

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact:

, ID No.

Telephone Number:

Refer Reply To:

CC:PSI:4 – PLR-163775-03

Date: JULY 07, 2004

Re:

Legend:

Decedent

Spouse

Son

Trust

Date 1

Date 2

Date 3

Date 4

Property

Cite 1

Cite 2

Cite 3

Cite 4

State X

Dear :

This is in response to your letter dated June 15, 2004, and prior correspondence, requesting a ruling that Spouse's disclaimer, executed on Date 4, was a qualified disclaimer under section 2518 of the Internal Revenue Code.

On Date 1, Decedent and Spouse, residents of State X, a community property state, established a revocable family trust, Trust. One of the assets transferred to Trust was Decedent's and Spouse's interest in Property, an asset held by them as community property. Trust, as finally amended on Date 2, provided that during the joint lives of Decedent and Spouse, the trustees are to pay to or apply for their benefit all the net income of the trust. The trustees have authority to invade corpus for the care, maintenance, or support of Decedent and Spouse. Under § 3.01 of the Trust agreement, upon the death of the first to die of Decedent or Spouse, the trustee is

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required to distribute the entire trust estate to Trust A for the benefit of the survivor of Decedent or Spouse. Under § 3.04, the survivor is to receive all trust income, and in addition, such amounts of principal as the survivor may request. However, in the event that the survivor of Decedent or Spouse disclaims any interest under section 2518 of the Internal Revenue Code, then the disclaimed property interest passes to Trust B.

Under § 3.05(A), the trustees of Trust B are to pay to or apply for the benefit of the survivor of Decedent or Spouse all the trust income. Under § 3.05(B), the trustees have the discretion to distribute corpus for the proper care, maintenance, support and education of the survivor and any child or grandchild of the survivor. Further, under § 3.05(C), the survivor of Decedent or Spouse has a lifetime and a testamentary special power to appoint the trust corpus to or for the benefit of any one or more of a group consisting of Decedent and Spouse's descendants, the spouse's of those descendants and other more remote family members.

Finally, under § 1.08, the survivor of Decedent and Spouse may alter, amend, modify or revoke any provision of Trust. Upon the death of the survivor of Decedent or Spouse, the Trust B corpus not otherwise disposed of is to be distributed outright to named beneficiaries.

The initial trustees of Trust were Decedent and Spouse. Under § 5.07 of Trust, Son was designated a successor co-trustee upon the death or incapacity of either Decedent or Spouse. Decedent died on Date 3. Approximately two month later, Spouse executed an amendment to the Trust and appointed Son as co-trustee. On Date 4, within 9 months of Date 3, Spouse executed and delivered a written disclaimer of Decedent's one-half community interest in Property. Spouse also disclaimed the lifetime power to appoint the disclaimed interest under § 3.05(c) of the Trust instrument. Lastly, Spouse disclaimed any power to alter, amend, modify or revoke the provisions of Trust B under § 1.08 of the Trust, and also any power to direct the disposition of the disclaimer interest upon her death under § 3.05(a).

Section 2518(a) provides that if a person makes a qualified disclaimer with respect to any interest in property, then for purposes of the federal estate, gift and generation-skipping transfer tax, such interest will be treated as if it had never been transferred to the disclaimant. Section 2518(b) defines the term "qualified disclaimer" to mean 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, the transferor's legal representative, or the holder of the legal title to the property to which the interest relates

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not later than the date that is 9 months after the later of the date on which the transfer creating the interest in such person is made, or the day that the 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 to the spouse of the decedent, or to a person other than the person making the disclaimer.

Section 25.2518-1(b) of the Gift Tax Regulations provides, in part, that if a person makes a qualified disclaimer, then 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 that a qualified disclaimer cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of the benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act that is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting dividends, interest, or rents from the property; and directing others to act with respect to the property or interest in the property. However, merely taking delivery of an interest or title, without more, does not constitute acceptance. Moreover, 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 the decedent.

Section 25.2518-2(d)(1) provides 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 the acceptance of such property or any of its benefits.

Section 25.2518-2(e)(1) provides that a disclaimer is not a qualified disclaimer unless the disclaimed interest passes without direction on the part of the disclaimant to a person other than the disclaimant (except if the disclaimant is the decedent's surviving spouse). If there is an express or implied agreement that the disclaimed interest in property is to be given or bequeathed to a person specified by the disclaimant, the disclaimant is to be treated as directing the transfer of the property interest. A disclaimer is not a qualified disclaimer if the disclaimant, either alone or in conjunction with another, directs the redistribution or transfer of the property or interest in property to another person (or has the power to direct the redistribution or transfer of the property

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or interest in property to another person unless such power is limited by an ascertainable standard); or the disclaimed property passes to or for the benefit of the disclaimant as a result of the disclaimer (except in the case of a disclaimer by the surviving spouse).

