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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04-PLR-135429-01

Date:

DECEMBER 10, 2001

In Re:

Legend:

Husband =

Wife =

Trust =

Date 1 =

Date 2 =

Dear :

This is in response to the June 25, 2001 letter and other correspondence requesting rulings concerning the estate and gift tax consequences applicable to a trust.

You have requested the following rulings:

1. The value of the entire Trust will be includible in the gross estate of the first spouse to die.
2. On the death of the first spouse, the surviving spouse will be treated as making a gift that qualifies for the marital deduction to the deceased spouse with respect to the portion of the Trust property that is attributable to the surviving spouse's contributions to the Trust.
3. To the extent that the Family Trust is funded, any portion of the property that passes to the Family Trust that originated with the surviving spouse will not constitute a gift by such spouse.
4. Future payments from the Family Trust to beneficiaries other than the surviving spouse will not constitute a gift from the surviving spouse to these beneficiaries, and none of the property attributable to the surviving

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spouse held in the Family Trust will be includible in the estate of the surviving spouse.

The facts submitted are as follows:

Husband and Wife, collectively the Donors, created Trust on Date 1. Trust was amended and restated on Date 2. Trust is funded with assets that the Donors own as joint tenants with right of survivorship or in their individual capacity.

Article VI of Trust provides that the Trust may be altered or amended by either Donor with the consent of the trustee(s) while both Husband and Wife are living. Article VI further provides that during the joint lives of Husband and Wife, the Trust may be revoked by either of the Donors, in whole or in part, and the trustee(s) shall, if so directed, transfer and convey in accordance with the direction of the Donors, any or all of the Trust property then held. Upon the death of either Husband or Wife, the Trust will become irrevocable.

Article XVIII provides that during the joint lives of the Donors, the trustee(s) shall pay all of the net income to the Donors, unless the Donors request in writing that a portion of such income be added to the principal. Article XVIII further provides that the trustee(s) shall pay to the Donors, or in accordance with their instructions, so much of the principal as the Donors, or either Donor, may request.

Article XIX provides for division of Trust upon the death of the first of the Donors to die.

Article XIX, Paragraph A provides that an amount of Trust property equal to the maximum marital deduction allowable to the deceased spouse's gross estate reduced by the amount necessary to create the largest taxable estate, which after utilizing the unified credit, will result in no tax due is to be transferred to a Marital Trust. During the life of the surviving spouse, the trustee(s) shall pay the net income to the surviving spouse at least quarter-annually, and such amounts of principal as the surviving spouse may direct. Upon the death of the surviving spouse, the trustee(s) shall pay over any remaining principal to such persons that the surviving spouse shall appoint by his or her Last Will.

Article XIX, Paragraph B provides that the remaining balance of Trust property is to be placed in a Family Trust. During the life of the surviving spouse, the trustee(s) is to pay all the net income to the surviving spouse. The trustee(s) may also pay so much principal allocated to the Family Trust to or for the benefit of surviving spouse and the issue of both Donors, as the trustee(s) shall deem advisable for their health, support, maintenance, or education. Upon the death of the surviving spouse, the remaining income and principal in the Family Trust shall be distributed to the Donor's living issue per stirpes.

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Article XXVII of Trust provides that the following persons will act as trustee(s) in the following order of succession: 1) Husband and Wife shall act as co-trustees during their joint lives, 2) the surviving Donor, 3) the living children of the Donors jointly or the survivor(s) of Donors' children, 4) trustee(s) chosen by a majority of the beneficiaries, and 5) additional or successor trustees may be appointed by the trustees then serving.

LAW AND ANALYSIS

Ruling 1

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 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2038(a) provides that the value of the gross estate includes the value of all property, to the extent of any interest therein, of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property or where the decedent relinquished this power during the three-year period ending on the date of the decedent's death.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

Section 2041(b)(1) provides that 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, invade, or appropriate 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 20.2041-1(b)(2) of the Estate Tax Regulations provides that the term "power of appointment" does not include powers reserved by the decedent to himself within the concept of sections 2036 to 2038.

Section 1014(a) provides that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a

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decedent is the fair market value of the property at the date of the decedent's death (or alternate valuation date).

Section 1014(b)(9) provides that, for purposes of section 1014(a), property acquired from the decedent includes property acquired from the decedent by reason of death, form of ownership, or other conditions, including property acquired through the exercise or non-exercise of a power of appointment, if the property is required to be included in determining the value of the decedent's gross estate for federal estate tax purposes.

Section 1014(e), however, provides an exception to the general rule of section 1014(a). Under section 1014(e), if appreciated property was acquired by the decedent by gift during the one-year period ending on the date of the decedent's death, and the property is acquired from the decedent by, or passes from the decedent to, the donor of such property, the basis of such property in the hands of the donor is the adjusted basis of the property in the hands of the decedent immediately before the death of the decedent.

In this case, each Donor holds a power to revoke the entire trust during their joint lifetime. Thus, the portion of the Trust property that the deceased Donor transferred to the Trust would be includible in the deceased Donor's gross estate under section 2038.

Either Donor has the power to direct the trustee(s) to pay so much of the principal as the Donor may request to himself or in any other manner in accordance with the Donor's instructions. This power is not limited to specific individuals, and can be exercised in favor of Donor, Donor's creditors, Donor's estate, and the creditors of Donor's estate. Thus, the portion of the Trust property that the surviving Donor transferred to the Trust would be includible in the deceased Donor's gross estate under section 2041.

In addition, section 1014(e) will apply to any Trust property includible in the deceased Donor's gross estate that is attributable to the surviving Donor's contribution to Trust and that is acquired by the surviving Donor, either directly or indirectly, pursuant to the deceased Donor's exercise, or failure to exercise, the general power of appointment over the Trust property.

Ruling 2

Section 2501 imposes a tax for each calendar year on the transfer of property by gift during such calendar year by any individual, resident or nonresident.

Section 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. Section 25.2511-2(c) provides that a gift is

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incomplete in every instance in which a donor reserves the power to revest the beneficial title to the property in himself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

In this case, the surviving Donor will relinquish dominion and control over his or her interests in the Trust property on the death of the first Donor. Accordingly, on the death of the first Donor, the surviving Donor will make a completed gift under section 2501 of the surviving Donor's entire interest in Trust. This gift will qualify for the marital deduction under section 2523.

Ruling 3

As discussed above, the surviving Donor is treated as making a completed gift of his or her interest in Trust on the death of the first deceasing Donor. Also, as discussed above, a portion of Trust property will be subject to inclusion in the deceased Donor's gross estate under section 2038, and a portion will be subject to inclusion under section 2041. Accordingly, to the extent the Family Trust is funded, property passing to the Family Trust is treated as passing from the deceased Donor, and not from the surviving Donor.

Ruling 4

Any future payments from the Family Trust to beneficiaries other than the surviving Donor will not constitute a gift from the surviving Donor to those beneficiaries. None of the assets held in the Family Trust will be includible in the surviving Donor's gross estate, since the surviving Donor will possess only an income interest with respect to the assets in the Family Trust.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

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.

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.

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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.

Sincerely yours,
Lorraine E. Gardner
Assistant to Branch Chief, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure:

Copy of letter for section 6110 purposes