

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

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Person To Contact: _____, ID No.

Telephone Number:

In Re:

Refer Reply To:
CC:PSI:B04 – PLR-144367-03

Date:
January 23, 2004

Legend

Decedent -
Child -
Child's Spouse -
Grandchild 1 -
Grandchild 2 -
Estate -

Foundation -

Trust -

State X -
State X Statute -
Date 1 -
Date 2 -
Date 3 -
Date 4 -
X Dollars -

Dear _____ :

This is in response to your letter dated July 24, 2003, in which you requested rulings under sections 2518 and 2055 of the Internal Revenue Code ("Code").

The information submitted and the representations made are summarized as follows. Child, Child's Spouse, and Grandchild formed Foundation, a non-profit corporation, on Date 1. Child, Child's Spouse, and Grandchild are the current Directors, Officers and

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Members of Foundation. You have represented that Foundation is a private foundation within the meaning of § 509(a) of the Internal Revenue Code and is recognized by the Internal Revenue Service ("Service") as a federally tax-exempt organization described in § 501(c)(3).

Article II(A) of Foundation's Articles of Incorporation provides that Foundation is formed exclusively to receive and administer funds for charitable, religious and educational purposes within the meaning of § 501(c)(3) of the Code.

Article II(H) provides, in pertinent part, that Foundation shall not conduct or carry on any activities not permitted to be conducted or carried on by an organization exempt under § 501(c)(3), or by an organization, contributions to which are deductible under § 170(c)(2).

Article IX provides that Foundation's Articles of Incorporation may be amended in the manner provided by law and that every amendment must be approved by the Board of Directors, proposed by them to the Members and approved at a meeting of the Members unanimously by all the Members, unless the Directors and Members consent in writing to said amendment.

Article III of Foundation's Bylaws provides for two classes of members: Regular Members who are the Directors with voting powers; and Associate Members and other classes, all of which are non-voting.

Article V of the Foundation's Bylaws provides that the Board of Directors may from time to time appoint temporary or special committees which it may be deemed necessary and advisable.

On Date 2, Decedent executed a restatement of Trust, a revocable trust that had previously been established by Decedent. Decedent and Child were the initial trustees of Trust. Article Eight of Trust provided that, during Decedent's life, Trust was to be governed by the laws of State X and, after Decedent's death, by the laws of the state of Child's domicile. Article Two, Section II(A) of Trust provides that, upon Decedent's death and after the payment of estate administration, taxes, debts, a portion of the Trust estate equal to Decedent's unused GST exemption will be set aside and distributed pursuant to the terms of Article Three of Trust. Under Article Two, Section II(B), the balance will be distributed to Child, provided, however, ". . . if [Child] shall disclaim all or any portion of this distribution, it shall pass to [Foundation]." Article Three of Trust provides that property passing pursuant to Article Two, Section II(A), shall be held in trust for a term of twenty years. During the term, six percent of the net fair market value of the trust property will be distributed annually to Foundation and upon, expiration of the 20 year term, the trust estate will be distributed to Child's living issue, per stirpes.

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Decedent died testate on Date 3 survived by Child, Child's Spouse, and Grandchild. Child is the personal representative of Decedent's estate. Decedent's will provides that, after payment of all estate, inheritance, succession and other death taxes, the rest, residue and remainder of Decedent's estate will pass to Trust. Under the terms of Trust, on Decedent's death, Child became the sole trustee. Also, under the terms of Trust, the laws of State X govern the disposition of Trust assets at Decedent's death.

Child proposes to disclaim a fractional share of the residuary distribution provided for in Article Two, Section II(B) of Trust. The numerator of the fraction will equal X Dollars. The denominator of the fraction will equal the value of the residue determined on the basis of values, deductions, and other information reported on the federal estate tax return with respect to Decedent's estate. The proposed disclaimer will be made no later than Date 4, which is the date that is nine months after the date of Decedent's death.

It is represented that prior to making the disclaimer, Child will not accept any benefit from, or receive any distribution from, the residuary disposition provided for under Article Two, Section II(B).

State X Statute provides in pertinent part, as follows:

(2) Scope of right to disclaim.—

(a) A beneficiary may disclaim succession to any interest in property that, unless disclaimed, would pass to the beneficiary:

* * *

6. As a beneficiary of a testamentary gift to any nontestamentary trust.

* * *

(3) Disposition of disclaimed interests.—

(a) Unless the decedent or a donee of a power of appointment has otherwise provided by will or other appropriate instrument with reference to the possibility of a disclaimer by the beneficiary, the interest disclaimed shall descend, be distributed, or otherwise be disposed of in the same manner as if the disclaimant had died immediately preceding the death or other event that caused the disclaimant's interest to become indefeasibly fixed both in quality and quantity.

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In connection with Child's proposed disclaimer, the Members and Board of Directors of Foundation will amend the Articles of Incorporation and Bylaws of Foundation as follows:

Article VI of the Articles of Incorporation will be amended by adding to the end of Article VI, which names the Officers of Foundation, a new paragraph which states:

The Board of Directors and Officers of the Corporation shall take whatever steps are necessary to ensure that no person will have any wholly discretionary power to direct the distribution of any funds of the Corporation that were received by the Corporation by reason of a disclaimer of property made by that person.

Article V of the Bylaws will be amended in its entirety to read as follows:

Section 1. Special Fund Committee.

(a) The Board shall create a "Special Fund Committee" to determine the disposition of any assets of the Corporation held in each "Special Fund" created under the provisions of Section 3 of Article VII. Any person may serve on the Special Fund Committee, except for a Disqualified Person.

(b) A "Disqualified Person" with respect to any particular Special Fund Committee is any person who has made a disclaimer of property that, as a result of the disclaimer, was transferred to such Special Fund.

(c) Notwithstanding anything herein to the contrary, no Member or Director who is a Disqualified Person with respect to a particular Special Fund may participate in any vote relating to the appointment, removal, or compensation of any member of the Special Fund Committee of the Special Fund.

Section 2. Special Committees. The Board may from time to time appoint temporary or any other special committees which in its discretion may be deemed necessary and advisable.

In addition, Article VII of the Bylaws will be amended by adding the following new section 3 to the end of existing Article VII:

Section 3. Special Fund. Notwithstanding anything herein to the contrary, the Treasurer shall segregate from the Corporation's other assets any

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property the Corporation receives as a result of a disclaimer by any person. That disclaimed property shall be held in a separate account on the Corporation's books (each such separate account to be designated a "Special Fund"). No distributions (other than for regular expenses of that particular Special Fund) shall be made from the Special Fund unless directed by the Special Fund Committee (as provided for under Section 1 of Article V) of that particular Special Fund.

It is also represented that the Members and Board of Directors of Foundation will amend the Articles of Incorporation and Bylaws of Foundation to provide that no amendment to either the Articles of Incorporation or the Bylaws of the Foundation may alter the general character of Foundation as one organized and operated exclusively for charitable, religious, and educational purposes.

Specifically, you request rulings that:

1. The proposed disclaimer by Child will constitute a qualified disclaimer within the meaning of § 2518 if the proposed changes to the Foundation's governing structure are made before Child executes the disclaimer.

2. Assuming that the disclaimer, as proposed, is a qualified disclaimer under § 2518 and that Foundation is a qualified charity under § 501(c)(3) to which bequests are deductible under § 2055, the amount passing to Foundation by reason of Child's proposed disclaimer will be treated as passing from Decedent to Foundation for purposes of § 2055(a) and thus will qualify as a federal estate tax charitable deduction for Estate under § 2055.

Law and Analysis

Issue 1

Section 2046 provides that for estate tax purposes, disclaimers of property interests passing upon death are treated as provided in § 2518.

Section 2518(a) provides that, if a person makes a qualified disclaimer with respect to any interest in property, the federal estate, gift, and generation-skipping transfer tax provisions will apply to that interest as if it had never been transferred to such person.

Under § 2518(b), the term "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, provided: (1) such refusal is in writing; (2) the disclaimer 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

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not later than the date which is nine 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 twenty-one; (3) the person disclaiming the interest 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 2518(c)(1) provides that a disclaimer with respect to an undivided portion of an interest which meets the requirements of § 2518(b) shall be treated as a qualified disclaimer of such portion of the interest.

Under § 25.2518-1(b) of the Gift Tax Regulations, if a qualified disclaimer is made, the property is treated, for federal gift, estate, and generation-skipping transfer tax purposes, as passing directly from the transferor, and not from the disclaimant, to the person entitled to receive the property as a result of the disclaimer. Thus, the disclaimant is not treated as making a gift.

Section 25.2518-2(d)(2) provides, in pertinent part, that if a beneficiary who disclaims an interest in property is also a fiduciary, the disclaimant cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. For example, 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.

Under § 25.2518-2(e), in general, a disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant. The disclaimer will not be qualified 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 or interest in property to another person) unless such power is limited by an ascertainable standard.

Section 25.2518-3(b) provides that the disclaimer of an undivided portion of a separate interest in property which meets the other requirements of a qualified disclaimer under § 2518(b) and the corresponding regulations 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. See § 25.2518-3(d), Example 20, regarding the disclaimer of a fractional share of a residuary bequest.

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In *Rev. Rul. 72-552, 1972-2 C.B. 525*, the decedent, who was the president and a director of a corporation organized under § 501(c)(3), transferred property to the corporation. In his capacity as president and a director, the decedent, in conjunction with the other directors of the corporation, had the power to direct the disposition of the corporation's funds for charitable purposes. The ruling holds that, because the decedent retained the right, in conjunction with others, to designate the entities that would possess or enjoy the property transferred to the corporation, the property transferred by the decedent to the corporation was included in the decedent's gross estate at his death under § 2036.

In the present case, Child proposes to disclaim a fractional portion of the residuary bequest. Any property that is disclaimed by Child will pass to Foundation pursuant to the terms of Article Two, Section II(B) of Trust. Pursuant to the terms of the proposed amended Articles of Incorporation and Bylaws of Foundation, the disclaimed property will be held in a segregated Special Fund in Foundation, separate and apart from the other Foundation assets. The power to make distributions of income and/or principal from the Special Fund and to select the recipients of such distributions will be held exclusively by the Special Fund Committee. Child is precluded from serving on the Special Fund Committee established for administering the property disclaimed by Child. Child will have no power to appoint or remove any member of that Special Fund Committee.

Therefore, we conclude that the disclaimer will constitute a qualified disclaimer under § 2518 provided the disclaimer otherwise complies with the requirements of § 2518 and the applicable regulations and the Articles of Incorporation and Bylaws of Foundation are amended as proposed and the terms, as amended, are effective under state law.

Issue 2

Under § 2055(a)(2), for estate tax purposes, 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 any corporation organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes. A corporation that qualifies under § 501(c)(3) is one that is organized and operated exclusively for these purposes.

Section 20.2055-2(c)(1)(i) of the Estate Tax Regulations states 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 § 2055 includes an interest which falls into the bequest, devise, or transfer as the result of a qualified disclaimer under § 2518.

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It is represented that Foundation is a private foundation within the meaning of § 509(a) and is recognized by the Service as a federally tax-exempt organization described in § 501(c)(3). Under the terms of Trust, any amount disclaimed by Child will pass to Foundation. Accordingly, based on the representations noted above, the property passing to Foundation as a result of Child's disclaimer that will be segregated in the Special Fund will qualify for an estate tax charitable deduction under § 2055, provided that Child's disclaimer is a qualified disclaimer under § 2518, and the Articles of Incorporation and Bylaws of Foundation are amended as proposed and the terms, as amended, are effective under state law.

The rulings contained in this letter are based upon information submitted and representations made 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 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.

This ruling is directed only to the taxpayer(s) 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, a copy of this letter is being sent to the taxpayer.

Sincerely,
Associate Chief Counsel
(Passthroughs and Special
Industries)

By: George Masnik,
Chief, Branch 4

CC: