

Internal Revenue Service

Department of the Treasury

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Washington, DC 20224

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:P&SI:4-PLR-116130-99
Date:
March 7, 2000

Re:

Legend

Grantor =

Spouse =

Daughter =

Son =

A =

B =

Trust 1 =

Trust 2 =

Trust 3 =

Trust 4 =

Date 1 =

Date 2 =

Date 3 =

Date 4 =

Year =

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Dear _____ :

We received a letter dated September 30, 1999, from your authorized representative requesting rulings concerning the application of §§ 2041 and 2514 of the Internal Revenue Code to Trust No. 4 referenced above.

According to the facts submitted, on Date 1, prior to October 29, 1979, Grantor created four irrevocable trusts, Trust 1, Trust 2, Trust 3, and Trust 4 (collectively, the Trusts), for the benefit of Grantor, Spouse, and their issue. No additional transfers were made to the Trusts after their creation.

Grantor died on Date 2. The current primary beneficiaries of Trust 1 and Trust 2 are Spouse, Daughter, and Daughter's issue. The current primary beneficiaries of Trust 3 and Trust 4 are Spouse, Son, and Son's issue. Other than the designation of the beneficiaries, the dispositive terms of the Trusts are identical.

Article FOURTH. A. provides that the trustees shall pay to, or apply for the benefit of, Spouse, annually or more often, as determined by the trustees, the entire net income of the trust. The trustees (other than Spouse if then a trustee) shall have the power, at any time or times during the life of Spouse: (a) to pay to, or apply for the benefit of, Spouse, such part or parts of all of the principal of the trust as the trustees shall determine, in the trustees' absolute and uncontrolled discretion, for any reason whatsoever, notwithstanding that such payments may result in the termination of the trust; and (b) to pay to, or apply for the benefit of one or more, or all, of the issue of the Grantor, such part, parts or all of the principal of the trust, in such proportions, as the trustees shall determine, in the trustees' absolute and uncontrolled discretion, for any reason whatsoever, notwithstanding that such payments may result in the termination of the trust. Under Article FOURTH. B., on Spouse's death the trust corpus is to be distributed pursuant to Spouse's exercise of a testamentary special power to appoint corpus directly to Grantor's family members or trusts for their benefit. Should Spouse fail to exercise her power of appointment, Article FIFTH provides that the trust corpus is to be held in further trust for the benefit of Daughter (with respect to Trust 1 and Trust 2) and Son (with respect to Trust 3 and Trust 4).

Article TENTH provides that no person who shall be or become a trustee shall participate in any decision by the trustees to pay or apply principal or income of any trust to himself or herself, or to, or for the benefit of, issue of such person, and any such decision shall be made solely by the other acting trustees.

Article NINETEENTH provides that there may be one or more, but no more than three, trustees. Successor or additional trustees may be designated by a Committee created pursuant to Article TWENTIETH. Any trustee may resign or cease to act as trustee at any time, with or without cause, by written notice of such resignation to the Committee and the other trustees. In the event of a vacancy, successor trustees shall

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be designated by the Committee. The trustees shall act, and all questions shall be decided, by a majority of their number; provided, however, that trustees who are specifically disqualified from acting under a specific article shall not be counted.

Article TWENTIETH. A. provides that Spouse shall be the original member of the Committee, and that Spouse may designate one or two additional members of the Committee. Any member, with or without resigning, may by instrument in writing, executed and delivered during his or her lifetime, or by his or her Last Will and Testament, designate the person who is to succeed him or her as a member of the Committee, which designation may be changed at any time before such member vacates his or her office. If any Committee member ceases to act as a Committee member without having designated a successor, his or her successor shall be selected by the remaining members of the Committee, or if only one remains, by that one. If at any time there is no member of the Committee, then a Committee shall be selected by the then trustees, or if there are no trustees at such time, by the person, or the majority vote of the persons among whom the income of the trust could then be distributed.

Article TWENTIETH. B. provides that the Committee may remove, with or without cause, any trustee or trustees from office at any time, and may appoint additional trustees or successor trustees to the extent permitted by Article NINETEENTH. Such additional or successor trustee or trustees may be any person or persons, including any member or members of the Committee.

The original co-trustees of all four Trusts were Spouse, Daughter and B. B was an unrelated individual. On Date 2, Spouse, in her capacity as the Committee for each Trust, removed B as the Trustee and appointed Son as the successor co-trustee of all four Trusts. On Date 3, Spouse as the Committees for Trust 1 and Trust 2 removed Son as the trustee of Trust 1 and Trust 2 and appointed an unrelated person, A, as successor trustee. Similarly, on Date 3, Spouse as the Committees for Trust 3 and Trust 4 removed Daughter as the Trustee of Trust 3 and Trust 4 and appointed A as successor trustee. At the present time, Spouse, Daughter, and A continue to serve as trustees of Trust 1 and Trust 2, and Spouse, Son, and A continue to serve as trustees of Trust 3 and Trust 4.

Spouse served as the sole member of the Committees for all four Trusts until Date 4 when Spouse resigned as the sole member for Trust 3 and Trust 4 and designated Son as her successor. Son continues to serve as the sole member of the Committees for Trust 3 and Trust 4, while Spouse remains the sole member of the Committees for Trust 1 and Trust 2.

You have requested the following rulings:

1. If Spouse dies while serving as a member of the Committee of Trust No. 4, she will not be treated as having a general power of appointment at her death within the

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meaning of § 2041(a)(2) as a result of her possession of a power, as a member of the Committee, to remove the trustees of Trust No. 4 and appoint successor trustees, including the power to appoint herself as trustee.

2. Spouse will not be treated as releasing, or having released, a general power of appointment within the meaning of §§ 2041(a)(2) or 2514(b) as a result of resigning as a member of the Committee of Trust No. 4.

LAW AND ANALYSIS

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has at the time of death a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released such a power of appointment by a disposition that is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive.

Section 2041(b)(1)(A) provides that a general power of appointment is a power that is exercisable in favor of the decedent, the decedent's creditors, or the creditors of the decedent's estate. However, a power to consume, invade, or appropriate property for the benefit of the decedent that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.

Section 20.2041-1(b) of the Estate Tax Regulations provides that a power in a decedent to remove or discharge a trustee and appoint himself may be a power of appointment. For example, if under the terms of a trust instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment.

Section 2514(b) provides that the exercise or release of a general power of appointment created after October 21, 1942, is deemed a transfer of property by the individual possessing the power. In general, rules similar to those applicable under § 2041, in determining what constitute a general power of appointment also apply for purposes of § 2514. *See, e.g.*, § 2514-1(b)(1). Further, § 25.2514-3(b)(4) provides that if a trustee holds a power in the capacity as a trustee that is considered a general power, the individual's resignation or removal as trustee will cause a lapse of the power.

Rev. Rul. 79-353, 1979-2 C.B. 325, held that the value of property transferred to a trust is includible in the decedent-grantor's gross estate under §§ 2036(a)(2) and 2038(a)(1) if the grantor retains the power to remove the corporate trustee, without

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cause, and appoint another corporate trustee, and the trustee is endowed with broad discretionary powers. In Rev. Rul. 81-51, 1981-1 C.B. 458, the Service announced that Rev. Rul. 79-353 would be applied prospectively only. Specifically, Rev. Rul. 81-51 held that, if on or before October 28, 1979, (the date of publication of Rev. Rul. 79-353), a grantor transferred property to an irrevocable trust, retaining the power to remove, at will, and replace the corporate trustee with another corporate trustee, no estate tax consequences will result on account of the retained removal and replacement power.

Subsequently, the Service reconsidered the position on this issue in Rev. Rul. 95-58, 1995-2 C.B. 191. This ruling revoked Rev. Rul. 79-353 and Rev. Rul. 81-51 and holds that a decedent-settlor's reservation of an unqualified power to remove a trustee and appoint an individual or corporate successor trustee that is not related or subordinate to the decedent within the meaning of § 672(c), is not considered a reservation of the trustee's discretionary power of distribution over the property transferred by the decedent-settlor to the trust.

Section 672(c) defines the term "related or subordinate party" to mean any nonadverse party who is (1) the grantor's spouse if living with the grantor; or (2) any one of the following: the grantor's father, mother, issue, brother or sister; an employee of the grantor; a corporation or any employee of a corporation in which the stock holdings of the grantor and the trust are significant from the viewpoint of voting control; a subordinate employee of a corporation in which the grantor is an executive.

In the present case, Trusts 1, 2, 3, and 4 authorize the removal and replacement of trustees by the Committees for each Trust. The trustee of any Trust may be replaced with a corporate or an individual trustee, including individuals who are beneficiaries of the Trusts. Article TENTH, however, provides that no person who shall be or become a trustee shall participate in any decision by the trustees to pay or apply principal or income of any Trust to himself or herself, or to, or for the benefit of, issue of such person, and any such decision shall be made by the other trustees then acting.

Further, Trusts 1, 2, 3, and 4 were created prior to October 29, 1979. Although Rev. Rul. 95-58 revoked Rev. Rul. 81-51, a trust that was exempt from the application of Rev. Rul. 79-353 by virtue of Rev. Rul. 81-51, does not lose this exemption even if the trust otherwise fails to meet the standard set forth in Rev. Rul. 95-58.

Based on the above, we conclude as follows:

1. Should Spouse die while serving as a member of the Committee of Trust No. 4, she will not be treated as having a general power of appointment at death within the meaning of § 2041(a)(2) solely as a result of possessing a power, as a member of the Committee, to remove the trustees of Trust No. 4 and appoint successor trustees, including the power to appoint herself as trustee.

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2. Spouse will not be treated as releasing, or having released, a general power of appointment within the meaning of §§ 2041(a)(2) or 2514(b) as a result of resigning as a member of the Committee of Trust No. 4.

Except as specifically set forth above, no opinion is expressed concerning the federal tax consequences of the facts described above under the cited provisions or any other provisions of the Code. In particular, no opinion is expressed on the consequences of the manner in which Spouse has exercised or may exercise the power to remove and replace trustees. Such a determination is factual in nature and not appropriate for advance ruling purposes.

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.

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.

In accordance with a power of attorney on file with this office, a copy of this ruling is being sent to your authorized representative.

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

Enclosure
Copy for § 6110 purposes