Section 25.2518-2(e)(2) provides that in the case of a disclaimer made by a decedent's surviving spouse with respect to property transferred by the decedent, the disclaimer satisfies the requirements of § 2518(b)(4) and § 25.2518-2(e) if the interest passes as a result of the disclaimer without direction on the part of the surviving spouse either to the surviving spouse or to another person. If the surviving spouse, however, retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to Federal estate and gift tax (whether as trustee or otherwise), such spouse will be treated as directing the beneficial enjoyment of the disclaimed property, unless such power is limited by an ascertainable standard.

Section 25.2518-2(e)(5), Example 5, describes a situation where B's will established both a marital trust and a nonmarital trust. B's surviving spouse, A, is an income beneficiary of the marital trust and has a testamentary general power of appointment over trust assets. A also has an income interest in the nonmarital trust and possesses a testamentary nongeneral power to appoint among designated beneficiaries. The will provides that any portion of the marital trust disclaimed is to pass to the nonmarital trust. A disclaimed 30 percent of the marital trust. The example concludes that the requirements of section 2518(b)(4) are not satisfied unless A also disclaims the nongeneral power to appoint the portion of the trust corpus that is attributable to the property that passed to the nonmarital trust as a result of A's disclaimer.

Section 25.2518-3(a)(1)(i) provides that if the requirements of the section are met, the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer, even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest.

Section 25.2518-3(a)(1)(iii) provides that a power of appointment with respect to property is treated as a separate interest in such property and such power of appointment with respect to all or any undivided portion of such property may be disclaimed independently from any other interest separately created by the transferor in the property if the requirements of § 2518(b) are met. Further, a disclaimer of a power of appointment with respect to property is a qualified disclaimer only if any right to direct the beneficial enjoyment of the property which is retained by the disclaimant is limited by an ascertainable standard.

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Section 25.2518-3(a)(2) provides that the disclaimer of both an income interest and a remainder interest in specific trust assets is not a qualified disclaimer if the beneficiary retains interests in other trust property unless, as a result of the disclaimer, such assets are removed from the trust and pass without any direction on the part of the disclaimant, to persons other than the disclaimant or to the spouse of the decedent.

Under section 25.2518-3(b), a disclaimer of an undivided portion of a separate interest in property which meets the other requirements of a qualified disclaimer under section 2518(b) is a qualified disclaimer. An undivided portion of a disclaimant's separate interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant's interest in such property.

Under applicable State X law, a beneficiary may disclaim any interest, in whole or in part, by filing a disclaimer as provided in the statute. Cite 1. Generally, in the case of an interest created by a living trust, the disclaimer is timely if made within nine months after the interest becomes indefeasibly vested. Cite 2. Unless the creator of the interest provides for a specific disposition of the interest in the event of a disclaimer, the interest disclaimed passes as if the disclaimant had predeceased the creator of the interest. Cite 3. Finally, under the statute if, as a result of a disclaimer the disclaimed interest is treated pursuant to the provisions of Title 26 of the United States Code, and the regulations promulgated thereunder, as never having been transferred to the beneficiary, then the disclaimer is effective as a disclaimer under the State X statute. Cite 4.

In the instant case, it is represented that, within 9 months of Decedent's death, Spouse disclaimed Decedent's undivided community one-half interest in Property that passed to Trust A subject to Spouse's power to alter, amend or revoke Trust. As a result of the disclaimer, the disclaimed interest passed, under the terms of Trust, to Trust B. As a result of Spouse's disclaimers with respect to Trust B, Spouse will continue to possess only an income interest in the disclaimed property and a power, as co-trustee, to distribute the disclaimed property to herself or specified beneficiaries based on an ascertainable standard. Spouse's action in amending Trust B to appoint Son as co-trustee, merely operated to confirm the appointment of Son as co-trustee under the terms of section 5.07 of Trust. Spouse's act did not constitute an acceptance of the benefits of the disclaimed property. Finally, Spouse's disclaimer is effective under State X law. Accordingly, we conclude that based on the representations made, Spouse's disclaimer constitutes a qualified disclaimer for purposes of section 2518.

Except as specifically set forth above, we express no opinion concerning the federal tax consequences of the foregoing transactions under any other provisions of the Code or regulations.

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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.

Sincerely,

George Masnik
Chief, Branch 4,
Office of Associate Chief Counsel
(Passthroughs & Special Industries)

Enclosures (2)
Copy of this letter
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