

# Section 2702.—Special Valuation Rules in Case of Transfers of Interest in Trusts

*26 CFR 25.2702–5: Personal residence trusts.*

T.D. 8743

DEPARTMENT OF THE TREASURY  
Internal Revenue Service  
26 CFR Parts 25 and 602

Sale of Residence From  
Qualified Personal Residence  
Trust

AGENCY: Internal Revenue Service (IRS), Treasury.

ACTION: Final regulations

SUMMARY: This document contains final regulations permitting the reformation of a personal residence trust or a qualified personal residence trust in order to comply with the applicable requirements for such trusts. The final regulations also provide that the governing instruments of such trusts must prohibit the sale of a residence held in the trust to the grantor of the trust, the grantor's spouse, or an entity controlled by the grantor or the grantor's spouse.

DATES: The regulations are effective December 23, 1997.

FOR FURTHER INFORMATION CONTACT: Lane Damazo (202) 622-3090 (not a toll-free number).

SUPPLEMENTARY INFORMATION:

## *Paperwork Reduction Act*

The collection of information contained in these final regulations has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1485. Responses to this collection of information are required in order to ensure the proper collection of the gift tax.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid control number.

The estimated annual burden per respondent/recordkeeper varies from 3 hours to 3.25 hours, depending on individual circumstances, with an estimated average of 3.1 hours.

Comments concerning the accuracy of this burden estimate and suggestions for reducing this burden should be sent to the **Internal Revenue Service**, Attn: IRS Reports Clearance Officer T:FP, Washington, DC 20224, and to the **Office of Management and Budget**, Attention: Desk Officer for the Department of the Treasury, Office of Information and Regulatory Affairs, Washington, DC 20503.

Books or records relating to this collection of information must be retained as long as their contents may become material in the administration of any internal revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

### *Background*

On April 16, 1996, the IRS published in the **Federal Register** a notice of proposed rulemaking (formerly PS-004-96) at 61 FR 16623. The IRS received written and oral comments on the proposed regulations and held a public hearing on July 24, 1996. This document adopts final regulations with respect to this notice of proposed rulemaking.

Comments with respect to §25.2702-5(a)(2) indicated that the procedure permitting reformation of trust instruments will be helpful to taxpayers and practitioners. It was suggested that an additional reformation period be made available for trusts for which the gift tax return due date had passed before the regulations became effective. Accordingly, under the final regulations, the trustees of trusts created before January 1, 1997, are granted a 90-day period after these regulations become final in which to reform the trust.

Some of the comments concerning the amendments to §25.2702-5(b) and (c) agreed that the restrictions in the proposed regulations on the sale of the personal residence after the termination of the grantor's retained interest in a personal residence trust or a qualified personal residence trust further the intent of Congress in enacting section 2702(a)-(3)(A)(ii). Other comments stated that the restrictions were not supported by the statute. Treasury and the IRS continue to

believe that these regulations are consistent with the intent of Congress and carry out the purpose of the personal residence exception to section 2702.

Other comments suggested that the final regulations should contain an exception permitting the sale of the residence to the grantor if the need arises. Treasury and the IRS believe, however, that a rule of this nature is not necessary, since a grantor may lease the residence after the retained term from a trust or individual to which the residence passes after the expiration of the initial term. The right to lease the residence may be expressly set forth in the trust document creating the personal residence trust. If the residence is leased for its fair market value rental, the grantor will not retain the economic benefit of the property for purposes of section 2036(a), since the grantor will be paying adequate consideration for the use of the property. However, if the residence is leased from a trust that is a grantor trust with respect to the grantor, the IRS under some circumstances may contend that the grantor has retained the economic benefit of the property.

Commentators raised a concern that because the regulations prohibit the transfer of the residence to the grantor, or the grantor's spouse, etc., the trust could not provide for a reversionary interest or a testamentary power of disposition, taking effect at the grantor's death prior to the expiration of the trust term, nor could the trust provide for a remainder interest in fee for the grantor's spouse (e.g., remainder outright to spouse, or remainder to child, but if child predeceases termination of the trust, then to spouse.) The final regulations permit dispositions to the spouse.

