such portion of the income from and principal of the trust as Husband may from time to time request. Further, during Husband's lifetime, the trustee may from time to time distribute to or for the benefit of Husband or Wife so much of the net income and sufficient principal which, together with income available from other sources known to the trustee, will maintain Husband and Wife as nearly as possible in their accustomed manner of living.

Upon Husband's death, the trustee shall distribute the trust assets, other than Husband's personal and household effects, to Wife outright. However, Wife shall have the right to disclaim the assets and have them held by the trustee in a credit shelter trust for her benefit, pursuant to which Wife would be entitled to quarterly distributions of income and discretionary distributions of principal for Wife's health, education, maintenance, and support. If Wife does not survive Husband, the remaining assets of Trust 2 will be held in a single trust for the benefit of Husband's and Wife's children until the youngest child attains the age of 25 years.

### Husband's Last Will and Testament

Husband proposes to execute a new last will and testament. In Article 4 of the will, Husband will exercise the testamentary general power of appointment granted to him under the terms of Trust 1 and appoint assets having a value equal to the amount of his remaining applicable exclusion amount minus the value of his taxable estate to the trustee of Trust 2.

Husband and Wife request the following rulings:

1. If Husband predeceases Wife, then by virtue of Husband's exercise of the general power of appointment granted to him under Trust 1, the value of the

trust assets of Trust 1 subject to the power of appointment will be included in Husband's gross estate.

2. If Husband predeceases Wife, then by virtue of Husband's exercise of the general power of appointment granted to him under Trust 1, that portion of the trust assets appointed by Husband will be treated as a gift by Wife that qualifies for the federal gift tax marital deduction.
3. Any assets that originated in Trust 1 and that pass to or from Trust 2 will not constitute a gift from Wife to the other beneficiaries of Trust 2.
4. Any assets that originated in Trust 1 and that pass to Trust 2 will not be included in Wife's gross estate upon her subsequent death.

## **LAW AND ANALYSIS**

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Under section 2036(a), the value of the gross estate includes the value of all property to the extent of any interest in the property that the decedent has transferred without receiving adequate and full consideration in money or money's worth, by trust or otherwise, retaining for life either (1) the possession or enjoyment of, or the right to income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2038(a) provides that the value of the gross estate includes the value of all property of which the decedent has at any time made a transfer (except where there has been a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property, or where the decedent relinquished this power within the three-year period ending on the date of the decedent's death.

Section 2041(a)(2) provides for the inclusion in the gross estate of any property over which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

Section 2041(b)(1) provides that the term "general power of appointment" means a power that is exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or the creditors of the decedent's estate, except that a power to

consume property for the benefit of the decedent that is limited by an ascertainable standard relating to health, education, support, or maintenance of the decedent is not deemed a general power of appointment.

Section 20.2041-1(b)(2) of the Estate Tax Regulations provides that the term power of appointment does not include powers reserved by the decedent to himself within the concepts of §§ 2036 to 2038.

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. 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 to himself or herself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

#### Rulings 1 and 2

Wife proposes to amend Trust 1. Under the terms of Trust 1, as amended, if Husband predeceases Wife, Husband will possess a testamentary general power of appointment over assets equal in value to Husband's remaining applicable exclusion amount less the value of Husband's taxable estate determined as if he did not possess this power. Accordingly, we conclude that, if Husband predeceases Wife, the value of Trust 1 assets over which Husband holds a testamentary general power of appointment will be included in Husband's gross estate.

Further, on the death of Husband during Wife's lifetime, if Husband exercises the testamentary general power of appointment conferred upon him under the terms of Trust 1, Wife is treated as relinquishing her dominion and control over the property subject to that power of appointment. Accordingly, on the death of Husband during Wife's lifetime, if Husband exercises the power of appointment granted to him under the terms of Trust 1, Wife will make a completed gift under § 2501. The gift will qualify for the federal gift tax marital deduction under § 2523.

Rulings 3 and 4

Husband intends to execute a last will and testament in which Husband will exercise to the fullest extent possible the testamentary general power of appointment granted to him under Trust 1. Under the terms of Husband's will, Husband's residuary estate will be added to Trust 2.

If Husband predeceases Wife and Husband exercises his testamentary general power of appointment to the fullest extent possible, Wife will be treated as making a completed gift to Husband of the appointed assets and Husband will be treated as the owner of those assets. The assets of Trust 1 appointed by Husband will ultimately pass to Trust 2 pursuant to the terms of Husband's will. Accordingly, we conclude that any assets that originated in Trust 1 and that are distributed to or from Trust 2 will not constitute gifts from Wife to the other beneficiaries of Trust 2.

As noted above, upon Husband's exercise of the testamentary general power of appointment, Wife will have made a completed gift to Husband. The appointed assets will pass to Trust 2 pursuant to Husband's will. Once the appointed assets are distributed to Trust 2, they will be commingled with the other assets of Trust 2. If Wife disclaims some or all of the assets of Trust 2, the disclaimed assets will be held in a credit shelter trust for Wife's benefit. Accordingly, we conclude that in the event Wife disclaims some or all of the assets of Trust 2, the disclaimed assets that originated in Trust 1 and that pass to Trust 2 by virtue of Husband's exercise of the testamentary general power of appointment will not be included in Wife's gross estate.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) 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,

Melissa C. Liquerman

Melissa C. Liquerman  
Branch Chief, Branch 9  
(Passthroughs & Special Industries)

Enclosures

Copy for 6110 purposes

cc: