



DEPARTMENT OF THE TREASURY **200510032**
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

TAX EXEMPT AND
GOVERNMENT ENTITIES
DIVISION

DEC 16 2004

Uniform Issue List: 408.00-00

SE:T:EP:RA:T 3

LEGEND:

Decedent =

Spouse =

Son 1 =

Son 2 =

Estate =

Date 1 =

Date 2 =

Date 3 =

Plan 1 =

Plan 2 =

IRA X =

State =

County =

Dear [REDACTED] :

This is in response to the February 21, 2004 letter submitted on your behalf by your authorized representative, and supplemented by correspondence dated August 20, 2004, requesting rulings under sections 402 and 457 of the Internal Revenue Code ("Code"). The following facts and representations support your ruling request.

Decedent, whose date of birth was Date 1, 1938 died on Date 2, 2003, at the age of 64 years, survived by his spouse (Spouse), and two children (Son 1 and Son 2). Decedent had not attained age 70 ½ as of his date of death, and would not have attained age 70 1/2 as of the date of this ruling request.

On Date 3, 2003 Decedent executed a Last Will and Testament stating that his entire estate was to be given to Spouse, specifically, and intentionally disinheriting his two children. Spouse was named as personal representative of Decedent's Estate. It is represented that at the time of his death, Decedent was a resident of County, and that Decedent's will has been probated before the Register of Wills of County in accordance with State law.

Decedent was a participant in State's Retirement System (Plan 1). It is represented that Plan 1 is a qualified plan under section 401 of the Internal Revenue Code, and is a governmental plan within the meaning of Code § 414(d). Decedent also participated in County's Deferred Compensation Plan (Plan 2). It is represented that Plan 2 is an eligible deferred compensation plan as defined in section 457(b) of the Internal Revenue Code.

Under the terms of both Plan 1 and Plan 2, upon a participant's death, the plan proceeds become payable to the participant's named beneficiary. Estate was named as the beneficiary of both plans. It is represented that no distributions have been made from either plan since Decedent's death.

At his death, Decedent maintained IRA X, an individual retirement account (IRA) described in section 408(a) of the Code. Estate was named as the beneficiary of IRA X. It is represented that no distributions have been made from IRA X since Decedent's death.

Spouse intends to request that all amounts standing in Decedent's account in either Plan 1 or Plan 2, and all amounts standing to his credit under IRA X be paid to Estate. As sole personal representative of Estate, and as sole beneficiary of Estate, Spouse will request trustee to trustee transfer(s) of said amounts into an individual retirement account (IRA) set up and maintained in her name.

Based on the above facts and representations, the following rulings are requested:

1. That IRA X is not an inherited IRA with respect to Spouse, and that the proposed trustee to trustee transfer of the balance of IRA X to an IRA of Spouse qualifies as a rollover contribution within the meaning of Code section 408(d)(3);

2. that the proposed trustee to trustee transfer (made pursuant to Code section 401(a)(31)) of the balance of the State's Plan 1 into an IRA of Spouse qualifies as a rollover within the meaning of Code section 402(c)(9); and

3. that the proposed trustee to trustee transfer of the balance of the County's Plan 2 into an IRA of Spouse qualifies as a rollover within the meaning of Code section 457(e).

With respect to your initial ruling request, section 408(a) provides the general qualification requirements applicable to IRAs.

Section 408(d)(1) of the Code provides that, except as otherwise provided in section 408(d), any amount paid or distributed out of an IRA shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72 of the Code.

Section 408(d)(3) of the Code defines, and provides the rules applicable to, IRA rollovers.

Section 408(d)(3)(A) of the Code provides that section 408(d)(1) of the Code does not apply to any amount paid or distributed out of an IRA to the individual for whose benefit the IRA is maintained if –

- (i) the entire amount received (including money and any other property) is paid into an IRA for the benefit of such individual not later than the 60th day after the day on which the individual receives the payment or distribution; or
- (ii) the entire amount received (including money and any other property) is paid into an eligible retirement plan (other than an IRA) for the benefit of such individual not later than the 60th day after the date on which the payment or distribution is received, except that the maximum amount which may be paid into such plan may not exceed the portion of the amount received which is includible in gross income (determined without regard to section 408(d)(3)).

