

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:9-PLR-129082-00

Date:

March 30, 2001

In Re:

Legend:

Decedent =

Spouse =

Children =

Grandchild A =

Grandchild B =

Grandchild C =

X =

Y =

Foundation =

Revocable
Trust =

Agreement =

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Marital Trust, =
 Part One

Marital Trust, =
 Part Two

 Date =

 Court =

Dear :

This is in response to your letter, dated November 28, 2000, in which you requested rulings that proposed disclaimers of the benefit conferred by the waiver in Decedent's will of the right of recovery under section 2207A of the Internal Revenue Code will constitute qualified disclaimers under section 2518, and that the value of any increase in the interest in property passing to Foundation as a result of the proposed disclaimers will qualify for a charitable deduction under section 2055(a).

The facts as represented are as follows. Decedent died on Date, predeceased by Spouse. Decedent and Spouse are survived by Children and Grandchild A, B and C (collectively, "Grandchildren"). Outside of minimal individual legacies, Article Fifth of Spouse's will directed that the residue of Spouse's estate be distributed to Revocable Trust in accordance with the provisions of Agreement. Pursuant to Article Second of Agreement, Revocable Trust was divided at Spouse's death into Marital Trust, Part One, and Marital Trust, Part Two (collectively, the "Marital Trusts"). Marital Trust, Part One, consisted of assets, the value of which equaled the amount of Spouse's generation-skipping transfer tax ("GSTT") exemption under section 2631. Marital Trust, Part Two, consisted of the remainder of the assets in Spouse's residuary estate. Pursuant to Article Second, Paragraph (A), of Agreement, Decedent received an income interest for life in the Marital Trusts.

On Spouse's federal estate tax return the executors: (1) claimed a marital deduction equal to the amount of the value of the Marital Trusts and made a qualified terminable interest property ("QTIP") election under section 2056(b)(7); the value of the Marital Trusts, accordingly, are included in the gross estate of Decedent pursuant to section 2044; (2) allocated Spouse's GSTT exemption to Marital Trust, Part One, and (3) made a section 2652(a)(3) "reverse QTIP" election to treat Spouse, for GSTT purposes only, as the transferor of Marital Trust, Part One.

Pursuant to Article Third, Paragraph (B)(1)(a), of Agreement, at Decedent's death Marital Trust, Part One, was divided into separate trusts, containing equal shares,

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for each of the Grandchildren (collectively, the "Grandchild Trusts"). Each Grandchild and that Grandchild's issue are to receive so much, none, or all of the income and principal of the relevant Grandchild Trust as the trustee deems advisable for welfare, comfort, and support. The trustee of each Grandchild Trust is the Child who is the parent of such Grandchild. Article Third, Paragraph (B)(1)(b), of Agreement provides that upon the death of Children, the Grandchild Trusts are to be transferred to one or more of Spouse's descendants and qualified tax-exempt charitable organizations, as Children may appoint by will. Absent such appointment, each Grandchild Trust is to continue for the benefit of the relevant Grandchild and that Grandchild's issue. Article Third, Paragraph (B)(1)(c), of Agreement provides that, at the death of a Grandchild, the relevant Grandchild Trust terminates and shares from the trust are to be transferred to one or more of Spouse's descendants and qualified tax-exempt charitable organizations, as that Grandchild may appoint by will. Absent such appointment by that Grandchild, the principal of the relevant Grandchild Trust is to be transferred to separate and equal trusts for the benefit of each of such Grandchild's living children and deceased children with issue then living.

Pursuant to Article Third, Paragraph (B)(2)(a), of Agreement, at Decedent's death Marital Trust, Part Two, was divided into separate trusts, containing equal shares, for each of the Children (collectively, the "Child Trusts"). Each Child is to receive the income from the relevant Child Trust for life and such principal as the trustees deem advisable for the welfare, comfort, and support of the Child and the Child's family. Children are the co-trustees of each Child Trust. Article Third, Paragraph (B)(2)(b), of Agreement provides that, upon the death of one of the Children, the assets of the relevant Child Trust are to be transferred to, or for the benefit of, that Child's issue and qualified tax-exempt charitable organizations, as such Child may appoint by will. Absent such appointment, the principal of each Child Trust is to be divided per stirpes into separate trusts for the issue of the relevant Child and, if such Child has no surviving issue, the principal is to be added in equal parts to the trust of the other Child, living or deceased. Article Third, Paragraph (C)(1), of Agreement provides that the Child and Grandchild trusts shall terminate in any event at the expiration of 21 years after the death of the last to die of Children.

After specific legacies to Children and Grandchildren, Decedent left the residue of his estate to Foundation, established by Decedent and Spouse. It is represented that Foundation is a private organization within the meaning of section 509(a), exempt from federal income tax under section 501(a) as an organization described in section 501(c)(3).

Article Second, Paragraph (A)(2) of Agreement provides that any death taxes resulting from the inclusion of the Marital Trusts in the gross estate of Decedent shall be paid first from the principal of Marital Trust, Part Two and, to the extent such principal is insufficient, shall be paid from the principal of Marital Trust, Part One. Article Eighth of Decedent's will provides that the estate, inheritance and other taxes

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payable with respect to the property constituting Decedent's gross estate, whether or not such property passes under Decedent's will, shall be paid from the principal of the residuary estate prior to any distribution to Foundation. Article Eighth further provides (the "Tax Clause") that Decedent "specifically waive[s] the right of my estate to be reimbursed for taxes pursuant to Section 2207A(a) of the Code."

Children are the co-trustees of the Marital Trusts, the executors of Spouse's and Decedent's estates and, together with X and Grandchild A, the co-trustees of Foundation. Children, individually and in their fiduciary capacities as trustees of the Marital Trusts and executors of Spouse's estate, and Grandchildren propose to execute an irrevocable, written "Disclaimer and Renunciation" of their interests in the benefit conferred by waiver of the section 2207A right of recovery under the Tax Clause in Decedent's will and to file that document with Court. The "Disclaimer and Renunciation" provides that Children, as co-trustees of the Marital Trusts, rather than Foundation, will pay the estate tax attributable to inclusion of the Marital Trusts in Decedent's gross estate. It is represented that Children and Grandchildren have accepted no benefit from, and will receive no interest in, the disclaimed amounts. To that end, it is represented that the Foundation trustees will appoint Y and Grandchild C as additional trustees and amend the trust document governing Foundation as follows:

(1) to provide that any funds received by Foundation as the result of disclaimers by any trustee (a "Disclaiming Trustee") shall be segregated in a separate account (the "Disclaimed Property Fund");

(2) to provide that the authority to make disbursements from the Disclaimed Property Fund shall be vested solely in those trustees who are not Disclaiming Trustees and who have not been appointed by a vote of any Disclaiming Trustee following the disclaimers (the "Independent Trustees");

(3) to provide that: (i) the Independent Trustees shall have sole authority regarding the distribution of the Disclaimed Property Fund and to appoint their own successors; (ii) there must be at least one Independent Trustee at all times while the Disclaimed Property Fund is in existence, and; (iii) in the event of the death, resignation, renunciation, or inability to serve on the part of the last remaining Independent Trustee who has not appointed a successor to fill his or her vacancy, the appropriate court shall appoint the successor Independent Trustee;

(4) to provide that the Disclaiming Trustees shall have no vote regarding any disbursement of the Disclaimed Property Fund and no right to appoint or discharge the Independent Trustees; and

(5) to provide that the above amendments cannot be repealed or

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amended in any manner that would allow a Disclaiming Trustee to possess, directly or indirectly, any voting or disbursement rights over the Disclaimed Property Fund, or that would enable a Disclaiming Trustee to designate Independent Trustees.

It is further represented that Children and Grandchildren will file with Court a "Petition for Confirmation of Estate Tax Allocation" requesting confirmation that, by virtue of the "Disclaimer and Renunciation," the amount of estate tax attributable to inclusion of the Marital Trusts in Decedent's gross estate will pass with the residue of Decedent's estate to Foundation.