Finally, commentators objected to the statement in the preamble to the proposed regulations to the effect that if the IRS finds a pre-effective date trust to be inconsistent with the purposes of section 2702, the IRS, by established legal doctrines, may treat the trust as non-qualifying. Treasury and the IRS wish to clarify that the IRS will apply these regulations only to post-effective date trusts. Nevertheless, Treasury and the IRS have the authority to apply established legal doctrines to disqualify a pre-effective date trust in cases where the statutory purpose has clearly been violated.

### *Special Analyses*

It has been determined that this Treasury decision is not a significant regulatory action as defined in EO 12866. Therefore, a regulatory assessment is not required. It has also been determined that section 553(b) of the Administrative Procedure Act (5 U.S.C. chapter 5) does not apply to these regulations, and, because these regulations do not impose on small entities, a collection of information requirement, the Regulatory Flexibility Act (5 U.S.C. chapter 6), does not apply. Therefore, a Regulatory Flexibility Analysis is not required. Pursuant to section 7805(f) of the Internal Revenue Code, the Notice of Proposed Rulemaking preceding these regulations was submitted to the Small Business Administration for comment on their impact on small business.

### *Drafting Information*

The principal author of these regulations is Dale Carlton, Office of the Chief Counsel, IRS. Other personnel from the IRS and Treasury Department participated in their development.

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### *Adoption of Amendments to the Regulations*

Accordingly, 26 CFR part 25 is amended as follows:

#### PART 25—GIFT TAX; GIFTS MADE AFTER DECEMBER 31, 1954

Paragraph 1. The authority citation for part 25 continues to read in part as follows:

Authority: 26 U.S.C. 7805 \* \* \*

Par. 2. Section 25.2702-5 is amended as follows:

1. Paragraph (a) heading and text are redesignated as paragraph (a)(1) heading and text and paragraph (a)(2) is added.
2. In paragraph (b)(1), five sentences are added after the third sentence.
3. Paragraph (c)(5)(ii)(C) is revised.
4. Paragraph (c)(9) is added.

The additions and revisions read as follows:

#### §25.2702-5 *Personal residence trusts.*

(a) \* \* \*

(2) *Modification of trust.* A trust that does not comply with one or more of the regulatory requirements under paragraph

(b) or (c) of this section will, nonetheless, be treated as satisfying these requirements if the trust is modified, by judicial reformation (or nonjudicial reformation if effective under state law), to comply with the requirements. In the case of a trust created after December 31, 1996, the reformation must be commenced within 90 days after the due date (including extensions) for the filing of the gift tax return reporting the transfer of the residence under section 6075 and must be completed within a reasonable time after commencement. If the reformation is not completed by the due date (including extensions) for filing the gift tax return, the grantor or grantor's spouse must attach a statement to the gift tax return stating that the reformation has been commenced or will be commenced within the 90-day period. In the case of a trust created before January 1, 1997, the reformation must be commenced within 90 days after December 23, 1997, and must be completed within a reasonable time after commencement.

(b) \* \* \* (1) \* \* \* In addition, the trust does not meet the requirements of this section unless the governing instrument prohibits the trust from selling or transferring the residence, directly or indirectly, to the grantor, the grantor's spouse, or an entity controlled by the grantor or the grantor's spouse, at any time after the original duration of the term interest during which the trust is a grantor trust. For purposes of the preceding sentence, a sale or transfer to another grantor trust of the grantor or the grantor's spouse is considered a sale or transfer to the grantor or the grantor's spouse; however, a distribution (for no consideration) upon or after the expiration of the original duration of the term interest to another grantor trust of the grantor or the grantor's spouse pursuant to the express terms of the trust will not be considered a sale or transfer to the grantor or the grantor's spouse if such other grantor trust prohibits the sale or transfer of the property to the grantor, the grantor's spouse, or an entity controlled by the grantor or the grantor's spouse. In the event the grantor dies prior to the expiration of the original duration of the term interest, this paragraph (b)(1) does not apply to the distribution (for no consideration) of the residence to any person (including the grantor's estate) pursuant

to the express terms of the trust or pursuant to the exercise of a power retained by the grantor under the terms of the trust. Further, this paragraph (b)(1) does not apply to any outright distribution (for no consideration) of the residence to the grantor's spouse after the expiration of the original duration of the term interest pursuant to the express terms of the trust. For purposes of this paragraph (b)(1), a grantor trust is a trust treated as owned in whole or in part by the grantor or the grantor's spouse pursuant to sections 671 through 678, and control is defined in §25.2701-2(b)(5)(ii) and (iii). \* \* \*

\* \* \* \* \*

- (c) \* \* \*
- (5) \* \* \*
- (ii) \* \* \*

(C) *Sale proceeds.* The governing instrument may permit the sale of the residence (except as set forth in paragraph (c)(9) of this section) and may permit the trust to hold proceeds from the sale of the residence, in a separate account.

\* \* \* \* \*

(9) *Sale of residence to grantor, grantor's spouse, or entity controlled by grantor or grantor's spouse.* The governing instrument must prohibit the trust from selling or transferring the residence, directly or indirectly, to the grantor, the grantor's spouse, or an entity controlled by the grantor or the grantor's spouse during the retained term interest of the trust, or at any time after the retained term interest that the trust is a grantor trust. For purposes of the preceding sentence, a sale or transfer to another grantor trust of the grantor or the grantor's spouse is considered a sale or transfer to the grantor or the grantor's spouse; however, a distribution (for no consideration) upon or after the expiration of the retained term interest to another grantor trust of the grantor or the grantor's spouse pursuant to the express terms of the trust will not be considered a sale or transfer to the grantor or the grantor's spouse if such other grantor trust prohibits the sale or transfer of the property to the grantor, the grantor's spouse, or an entity controlled by the grantor or the grantor's spouse. In the event the grantor dies prior to the expiration of the retained term interest, this paragraph (c)(9) does not apply to the dis-

tribution (for no consideration) of the residence to any person (including the grantor's estate) pursuant to the express terms of the trust or pursuant to the exercise of a power retained by the grantor under the terms of the trust. Further, this paragraph (c)(9) does not apply to an outright distribution (for no consideration) of the residence to the grantor's spouse after the expiration of the retained trust term pursuant to the express terms of the trust. For purposes of this paragraph (c)(9), a grantor trust is a trust treated as owned in whole or in part by the grantor or the grantor's spouse pursuant to sections 671 through 678, and control is defined in §25.2701-2(b)(5)(ii) and (iii).

\* \* \* \* \*

Par. 3. Section 25.2702-7 is amended as follows:

1. The first sentence is revised.
2. A sentence is added at the end of the section.

The revision and addition read as follows:

*§25.2702-7 Effective dates.*

Except as provided in this section, §§25.2702-1 through 25.2702-6 apply as of January 28, 1992. \* \* \* The fourth through eighth sentences of §25.2702-5(b)(1) and §25.2702-5(c)(9) apply with respect to trusts created after May 16, 1996.

**PART 602—OMB CONTROL NUMBERS UNDER THE PAPERWORK REDUCTION ACT**

Par. 4. The authority citation for part 602 continues to read as follows:

Authority: 26 U.S.C. 7805.

Par. 5. In §602.101, paragraph (c) is amended by adding an entry in numerical order to the table to read as follows:

*§602.101 OMB Control numbers.*

\* \* \* \* \*

(c) \* \* \*

CFR part or section where identified and described	Current OMB control No.
* * * * *	
25.2702-5 . . . . .	1545-1485
* * * * *	

Michael P. Dolan,  
*Acting Commissioner of  
Internal Revenue.*

Approved December 4, 1997.

Donald C. Lubick,  
*Acting Assistant Secretary of  
the Treasury.*

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62 F.R. 66987)

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