

INTERNAL REVENUE SERVICE
NATIONAL OFFICE TECHNICAL ADVICE MEMORANDUM

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Index (UIL) No.: 2041.02-00
CASE MIS No.: TAM-113623-99/CC:DOM:P&SI:B4

Taxpayer's Name:

Taxpayer's Address:

Taxpayer's Identification No:

Years Involved: Date of Death:

Date of Conference:

LEGEND:

Spouse =
Decedent =
Date 1 =
Will =

ISSUE:

Is the value of the testamentary trust of which Decedent was a co-trustee and life beneficiary includible in Decedent's gross estate under § 2041(a)(2) of the Internal Revenue Code?

CONCLUSION:

Decedent is prohibited by a state statute from exercising any power to distribute trust corpus to herself. Accordingly, the value of the testamentary trust of which Decedent was a co-trustee and life beneficiary is not includible in Decedent's gross estate under § 2041(a)(2).

FACTS:

Decedent's spouse died in 1950. Under Item Seven of his Will, the residuary estate passed in trust for the benefit of Decedent and the children of Spouse and Decedent. A bank and Decedent were designated as co-trustees. Regarding distributions during Decedent's life, the will provided as follows:

I direct my said Trustees to pay all the net revenue and income derived from said trust estate to my wife, [Decedent], in as nearly equal monthly installments as practicable, for her comfort and support, and for the comfort, education and support of our daughter, and such other children as may be born unto us. In the event such income be insufficient for the purposes aforesaid I authorize and empower my Trustees to encroach upon the corpus or principal of the trust estate in such amounts as they may, in their discretion, deem necessary.

After Decedent's death, the trust is to be held for the benefit of the daughter and any other children born to Spouse and Decedent. Each child's share is to be paid outright to the child when the child reaches age 35. The share of a child who dies before receiving outright payment will be held in trust for that child's then living lineal descendants or heirs at law.

Decedent died in 1997 on Date 1. At the time of her death, Decedent and a bank were serving as co-trustees.

LAW AND ANALYSIS:

Section 2041(a)(2) provides that 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 his death a general power of appointment created after October 21, 1942.

Section 2041(b)(1) defines a general power of appointment as a power that is exercisable in favor of the decedent, the decedent's estate, or the creditors of either. Under § 2041(b)(1)(A) a power to consume, invade or appropriate property for the benefit of the decedent limited by an ascertainable standard relating to health, education, support, or maintenance of the decedent is not a general power of appointment. Under § 2041(b)(1)(C), a power of appointment (created after October 21, 1942) is not a general power of appointment if it is exercisable by the possessor only in conjunction with another person having a substantial adverse interest in the

property subject to the power, which is adverse to exercise of the power in favor of the possessor.

Under § 20.2041-1(c)(1) of the Estate Tax Regulations, a power of appointment exercisable for the purpose of discharging a legal obligation of the decedent or for the decedent's pecuniary benefit is considered a power of appointment exercisable in favor the decedent or the decedent's creditors.

Rev. Rul. 54-153, 1954-1 C.B. 185, addressed a situation in which a decedent was a life income beneficiary and co-trustee of a trust created under her spouse's will. The will provided that should the beneficiary be in need of additional funds for her maintenance, comfort, or support, or for any other purpose or purposes whatsoever, the trustees were authorized to pay her such amounts of principal held in trust as in the exercise of their sole and absolute discretion they deem advisable for such purposes.

The revenue ruling involved New York State law under which a relevant statute provided:

A power, vested in a person in his capacity as trustee of an express trust, to distribute principal to himself cannot be exercised by him; if the power is vested in two or more trustees, it may be executed by the trustee or trustees who are not so disqualified; if there is no trustee qualified to execute the power, its execution devolves on the supreme court. . . .

The revenue ruling concludes that in the absence of an indication that the New York courts would construe the statute otherwise, the Service will accept the view that such trustee is also prevented by the statute from exercising the power to distribute principal to his estate, his creditors, or the creditors of his estate. Accordingly, the ruling holds that where a trustee, who is also a beneficiary of a trust, is prevented by a state statute from participating in a decision to distribute corpus to himself, his estate, his creditors, or the creditors of his estate, no part of the trust property is includible in the beneficiary-trustee's gross estate under § 811(f)(2) (the predecessor to § 2041) by reason of the fact that the trust instrument provides that the trustees may distribute corpus to the beneficiary. See also, Rev. Proc. 94-44, 1994-2 C.B. 683, considering a similar statute under Florida law.

Mo. Ann. Stat. § 456.540.4 (Vernon 1992) provides that unless the terms of the trust refer to this section and provide otherwise, a power conferred upon two or more persons, none of whom is the settlor, in their capacity as trustees to make discretionary distribution of either principal or income to or for the benefit of one of them, cannot be exercised by such person, but it shall be exercisable by the trustee or trustees who are not so disqualified. This section of the statute applies to any trust established at any

time.

In the instant case, Decedent was a life income beneficiary and a co-trustee of the trust created under Item Seven of Spouse's will. The will directed the trustees to pay to Decedent all of the trust income for her comfort and support and for the comfort, education, and support of the children of Spouse and Decedent. The will further provided that should the income payable to Decedent be insufficient for her comfort and support and for the comfort, education, and support of the children of Spouse and Decedent, the trustees were authorized to encroach upon the trust corpus in such amounts as they deemed necessary, in their discretion.

However, as was the case in Rev. Rul. 54-153, under Mo. Ann. Stat. § 456.540.4, at the time of her death, Decedent, as both beneficiary and co-trustee, was prohibited from exercising her trustee powers to make discretionary distributions of trust principal to herself. Consequently, under Missouri law, as co-trustee and life beneficiary, Decedent held no power to invade trust principal for her own benefit. Thus, as provided in Rev. Rul. 54-153, Decedent was prohibited by the Missouri statute from participating in decisions to distribute trust corpus to herself. Accordingly, because Decedent did not have a power to appoint corpus to herself, or for her benefit, (whether or not limited by an ascertainable standard) no part of the value of the trust created under Spouse's will is includible in Decedent's gross estate under § 2041.

CAVEAT(S)

A copy of this technical advice memorandum is to be given to the taxpayer(s). Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.