Section 408(d)(3)(B) of the Code provides that section 408(d)(3) does not apply to any amount described in section 408(d)(3)(A)(i) received by an individual from an IRA if at any time during the 1-year period ending on the day of such receipt such individual received any other amount described in section 408(d)(3)(A)(i) from an IRA which was not includible in gross income because of the application of section 408(d)(3).

Section 408(d)(3)(C) of the Code provides, in general, that the IRA rollover rules do not apply to inherited accounts. The term "inherited account" does not apply to an IRA that is acquired by the surviving spouse of an IRA owner by reason of the death of the IRA owner.

Section 1.408-8 of the Final Income Tax Regulations under Code sections 401(a)(9) and 408(a)(6), Question and Answer-5(a), (See 67 Federal Register 18988, 19025 (April 17, 2002)), provides in relevant part, that the surviving spouse of an individual may elect to treat the spouse's entire interest as a beneficiary in an individual's IRA (or the remaining part of such interest if distribution has commenced to the spouse) as the spouse's own IRA. This election is permitted to be made at any time after the individual's date of death. If the surviving spouse

makes such an election, the required minimum distribution for the calendar year of the election and each subsequent calendar year is determined under Code section 401(a)(9)(A) with the spouse as the IRA owner and not Code section 401(a)(9)(B) with the surviving spouse as the deceased IRS owner's beneficiary.

Section 1.408-8 of the Final Regulations, Q&A-5(a), provides in relevant part, that in order to make this election, the spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a trust is named as beneficiary of the IRA, this requirement is not satisfied even if the spouse is the sole beneficiary of the trust.

Section 1.408-8 of the Final Regulations, Q&A-5(c), provides that if the surviving spouse makes such an election, the surviving spouse shall then be considered the IRA owner for whose benefit the trust is maintained for purposes under the Code.

The Preamble to the Final Regulations under section 1.408-8 provides, in relevant part, that a surviving spouse who actually receives a distribution from an IRA is permitted to roll that distribution over into his or her own IRA even if the spouse is not the sole beneficiary of the deceased's IRA as long as the rollover is accomplished within the requisite 60-day period. A rollover may be accomplished even if the IRA assets pass through either a trust or an estate,

Revenue Ruling 78-406, 1978-2 C.B. 157, provides that the direct transfer of funds from one IRA trustee to another IRA trustee, even if at the behest of the IRA holder, does not constitute a payment or distribution to a participant, payee or distributee as those terms are used in Code § 408(d). Furthermore, such a transfer does not constitute a rollover distribution.

Additionally, a trustee to trustee transfer, as described in Rev. Rul. 78-406, does not constitute a distribution or payment as those terms are defined for purposes of Code § 408(d).

With respect to your second ruling request, Section 402(c)(1) of the Code provides, generally, that if any portion of an eligible rollover distribution from a section 401(a) of the Code qualified retirement plan is transferred into an eligible retirement plan, the portion of the distribution so transferred shall not be includible in gross income in the taxable year in which paid.

Section 402(c)(2) of the Code provides that the maximum amount of an eligible rollover distribution to which paragraph (1) applies shall not exceed the portion of such distribution which is includible in gross income (determined without regard to paragraph (1)) but states that this maximum limitation does not apply to a distribution transferred to an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B).

Section 402(c)(4) of the Code defines "eligible rollover distribution" as any distribution to an employee of all or any portion of the balance to the credit of an employee in a qualified trust except the following distributions:

(A) any distribution which is one of a series of substantially equal periodic payments (not less frequently than annually) made --

(i) for the life (or life expectancy) of the employee or the joint lives (or joint life expectancies) of the employee and the employee's designated beneficiary, or

(ii) for a specified period of 10 years or more,

(B) any distribution to the extent the distribution is required under section 401(a)(9), and

(C) any distribution which is made upon the hardship of the employee.

Section 402(c)(8)(B) of the Code defines eligible retirement plan as (i) an individual retirement account described in section 408(a), (ii) an individual retirement annuity described in section 408(b) (other than an endowment contract), (iii) a section 401(a) of the Code qualified retirement plan, (iv) an annuity plan described in section 403(a), (v) an eligible deferred compensation plan described in section 457(b) which is maintained by an eligible employer described in section 457(e)(1)(A), and (vi) an annuity contract described in section 403(b).

Section 402(c)(3)(A) of the Code provides, generally, that, except as provided in subparagraph (B), section 402(c)(1) shall not apply to any transfer of a distribution made after the 60th day following the day on which the distributee received the property distributed.

Section 1.402(c)-2, Question and Answer 11, of the Income Tax Regulations states that if an eligible rollover distribution is paid to an employee and the employee contributes all or part of the eligible rollover distribution to an eligible retirement plan no later than the 60th day following the date the employee received the distribution, the amount contributed is not currently includible in gross income.

Section 402(c)(9) of the Code provides, generally, if a distribution attributable to an employee is paid to the spouse of the employee after the employee's death, section 402(c) of the Code will apply to such distribution in the same manner as if the spouse were the employee.

Section 1.402(c)-2 of the regulations, Q&A 12, provides, generally, that if a distribution attributable to an employee is paid to the employee's surviving spouse, section 402(c) applies to the distribution in the same manner as if the spouse were the employee. Thus, a distribution to the surviving spouse of an employee is an eligible rollover distribution if it meets the applicable requirements of section 402(c)(2) and (4) and the associated regulations.

Section 1.402(c)-2 of the regulations, Q&A 7(b) provides that any amount that is paid before January 1 of the year in which the employee attains (or would have attained) age 70 ½ will not be treated as required under section 401(a)(9) and thus is an eligible rollover distribution if it otherwise qualifies.

Section 401(a)(31)(A) of the Code provides that, in general, a trust will not constitute a

qualified trust under this section unless the plan, of which such trust is a part, provides that if the distributee of any eligible rollover distribution: (i) elects to have such distribution paid directly to an eligible retirement plan, and (ii) specifies the eligible retirement plan to which such distribution is to be paid (in such form and at such time as the plan administrator may prescribe), such distribution shall be made in the form of a direct trustee to trustee transfer to the eligible retirement plan.

Section 401(a)(31)(C) of the Code provides, in relevant part, that subparagraph (A) shall apply only to the extent that the eligible rollover distribution would be includible in gross income if not transferred as provided in subparagraph (A) determined without regard to sections 402(c), 403(a)(4) and 457(e)(16) of the Code. The preceding sentence shall not apply to such distribution if the plan to which such distribution is transferred—(ii) is an eligible retirement plan described in clause (i) or (ii) of section 402(c)(8)(B).

Section 1.401(a)(31)-1 of the regulations, Q&A-15, provides that a direct rollover described in Code section 401(a)(31) is to be treated as a distribution and rollover of an eligible rollover distribution.

With respect to your third ruling request, Section 457(a) of the Code provides that any amount of compensation deferred under an eligible deferred compensation plan (as defined in section 457(b) of the Code), and any income attributable to the amounts so deferred, shall be includible in gross income only for the taxable year in which such compensation or other income is paid to the participant or other beneficiary, in the case of a plan of an eligible employer described in section 457(e)(1)(A) of the Code, and is paid or otherwise made available to the participant or other beneficiary, in the case of a plan of an eligible employer described in section 457(e)(1)(B) of the Code. Sections 457(e)(1)(A) and (B) of the Code, respectively, describe “eligible employer” as a state, political subdivision of a state, and any agency or instrumentality of a state or political subdivision of a state, and as any other organization (other than a governmental unit) exempt from tax under this subtitle.

Section 457(e)(16)(A) of the Code (concerning rules applicable to rollovers from compensation plans of state and local governments) provides, in part, that if any portion of the balance to the credit of an employee is paid to the employee in an eligible rollover distribution (within the meaning of section 402(c)(4) of the Code) and the distributee transfers any portion of the property received in such distribution to an eligible retirement plan described in section 402(c)(8)(B) of the Code, then such distribution (to the extent so transferred) shall not be includible in gross income for the taxable year in which paid.

Section 457(e)(16)(B) of the Code provides that the rules of paragraphs (2) through (7) and (9) of section 402(c) of the Code and section 402(f) of the Code shall apply for purpose of subparagraph (A) above.

Sections 457(b)(5) and 457(d) of the Code provide, in relevant part, that an eligible deferred compensation plan must provide for distributions similar to Section 401(a)(31) of the Code.

