

Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply to:
CC:DOM:P&SI:4/PLR-101566-98
Date:December 21, 1998

Re:

Legend:

Grantor =
Spouse =
Child =
Trustee =
Trust 1 =
Trust 2 =

Dear :

This is in response to a letter of December 14, 1998, and prior correspondence in which you requested rulings regarding Trust 1 and Trust 2.

Grantor created Trust 1, an irrevocable trust. Trust 1 provides that Trustee is to hold the trust property and administer and distribute it for the benefit of Child. Trustee may accumulate income during the term of Trust. The Trustee of Trust 1 is a person unrelated to Grantor. The trust instrument provides that Child or his custodian will be given reasonable notice of any additions to Trust 1 from any source. Child or his custodian may demand by written notice all or any amount contributed to the trust. Any demand for the property must be made within thirty days after notice of the addition is given to Child or his custodian. The withdrawal rights are not cumulative and lapse in each instance if they are not exercised. No withdrawal shall be used or applied to relieve or satisfy Grantor's support obligation.

At Grantor's death, Trustee is to hold all property in Trust 1 for the benefit of Spouse and children. Trustee is directed to distribute all or part of the net income to Spouse or children as is necessary for the support, maintenance, welfare, health and education of Spouse and children. No principal is to be distributed to spouse unless there is sufficient proof that the

principal of any other trust created for her has first been exhausted. Trustee is to accumulate any undistributed net income and add the income to corpus.

After the death of the last to die of Grantor or Spouse, Trustee is directed to distribute the remaining principal and income in equal shares to Grantor's children, and to the issue, per stirpes, of any child of Grantor who does not survive. If any of Grantor's issue shall not have attained the age of 32, Trustee is to hold the trust property for the beneficiary for his or her support, maintenance, general welfare, and education. When a beneficiary attains the age of 21, the beneficiary has the right to demand the payment of all income of the trust by written notice to Trustee. When the beneficiary reaches age 32, Trustee is to distribute all income and principal to the beneficiary. If a beneficiary dies before attaining age 32, Trustee is to distribute the remaining income and principal to his surviving issue equally, or if there are no issue, to his brothers and sisters equally, or if there are none, to his closest living relation.

Grantor proposes to create Trust 2, an irrevocable trust. Trust 2 provides that Trustee is to hold the trust property and administer and distribute it for the benefit of Child. The trust provides that no withdrawal made from Trust shall be used to satisfy Grantor's support obligation. The trust instrument provides that Trustee will give Child or his custodian reasonable notice of any additions to Trust 2 from any source. Child or his custodian may demand by written notice all or any amount contributed to Trust 2. Any demand for the property must be made within thirty days after notice of the addition is given to Child or his custodian. The withdrawal rights are not cumulative and lapse in each instance if they are not exercised.

Trust is to terminate and the remaining principal and interest shall be distributed to Child, when Child attains age 32. If Child dies before Trust 2 terminates, the remaining principal and income will be distributed as Child may appoint in his will. If Child does not exercise the power of appointment, Trustee will distribute the principal and income of Trust 2 to Child's estate.

You request the following rulings:

1. That transfers by Grantor and Spouse to Trust 1 and proposed transfers by Grantor and Spouse to Trust 2 qualify for the annual exclusion under section 2503(b) of the Internal Revenue Code.

2. That the assets transferred to Trust 1 and Trust 2 will not be included in Grantor's gross estate for federal estate tax purposes.

RULING REQUEST 1

Section 2511 provides that the gift tax applies to a transfer by way of gift whether the transfer is in trust or otherwise, whether the gift is direct or indirect and whether the property is real or personal, tangible or intangible.

Section 2512(b) provides that where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Section 2503(b)(1) provides that each citizen of the United States in computing gifts for the calendar year may exclude the first \$10,000 of gifts (other than gifts of future interests in property), made to any one person during the calendar year in determining the total amount of gifts for the calendar year. The \$10,000 annual exclusion may be applied to all gifts of a present interest in the order in which they are made until the exclusion is exhausted. Under § 2503(b)(2) the \$10,000 amount is to be adjusted annually based on a cost of living index.

