

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B09-PLR-116405-01

Date:

November 7, 2001

In Re:

LEGEND:

Decedent =

Trust =

Date 1 =

Date 2 =

First Amendment =

Second Amendment =

Third Amendment =

Date 3 =

Spouse =

Brother =

Foundation 1 =

Foundation 2 =

PLR-116405-01

Family Fund =

Foundation 3 =

Dear :

This is in response to your letter dated March 12, 2001, requesting a ruling that the Colorado estate tax apportionment statute will apply to apportion taxes among the non-marital and non-charitable beneficiaries of Decedent's will and Trust, as amended. This letter responds to your request.

The information submitted and representations made are summarized as follows. On Date 1, Decedent executed Trust, a revocable trust. On Date 2, Decedent executed a will and also amended Trust in its entirety by First Amendment. Decedent subsequently amended Trust, in part, by Second Amendment and Third Amendment, respectively. Decedent died on Date 3, survived by Spouse and her two children.

Article 1-3 of Decedent's will provides for the disposition of tangible personal property. Article 1-3.1 provides that Decedent directs the personal representative to follow the terms of a written memorandum, if any, that Decedent may leave at her death concerning the disposition of certain items of her tangible personal property. Article 1-3.2 provides that Decedent gives all her tangible personal property that has not passed to Spouse as joint tenant by right of survivorship and that is not disposed of under Article 1-3.1 to Spouse if he survives Decedent. Article 1-3.3 provides that if Spouse does not survive Decedent and any child of Decedent's survives her, the personal representative shall first segregate and dispose of all items of Decedent's tangible personal property not disposed of under 1-3.1 that it determines after consulting with Decedent's children to be of no present or future use or value to them, by gift to any charity or person, by abandonment, destruction or sale. The proceeds of any sale shall be added to Decedent's residuary estate. Decedent gives all the rest of such tangible personal property to her children who survive her, in equal shares as they shall decide, or as her personal representative shall determine, if they do not agree. Article 1-3.4 provides that any of Decedent's tangible personal property not disposed of under this Article shall be disposed of as part of Decedent's residuary estate.

Article 1-4 of Decedent's will provides, in part, that Decedent gives her residuary estate to the then acting trustee of the Trust created by Decedent by trust agreement dated Date 1, as amended by the First Amendment, to be added to the principal of that trust and to be held, administered and distributed under such agreement as amended prior to Decedent's death. If such trust is not in existence at Decedent's death, Decedent gives her residuary estate to the trustees named in such trust, to be held, administered and distributed pursuant to the provisions thereof as amended prior to Decedent's death, as if such trust were in effect.

PLR-116405-01

Article 2-1.5 of Decedent's will provides that the term "residuary estate" means all of Decedent's estate of whatever nature and wherever situated in which Decedent may have an interest that is not otherwise effectively disposed of other than by the Article entitled RESIDUARY ESTATE.

Article 2-4.2 of Decedent's will provides, in pertinent part, that the personal representative shall pay from Decedent's residuary estate or direct the trustee of the trust described in the Article entitled RESIDUARY ESTATE, to pay all debts that are due and enforceable against Decedent's estate, the expenses of Decedent's last illness and funeral, the expenses of administering such trust and Decedent's probate estate, if any, and all death taxes and other governmental charges imposed and made payable under the laws of the United States or of any state or country by reason of Decedent's death.

Article 1-3 of the Trust, as amended by the First Amendment, provides, in pertinent part, that while Decedent is living, the net income, if any, and the principal shall be disposed of as Decedent may direct the trustee, other than Decedent, from time to time by writings signed by Decedent and delivered to the trustee. If Decedent is incapacitated, the trustee may, while such incapacity continues, apply such amount or amounts of the net income or principal toward the health, support and maintenance of Decedent and Spouse as the trustee may determine without regard to the recipient's other means.

Article 1-5.1 of the Trust, as amended by the First Amendment, provides for specific distributions at Decedent's death. Article 1-5.1[1] provides that Decedent directs the trustee to follow the terms of a written memorandum, if any, that Decedent may leave at her death concerning the disposition of certain items of her tangible personal property. Article 1-5.1[2] provides that Decedent gives all her tangible personal property that has not passed to Spouse as joint tenant by right of survivorship and that is not otherwise disposed of under Article 1-3.1[1] to Spouse if he survives Decedent. Article 1-5.1[3] provides that if Spouse does not survive Decedent and any child of hers survives her, the trustee shall first segregate and dispose of all items of Decedent's tangible personal property not disposed of under Article 1-3.1[1] that it determines after consulting with Decedent's children to be of no present or future use or value to them, by gift to any charity or person, by abandonment, destruction or sale. The proceeds of any sale shall be added to the residuary trust estate. Decedent gives all the rest of such tangible personal property to her children who survive her, in equal shares as they shall decide, or as the trustee shall determine, if they do not agree. Article 1-5.1[4] provides that any of Decedent's tangible personal property not disposed of under this Article shall be disposed of as part of the residuary trust estate.