With respect to your three ruling requests, generally, if either a decedent's qualified retirement plan accounts or IRA amounts pass through a third party such as an estate, the surviving spouse will be treated as acquiring them from the third party and not from the decedent, and would not be eligible to roll over the distributions into an individual retirement account (IRA) set up and maintained in the surviving spouse's name. However, there are exceptions to the general rule.

In this case, the surviving spouse is the sole beneficiary and sole personal representative of Decedent's Estate. As sole personal representative and sole beneficiary of Estate, Spouse intends to request that amounts due Decedent from either Plan 1, Plan 2, or IRA X be paid to the Estate. Concurrent with said request, Spouse will request that all amounts due and payable to the Estate be transferred, by means of a series of trustee to trustee transfers, into one or more IRAs set up and maintained in the name of Spouse who is entitled to receive said amounts under the terms of Decedent's last will and testament. As noted above, Decedent had not attained age 70 ½ as of neither his date of death nor the date of this ruling request. Furthermore, Spouse has also not attained age 70 ½.

With specific respect to your initial ruling request, Spouse is ineligible to treat IRA X as her own IRA. However, as sole personal representative of Estate, the named beneficiary of IRA X, and as sole beneficiary of said Estate, Spouse has total control over the Estate's assets. As a result, the Service will treat Spouse as being the distributee of IRA X and, as such, as being eligible to roll over, or transfer, said IRA X into an IRA set up and maintained in her name. Furthermore, with respect to Spouse, IRA X will not be treated as an inherited IRA as that term is defined in code section 408(d)(3).

With specific respect to your second and third ruling requests, Estate is the named beneficiary of Decedent's interests in Plan 1 and Plan 2. However, as noted above, Spouse is both the sole beneficiary and sole personal representative of Estate. As such, Spouse makes any decisions that need to be made with respect to the disposition of assets, including Decedent's interests in Plans 1 and 2, of Estate. As a result, the Service will treat Spouse as being eligible to roll over, or transfer, pursuant to Code sections 401(a)(31) and 457(b)(5) and (d), Decedent's accounts in Plans 1 and 2 into one or more IRAs set up in the name of Spouse.

Thus, since the Service has held that it will not apply the general rule, above, in this case, it concludes as follows with respect to your ruling requests:

1. That IRA X is not an inherited IRA with respect to Spouse. Furthermore, pursuant to Code section 408(d)(3) and Revenue Ruling 78-406, Spouse may transfer, by means of the proposed trustee to trustee transfer, Decedent's individual retirement account (IRA X) to an IRA set up and maintained by in the name of Spouse;

2. that the proposed trustee to trustee transfer of the balance standing to Decedent's credit

under State's Plan 1 to an individual retirement account (IRA) set up and maintained in the name of Spouse (made pursuant to Code section 401(a)(31)) will qualify as a rollover within the meaning of Code section 402(c)(9); and

3. that the proposed trustee to trustee transfer of the balance standing to Decedent's credit under County's Plan 2 to an IRA of Spouse (authorized pursuant to sections 457(b)(5) and (d) of the Code) qualifies as a rollover within the meaning of Code section 457(e).

It is noted that Spouse will not have to include in her Federal gross income for the year of distribution and rollover any portion of the distribution from State's Plan 1, County's Plan 2 or Decedent's IRA X, timely rolled over (or transferred as proposed) into an IRA set up and maintained in the name of the Spouse.

This ruling letter is based on the assumption that State's Plan 1 is qualified within the meaning of Code section 401(a) and is a qualified governmental plan within the meaning of Code section 414(d) as represented. It also assumes that the County's Plan 2 is a plan governed by Code section 457 as represented, and that IRA X is an IRA defined under Code section 408(a) at all times relevant thereto. It also assumes that the IRA to be set up and maintained in the name of Spouse will meet the requirements of Code section 408(a) as represented. Additionally, it assumes the correctness of all facts and representations made with respect thereto.

A copy of this letter has been sent to your authorized representatives in accordance with a power of attorney on file in this office.

If you have any questions concerning this letter ruling, please contact _____ at
(Phone) or _____ (FAX).

Sincerely yours,



Frances V. Sloan, Manager
Employee Plans Technical Group 3

Enclosures:

Deleted copy of letter ruling
Form 437