Section 25.2503-3(b) of the Gift Tax Regulations defines a present interest as an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or a term certain).

Transfers of future interests in property do not qualify for the annual exclusion. Section 25.2503-3(a) provides in part, that a "future interest" is a legal term, and includes reversions, remainders, and other interests or estates, whether vested or contingent, which are limited to commence in use, possession or enjoyment at some future date.

The courts have recognized that if the beneficiaries are given the power to demand immediate possession and enjoyment of corpus or income, they have a present interest. Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968); See also, Rev. Rul. 73-405, 1973 2 C.B. 321. However, it is necessary to consider not only the terms of the trust, but also the circumstances in which the gift was made in order to determine whether the gift is a present or future interest. When the delivery of property to a trust is accompanied by limitations upon the donee's present enjoyment of the property in the form of conditions,

contingencies, or the will of another, either under the terms of the trust or other circumstances, the interest is a future interest even if the enjoyment is deferred only for a short time. The question is not when title vests, but when enjoyment begins. Disston v. Commissioner, 325 U.S. 442 (1945), Fondren v. Commissioner, 324 U.S. 18 (1945); Ryerson v. United States, 312 U.S. 405 (1941); Roderick v. Commissioner, 57 T.C. 108 (1971). See also, Rev. Rul. 81-7, 1981-1 C.B. 474, holding that a trust provision granting the trust beneficiary a right to withdraw corpus does not qualify a transfer to the trust as a present interest eligible for the annual exclusion, unless the beneficiary has notice of the withdrawal right and a reasonable opportunity to exercise the power.

In the present case, Trustee of Trust 1 and Trust 2 is required to give Child reasonable notice of contributions to Trust 1 and Trust 2. In addition, Child is granted adequate time following notice in which to exercise his right of withdrawal. Upon exercising the withdrawal right, Child will have the immediate and unrestricted right to an amount equal to the amount contributed to the trust. Accordingly, if Trustee gives prompt notice of the contribution to Trust 1 and Trust 2 to Child, or child's custodian, and assuming there is no understanding or agreement, express or implied, that the withdrawal right will not be exercised, a contribution to Trust 1 and Trust 2 will qualify for the gift tax annual exclusion under § 2503(b).

RULING REQUEST 2

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the decedent's interest therein at the time of his death. Section 2033 applies generally to property that is owned outright by the decedent and that may be passed by the decedent's will to the beneficiaries of the probate estate. The section does not apply to property interests that are extinguished at death.

Section 2036 provides that the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has made a transfer by trust or otherwise under which the decedent has retained for his life, or for a period that does not in fact end before his death, (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 person who shall possess or enjoy the property, or the income from the property.

Section 2038 provides that the gross estate shall include the value of all property to the extent of any interest therein transferred by the decedent in trust or otherwise, where the

enjoyment of the property is subject at the date of decedent's death to any change through the exercise of a power either by the decedent alone or in conjunction with any person, to alter, amend or revoke.

We conclude that Grantor will retain no power over or interest in Trust 1 or Trust 2 that would subject the trust corpus to inclusion in Grantor's gross estate under §§ 2036 or 2038.

This ruling is based on the facts and applicable law in effect on the date of this letter. If there is a change in material fact or law (local or federal) before the transactions considered in the ruling take effect, the ruling will have no force or effect. If the taxpayer is in doubt whether there has been a change in material fact or law, a request for reconsideration of this ruling should be submitted to this office.

Except as we have 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 letter is directed only to the taxpayer who requested it. Section 6110(j)(3) provides that it may not be used or cited as precedent.

Sincerely yours,
Assistant Chief Counsel
(Passthroughs and Special
Industries)

By _____
George Masnik
Chief, Branch 4

Enclosure
Copy for § 6110 purposes