Article 1-5.2 of the Trust, as amended by the First Amendment, provides that Decedent gives the sum of Ten Thousand Dollars (\$10,000.00) to each child of Brother who survives Decedent.

PLR-116405-01

Article 1-5.3 of the Trust, as amended by the First Amendment, provides that Decedent gives the sum of One Hundred Thousand Dollars (\$100,000.00) for endowment to each of Foundation 1 and Foundation 2.

Article 1-6 of the Trust, as amended by the Third Amendment, provides that if Decedent is survived by any of her descendants, the trustee shall distribute the assets subject to distribution under this Article as follows: one-half ($\frac{1}{2}$) of the residuary trust estate shall be distributed to Decedent's descendants living at Decedent's death, by representation, provided that each share for a grandchild of Decedent shall be held in a separate trust for the benefit of such grandchild under the provisions of Article 1-7, the provisions of which shall apply to each such separate trust; and one-half ($\frac{1}{2}$) of the residuary trust estate shall be distributed to the Family Fund of Foundation 3, to be used for such unrestricted charitable purposes as its governing board shall determine.

Article 1-10 of the Trust, as amended by the Third Amendment, provides that if the foregoing provisions fail to effect a complete distribution of any portion of the residuary trust estate or of any trust estate created by this trust agreement, such portion shall be distributed to the Family Fund of Foundation 3, to be used for such unrestricted charitable purposes as its governing board shall determine.

Article 3-5 of the Trust, as amended by the First Amendment, provides, in part, that the trustee shall follow any direction of the personal representative of Decedent's estate regarding payment of any and all debts that are due and enforceable against Decedent's estate, the expenses of Decedent's last illness and funeral, the expenses of administering Decedent's estate, and any and all death taxes and other governmental charges (including penalties and interest thereon, if any) imposed and made payable under the laws of the United States or of any state or country by reason of Decedent's death. If such personal representative fails to furnish any such directions or if no such personal representative is appointed, then the trustee may, in its discretion, pay in whole or in part all debts that are due and enforceable against Decedent's probate estate, the expenses of Decedent's last illness and funeral, the expenses of administering Decedent's estate, and the trustee may also pay from the share of the residuary trust estate all death taxes and other governmental charges (including penalties and interest thereon, if any) imposed and made payable under the laws of the United States or of any state or country by reason of Decedent's death.

RULING REQUESTED:

The Colorado estate tax apportionment statute will apply to apportion estate taxes among the non-marital and non-charitable beneficiaries of Decedent's will and Trust.

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 2055(a) provides, generally, that for purposes of the estate tax, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers to or for the use of a charitable organization. Under § 2055(c), the amount otherwise allowable as a deduction under § 2055(a) shall be reduced by the amount of any estate, succession, legacy, or inheritance taxes which are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible under § 2055.

Section 2056(a) provides that for purposes of the estate tax, the value of the taxable estate shall be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to his or her surviving spouse, but only to the extent that such interest is included in determining the value of the gross estate.

Section 2205 provides that if the tax or any part thereof is paid by, or collected out of, that part of the estate passing to or in the possession of any person other than the executor in his capacity as such, such person shall be entitled to reimbursement out of any part of the estate still undistributed or by a just and equitable contribution by the persons whose interest in the estate of the decedent would have been reduced if the tax had been paid before the distribution of the estate or whose interest is subject to equal or prior liability for the payment of taxes, debts, or other charges against the estate, it being the purpose and intent of this chapter that so far as is practicable and unless otherwise directed by the will of the decedent the tax shall be paid out of the estate before its distribution.

In Riggs v. Del Drago, 317 U.S. 95 (1942), the Supreme Court held that applicable state law as to the devolution of property at death should govern the ultimate impact of the federal tax on the respective beneficiaries. With respect to estate tax apportionment, the Colorado apportionment statute is applicable unless the testator expresses a clear and unambiguous intent that legacies and devises be transferred without deduction for taxes. In re Estate of Kelly, 584 P.2d 640 (Colo. App. 1978).