The following rulings have been requested:

1. The proposed disclaimers of the benefit conferred by the waiver of the section 2207A right of recovery under the Tax Clause of Decedent's will constitute qualified disclaimers under section 2518.
2. The value of the increase in the interest in property passing to Foundation as a result of the proposed disclaimers will qualify for the charitable deduction under section 2055(a).

Ruling Request #1

Section 2207A(a)(1) provides, in general, that if any part of the gross estate consists of property the value of which is includible in the gross estate by reason of section 2044 (relating to certain property for which marital deduction was previously allowed), the decedent's estate shall be entitled to recover from the person receiving the property the amount by which –

(A) the total tax under this chapter which has been paid, exceeds

(B) the total tax under this chapter which would have been payable if the value of such property had not been included in the gross estate.

Section 20.2207A-1(a)(1) of the Estate Tax Regulations provides, in pertinent part, that the right of recovery arises when the Federal estate tax with respect to the property includible in the gross estate by reason of section 2044 is paid by the estate.

Section 20.2207A-1(d) provides, in pertinent part, that if the property is in a trust at the time of the decedent's death, the *person receiving the property* is the trustee and any person who has received a distribution of the property prior to the expiration of the right of recovery if the property does not remain in trust.

Section 2207A(a)(2) provides that section 2207A(a)(1) shall not apply with

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respect to any property to the extent that the decedent in his will (or a revocable trust) specifically indicates an intent to waive any right of recovery under this subchapter with respect to such property.

Section 2046 provides that the provisions of section 2518 relating to the effect of disclaimers are applicable for purposes of the estate tax.

Section 2518(a) provides that if a person makes a qualified disclaimer with respect to any interest in property, this subtitle shall apply with respect to such interest as if the interest had never been transferred to such person.

Section 2518(b) provides, in pertinent part, that for purposes of subsection (a), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property but only if –

(1) such refusal is in writing,

(2) such writing is received by the transferor of the interest, his legal representative, or the holder of the legal title to the property to which the interest relates not later than the date which is 9 months after the later of (A) the date on which the transfer creating the interest in such person is made, or (B) the day on which such person attains age 21,

(3) such person has not accepted the interest or any of its benefits, and

(4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either (A) to the spouse of the decedent, or (B) to a person other than the person making the disclaimer.

Section 25.2518-1(b) provides, in pertinent part, that if a person makes a qualified disclaimer as described in section 2518(b) and section 25.2518-2, for purposes of the Federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the property as a result of the disclaimer. Accordingly, a person making a qualified disclaimer is not treated as making a gift.

Section 25.2518-2(d)(1) provides, in pertinent part, that a qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. A disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent.

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Section 25.2518-2(d)(2) provides that if a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits. A fiduciary's disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercised or retains a discretionary power to allocate enjoyment of that interest among members of a designated class.

We must address whether the benefit conferred by a waiver of the section 2207A right of recovery of estate tax attributable to the inclusion of QTIP property in a gross estate is an interest in property. The nature of legal rights and interests in property is a matter of state law. It is federal law, however, that determines the manner in which the rights or interests so created shall be taxed. *Morgan v. Commissioner*, 309 U.S. 78, 80 (1940); *Estate of Boyd v. Commissioner*, 819 F.2d 170, 172 (7th Cir. 1987).

The Pennsylvania disclaimer provisions state that "any interest in, to, or over real or personal property held or owned outright, or in trust, or in any other manner which is reserved or given to any person by deed, will, or otherwise" may be disclaimed. 20 Pa. Cons. Stat. § 6103 (2000); *see also* 20 Pa. Cons. Stat. § 6203 (2000). One purpose of the disclaimer provisions "is to liberalize the property law requirements for disclaimer[s] so that legitimate attempts to avoid taxes on unwanted gifts will not be frustrated by property law provisions that are stricter than those required for tax purposes." 20 Pa. Cons. Stat. §§ 6103 et seq., Official Comment (1976). Thus, Pennsylvania statutory provisions do not specifically address the question whether the benefit conferred by a decedent's waiver of the section 2207A right of recovery is an interest in property. Pursuant to *Commissioner v. Bosch*, 387 U.S. 456 (1957), therefore, we must determine what the law of the state is likely to be. If there is no pertinent decision by the highest court of the state, we apply what we determine to be state law after giving "proper regard" to relevant rulings of the Pennsylvania courts. *Id.* at 465.

