

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-104019-00
Date: June 28, 2000

Re:

Legend:

Decedent	=
Spouse	=
Trust	=
Mother-in-law	=
Nephew	=
H	=
G	=
K	=
Date 1	=
Date 2	=
Date 3	=
State	=

Dear :

This is in response to your submission dated February 16, 2000, requesting a ruling under § 2041 of the Internal Revenue Code.

According to the facts submitted, Spouse died on Date 1. Under Paragraph IV.2 of Spouse's 1966 will, Spouse created Trust for the benefit of her husband, Decedent. Paragraph IV provides:

Subject to the foregoing bequests, all the rest, residue and remainder of my estate, whether real, personal or mixed, including lapse of any legacies hereinabove contained, I give, devise and bequeath unto my beloved husband, [Decedent], and my beloved brother-in-law, [H], as Joint Trustees, and/or their successors or alternates hereinafter named, herein referred to as "Trustee" or "Trustee", each meaning singular or plural, to be owned, held, used and finally disposed of upon the terms and conditions, to-wit:

After the establishment of a trust under Paragraph VI.1 for the benefit of

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Spouse's brother and his wife, the trust for the benefit of Decedent is created under Paragraph VI.2:

All the rest, residue and remainder of my estate devised in the paragraph IV. shall be placed in a trust to be known as [Trust] the income from which shall be collected by my trustees and after paying all taxes and all other expenses incidental to the handling thereof, and from the remaining net income from same shall first provide the money necessary to supplement the income of my beloved mother-in-law, [Mother-in-law], to the extent necessary, in the discretion of the trustees to provide her with proper maintenance, medical attention, and the comforts of life, as long as she shall live; and the remainder or all of the net income derived therefrom shall be remitted in monthly, quarterly, or other convenient installments to my beloved husband, [Decedent], as long as he shall live.

Paragraph IV.5 provides for discretionary distributions of principal to Decedent::

In connection with the trusts hereinabove created for the benefit of my husband, [Decedent], whenever in the discretion of the joint trustee, [H], or any successor or alternate of his hereinafter named; it would appear to him, in his sole discretion, and not in the discretion of [Decedent] that part or all of the corpus, of my estate should be expended for his maintenance, care, comfort, or well-being, such corpus may be invaded or totally expended for anyone or all of such purpose.

[emphasis added]. Paragraph IV.6 provides for trustee powers under Trust as follows:

Subject to the limitation set out next above pertaining to the discretion of my husband, as trustee, pertaining to the invasion of the corpus of the trust created for his benefit, my trustee, or trustees, named herein, shall have full power and authority to do any act or thing pertaining to any trust, or trusts created hereunder that I, myself, could do if then being present and acting in person including but not limited to all of the powers and authorities otherwise herein given to my trustees and in addition thereto, not by limitation, by way of illustration, the following:(b) the power to sell, exchange, lease, rent, assign, transfer, mortgage, or otherwise dispose of all or any part of any real or personal property upon such terms and conditions, as to such trustee or trustees seem advisable; (c) the power at anytime, in the discretion of my trustee, or trustees, if anyone for whom any part of my estate is being held hereunder, should be in need of funds for his or her maintenance and support, education, medical treatment, or for any other purpose that would seem to my trustee or trustees to justify the expenditure of any income or corpus of my estate, then such expenditure may be made....

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Upon Decedent's death, the Trust property is to be disposed of in accordance with Paragraph IV.3 of Spouse's will. That paragraph provides that if Decedent is survived by either Spouse's brother or the brother's wife, one-half the income of Trust shall be used for the benefit of them, or the survivor of them until both have died or until brother's wife has remarried. The Trust property is then to pass in equal shares to the then living children of Spouse's Nephew. The remaining one-half of Trust is to be divided into two equal shares, one designated the H Trust (for the benefit of H) and one designated the G Trust (for the benefit of G). If either of G or H do not survive Decedent, G and or H's one-half share of the remaining one-half of Trust is to pass in equal shares to their living children.

Paragraph V provides that, if Decedent or H is unable for any reason to act as a joint trustee, then G and K (in that order) are designated as successor trustees.

Mother-in-law died on Date 2. Decedent died on Date 3. From Date 2, until Decedent's death, Decedent received all of the net income from Trust. H predeceased Decedent. After H's death, G served as co-trustee of Trust with Decedent, until Decedent's death.

It is represented that at least since 1982, neither G nor H have received any distributions from Trust.

You have requested a ruling that except for any accrued but unpaid net income of the Trust at the time of Decedent's death, no portion of the corpus of the Trust is includible in Decedent's gross estate for federal estate tax purposes.

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

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

Under § 2041(b)(1) 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 2041(b)(1)(C)(ii) provides that a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person, is not deemed a general power of appointment, if the power is exercisable by the decedent only in conjunction with a person having a substantial interest in the property subject to the power, which interest is adverse to exercise of the power in favor of the decedent.

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Section 20.2041-3(c)(2) relates to a power of appointment created after October 21, 1942, which is exercisable only in conjunction with another person as described in § 2041(b)(1)(C). Such power is not considered a general power of appointment if it is exercisable by the decedent with the consent or joinder of a person having a substantial adverse interest in the property subject to the power which interest is adverse to the exercise of the power in favor of the decedent, his estate, his creditors, or the creditors of his estate. An interest adverse to the exercise of a power is considered as substantial if its value in relation to the total value of the property subject to the power is not insignificant.

Section 20.2041-3(c)(2), Example 2, considers a situation where the decedent and L were trustees of a trust under the terms of which the income was to be paid to L for life and then to M for life, and the remainder was to be paid to the decedent. The trustees had the power to distribute corpus to the decedent during L's life. The example concludes that since L's interest was adverse to the exercise of the power in favor of the decedent, the decedent did not have a general power of appointment. If the decedent and M were the trustees, M's interest would likewise have been adverse to the exercise of the power in favor of the decedent.

Section 20.2041-1(b)(1) provides, in part, that the mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift beneficial interests except as an incidental consequence of the discharge of such fiduciary duties, is not a power of appointment.

Revenue Ruling 54-153, 1954-1 C.B. 185, concludes that where a trustee who is also a beneficiary of the trust, is prevented by a state statute from participating in a decision to distribute corpus to himself, the trust property is not includible in the gross estate pursuant to § 811(f)(2), the predecessor to § 2041(b).

In the present case, Decedent, prior to Mother-in-law's death, was entitled to receive the remaining income from Trust, after payment to Mother-in-law of that portion of Trust income necessary to supplement her other income in order to provide her with proper maintenance, medical attention, and the comforts of life. After Mother-in-law's death, Decedent became entitled to receive all or the net income from Trust for the remainder of his lifetime. In addition to Decedent's right to income from Trust, the trustees of Trust, other than Decedent, were authorized to distribute corpus of Trust to Decedent in their discretion for Decedent's maintenance, care, comfort or well-being.

Decedent served as cotrustee of Trust and as co-trustee had broad powers to sell, exchange, assign, transfer, or otherwise dispose of all or any part of any real or personal property as well as the power to distribute corpus to any beneficiary of Spouse's estate for his or her maintenance and support, education, medical treatment, or any other purpose. This power, however, was subject to the limitation prohibiting Decedent from participating in any decision by the trustees to distribute corpus of Trust to Decedent.

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Based on the facts presented and the representations made, we conclude that at the time of his death, Decedent did not possess a general power of appointment over any part of Trust. Decedent was precluded from participating in any decisions by the trustees of Trust to make discretionary distributions of corpus to Decedent. In addition, with respect to the administrative trustee powers contained in Paragraph IV.6 of Spouse's will, Decedent as a cotrustee could exercise these powers only in a fiduciary capacity in administering the trust.

Accordingly, we conclude that at the time of his death, Decedent did not possess a general power of appointment in Trust within the meaning of § 2041(b)(1). Except for any accrued but unpaid net income of the Trust at the time of Decedent's death, no portion of the corpus of the Trust is includible in Decedent's gross estate for federal estate tax purposes.

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.

Except as we have specifically ruled 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.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely yours,
Assistant Chief Counsel
(Passthroughs and Special Industries)
By George Masnik
Branch Chief, Branch 4

Enclosures
Copy of section 6110 purposes
Copy of letter