The Colorado estate tax apportionment statute provides, in part, as follows:

Unless otherwise provided in the will or other dispositive instrument, the tax shall be apportioned among all persons interested in the estate, subject to the exceptions specified in this section. The apportionment is to be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. . . . [I]f the decedent's will or other dispositive instrument directs a method of apportionment of tax different from the method described in this code, the method described in the will or other dispositive instrument controls. . . .

PLR-116405-01

. . . .

In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate, and for any deductions and credits allowed by the law imposing the tax.

Any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift inures to the benefit of the person bearing such relationship or receiving the gift. . . .

. . . .

To the extent that property passing to or in trust for a surviving spouse or any charitable, public, or similar gift or devise is not an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property is not included in the computation provided for in subsection (2) of this section, and to that extent no apportionment is made against the property.

Colo. Rev. Stat. § 15-12-916(2), (5)(a)-(b), (e) (1999).

In accordance with Colorado law, we must first look to Decedent's intent to determine whether the statutory apportionment rule will apply to Decedent's estate. Article 2-4.2 of Decedent's will provides, in part, as follows:

My personal representative shall pay from my residuary estate or direct the trustee of the trust described in the Article entitled RESIDUARY ESTATE, to pay . . . all death taxes and other governmental charges imposed and made payable under the laws of the United States or of any state or country by reason of my death.

Article 3-5 of the Trust, as amended by the First Amendment, provides, in part, as follows:

The trustee shall follow any direction of the personal representative of the settlor's estate regarding payment of . . . any and all death taxes and other governmental charges (including penalties and interest thereon, if any) imposed and made payable under the laws of the United States or of any state or country by reason of the settlor's death. If such personal representative fails to furnish any such directions or if no such personal representative is appointed, then the trustee may, in its discretion, pay in whole or in part all debts that are due and enforceable against the settlor's probate estate, the expenses of the settlor's last illness and funeral, the

PLR-116405-01

expenses of administering the settlor's estate, and the trustee may also pay from the share of the residuary trust estate all death taxes and other governmental charges (including penalties and interest thereon, if any) imposed and made payable under the laws of the United States or of any state or country by reason of the settlor's death.

Under Colorado law, the testator must make a clear, unambiguous manifestation of his intent to avoid apportionment. In re Estate of Kelly, 584 P.2d 640 (Colo. Ct. App. 1978). An intent to shift the burden of the tax will not be inferred from vague and uncertain language, and ambiguous language will be interpreted in favor of apportionment. Id. at 641. In In re Estate of Kelly, the decedent's will included several specific bequests to his grandchildren of stated amounts of money and contained the following provision with respect to the payment of taxes: "I direct that my funeral charges, expenses of administering my estate and all my just debts, including inheritance and succession taxes, be paid out of my personal property; and, if that be insufficient, I authorize my executor, hereinafter named, to sell so much of my real property as may be necessary for that purpose." Id. The Court of Appeals of Colorado affirmed the state district court decision ordering the apportionment of estate taxes pursuant to the Colorado apportionment statute. The court held that the decedent's will lacked clear, unambiguous language designating a method for payment of taxes and also held that the testator's bequest of a stated sum of money to a legatee does not constitute a direction against apportionment.

In the instant case, the Decedent's intent regarding the apportionment of estate taxes is unclear. Article 2-4.2 of the will and Article 3-5 of the Trust fail to specify which residuary beneficiaries or assets shall bear the burden of payment of estate taxes generated by the residuary bequests, and thus, do not provide an unambiguous direction against statutory apportionment of death taxes generated by the residuary bequests. In the absence of a clear direction in the will or other dispositive instrument against apportionment of estate taxes, the mandate of the statute must be followed.

We conclude, based on the facts presented and representations made, that the Colorado estate tax apportionment statute noted above is applicable with respect to the estate tax generated by the residuary bequests. Any estate tax generated by the residuary bequests must be apportioned among all property passing to residuary beneficiaries that is not otherwise deductible and thus does not generate any tax.

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. 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. 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.

PLR-116405-01

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. In addition, we express or imply no opinion with respect to whether the transfers qualify for the estate tax charitable and marital deductions under §§ 2055 and 2056.

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. A copy of this letter should be attached to the federal estate tax return of the decedent. A copy is enclosed for that purpose.

Pursuant to the Power of Attorney on file with this office, a copy of this letter is being sent to Taxpayer.

Sincerely yours,
Melissa Liquerman
Branch Chief, Branch 9
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure:

Copy for section 6110 purposes