Although the Pennsylvania Supreme Court also has not ruled specifically on the issue of this ruling request, it recognizes that a legatee receiving a bequest free of state inheritance tax receives an economic benefit. *See, e.g., Neamand Estate*, 318 A.2d 730, 735 (1974). That court also equates in some instances the receipt of a tax-free bequest to a debt in the amount of the tax on the bequest. *Morell Estate*, 318 A.2d 727, 729 (1974). The Court of Appeals for the Seventh Circuit has addressed an analogous question dealing with Wisconsin state law and a disclaimer of a waiver of the benefit conferred by the section 2206 right to recover the estate tax attributable to inclusion of life insurance proceeds in a gross estate. That court determined in *Estate of Boyd v. Commissioner* that the waiver of a section 2206 right of recovery confers an economic benefit because it is an additional bequest or is analogous to the forgiveness of a debt, and concluded that this benefit constitutes a property interest that may be disclaimed under section 2518. *Supra*, 819 F.2d at 173; *but see Loeb Estate*, 162 A.2d 207, 211 (1960) (recognizing the economic benefit conferred by a "tax-free" clause but,

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for purposes of the state inheritance tax, concluding that the benefit is not an additional bequest).

Our examination of Pennsylvania statutes and their legislative history, together with relevant Pennsylvania case law, leads us to conclude that the Pennsylvania Supreme Court would, if presented with the issue, hold that the benefit conferred by Decedent's waiver of the section 2207A right of recovery is an interest in property. We further conclude that, assuming that the requirements of section 2518(b) and the regulations thereunder will be satisfied as has been represented, the proposed disclaimers will constitute qualified disclaimers within the meaning of section 2518.

Ruling Request # 2.

Section 2055(a) provides, in pertinent part, that for purposes of the tax imposed by section 2001, 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 --

(3) to a trustee or trustees . . . but only if such contributions or gifts are to be used by such trustee or trustees . . . exclusively for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals, such trust . . . would not be disqualified for tax exemption under section 501(c)(3) by reason of attempting to influence legislation, and such trustee or trustees . . . does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office.

Section 20.2055-2(c)(1) of the Estate Tax Regulations provides, in pertinent part, that in the case of a bequest, devise, or transfer made by a decedent dying after December 31, 1976, the amount of a bequest, devise or transfer for which a deduction is allowable under section 2055 includes an interest which falls into the bequest, devise or transfer as the result of a qualified disclaimer.

Pennsylvania law provides, in pertinent part, that a disclaimer shall be binding upon the disclaimant and all persons claiming through or under him, and that the disclaimer shall, for purposes of determining the rights of other parties, be equivalent to the disclaimant's having died before the decedent. 20 Pa. Cons. Stat. § 6205(A), (B) (2000). Children and Grandchildren are filing a petition requesting a determination by Court that the proposed disclaimers, when executed, will have the effect of increasing the interest received by Foundation. As stated above, it is represented that Children, as co-trustees of the Marital Trusts, rather than Foundation, will pay the estate tax attributable to inclusion of the Marital Trusts in Decedent's gross estate. If the corresponding proposed disclaimers of the benefit conferred by Decedent's waiver of

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the section 2207A right to recover such estate tax from the Marital Trusts have the effect under Pennsylvania law of entirely removing such interests from the Marital Trusts and passing the interests thereby to Foundation, the resulting increase in the interest received by Foundation will qualify for a charitable deduction under section 2055(a). See Treas. Reg. § 20.2055-2(c)(1).

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.

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.

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, copies of this letter are being sent to the taxpayer and to the taxpayer's second authorized representative.

Sincerely,
Lorraine E. Gardner
Assistant Branch Chief, Branch 9
(Passthroughs and Special Industries)

Enclosure (1)
Copy for Section 6110 purposes
cc: