

INTERNAL REVENUE SERVICE
TECHNICAL ADVICE MEMORANDUM

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LEGEND:

Issue:

Whether the terms of Decedent's will provide the surviving spouse, (Spouse), with a qualifying income interest for life within the meaning of § 2056(b)(7)(B)(ii) of the Internal Revenue Code.

Conclusion:

The terms of Decedent's will provide Spouse with a qualifying income interest for life within the meaning of § 2056(b)(7)(B)(ii).

Facts:

Decedent died testate in 1997, survived by Spouse. Decedent was a resident of State. Under the terms of Article Third, Paragraph A, of Decedent's will, in the event that Spouse survived Decedent, the residuary of Decedent's estate is to be held in a separate trust for the benefit of Spouse.

Article Third, Paragraph A(1), provides as follows:

My Trustees shall pay the entire net income therefrom to my wife [Spouse] for so long as she lives, in quarter annual or more frequent intervals as my Trustees determine in their absolute discretion. In addition, my Trustees may pay to or apply for the benefit of my wife, for so long as she lives, so much (even to the extent of the whole) of the principal of this trust as my Trustees shall deem advisable, in their sole and absolute discretion. However, any authorization, direction, or other provision contained in this trust which would prevent my wife from being eligible for or result in the loss of government benefits or assistance shall be void to the extent that such authorization, direction or other provision would have such adverse result. I intend that the trust

assets be used to supplement, not supplant, impair or diminish, any benefits or assistance of any federal, state, county, city, or other governmental entity for which my wife may otherwise be eligible or which my wife may be receiving.

Article Third, Paragraph A(3), provides:

It is my intent that this Trust be a source of supplemental medical care and support for my wife; my desire being that existing or future governmental programs shall be the primary source of her medical care and support.

Accordingly, notwithstanding any provision to the contrary, the Trustees are to expend trust funds from the Trust to procure more sophisticated medical, psychological and/or dental treatment... provided that such care is not available under any governmental program, and to pay for expenses not covered by the available public programs, including maintenance and living expenses, and to make trust distributions from the Trust to or for the benefit of my wife in such a way that her life will be enriched and made more enjoyable, including providing recreational and vacation opportunities.

Article Third, Paragraph A(4), provides:

Under no circumstances shall my Trustees exercise discretion to utilize trust funds for the payments of such services that would otherwise be borne by any publicly funded program...

Article Third, Paragraph C authorizes the executor to elect to qualify the trust for the marital deduction under § 2056(b)(7). The paragraph further provides:

None of the powers granted to my Trustees in this will or by law shall be exercised in any manner which would disqualify this trust or any part thereof from the Federal estate tax marital deduction.

Article Fourth, Paragraph (c) provides:

Every provision of this will shall be construed and interpreted and, if necessary, modified and limited in such manner that the provisions respecting the Marital Deduction Trust, including every

power and duty of my fiduciaries with respect thereto, comply with every provision of the Internal Revenue Code in effect at the time of my death prerequisite to every such provision qualifying said trust for the allowance of a marital deduction with respect thereto in determining the Federal estate tax on my estate.

Under Article Third, Paragraph A(5), upon Wife's death, the principal of Trust at that time remaining is to be paid and distributed to Decedent's two children, in equal shares per stirpes.

The Decedent's estate claimed a marital deduction under § 2056(b)(7) in the amount of \$x with respect to Trust on Decedent's federal estate tax return (Form 706).

Law and Analysis:

Section 2001(a) imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse.

Section 2056(b)(1) provides the general rule that no deduction shall be allowed for an interest passing to the surviving spouse if, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, the interest will terminate or fail.

Section 2056(b)(7)(A) provides that, in the case of qualified terminable interest property, the property shall be treated as passing to the surviving spouse for purposes of § 2056(a) and no part of the property shall be treated as passing to any person other than the surviving spouse.

Section 2056(b)(7)(B)(i) defines "qualified terminable interest property" as property: (1) which passed from the decedent, (2) in which the surviving spouse has a qualifying income interest for life, and (3) to which an election under § 2056(b)(7)(B)(v) applies.

Section 2056(b)(7)(B)(ii) provides that the surviving spouse will be considered to have a qualifying income interest for life if the surviving spouse is entitled to all of the income from the property payable annually or at more frequent intervals, and no other person has a power to appoint any part of the property to

any person other than the surviving spouse.

Section 2056(b)(7)(B)(v) provides that an election under § 2056(b)(7) with respect to any property shall be made by the executor on the return of tax imposed by § 2001. Such an election, once made, shall be irrevocable.

Under § 20.2056(b)-7(d)(2) of the Estate Tax Regulations, the principles of § 20.2056(b)-5(f), relating to whether the spouse is entitled for life to all of the income from a trust for purposes of qualifying for a marital deduction under § 2056(b)(5), also apply in determining whether the spouse is entitled for life to all trust income for purposes of § 2056(b)(7). Under § 20.2056(b)-5(f)(7), a spouse does not have the requisite income interest if trust income may be accumulated, in whole or in part, in the discretion of any person other than the spouse.

In this case, the will directs that the entire net income of the residuary trust is to be paid to Spouse and the trustees may also make discretionary distributions of principal to the Spouse. However, the will further provides that any authorization, direction or provision in the will which would cause Spouse to be ineligible for government benefits will be void. This provision, along with the quoted language from Article Third, Paragraph A(3), and Article Third, Paragraph A(4), could be viewed as curtailing Spouse's right to that income, such that the income interest would not satisfy the requirements of § 2056(b)(7)(B).

However, Articles Third and Fourth of the will contain provisions precluding the trustees from exercising any power in a manner that would disqualify the trust for the estate tax marital deduction, and directing that the provisions of the will be construed and if necessary modified and limited in such manner that every power and duty of the trustees will comply with the requirements for allowance of a marital deduction with respect to the trust. In general, savings clauses of this nature, which would effectively void a trustee power or direction that would disqualify the trust for marital deduction purposes are not effective for transfer tax purposes. Estate of Walsh v. Commissioner, 110 T.C. 393, 402 (1998); Rev. Rul. 75-440, 1975-2 C.B. 372; Rev. Rul. 65-144, 1965-1 C.B. 442.

Nonetheless, as discussed in Rev. Rul. 75-440, these provisions can be used as an aid in determining testator's intent where the instrument presents an ambiguity.

In Rev. Rul. 75-440, a decedent executed a will that provided for both a marital deduction trust and a residuary trust. Thereafter, the will set out the powers granted to the trustees of both trusts. The powers were set out only once

rather than being separately stated for each trust. One of the powers granted was the power, "To take out and carry policies of insurance on the life of any person or persons in which such beneficiary may at any time have an insurable interest, provided that the policies for such insurance shall be owned by the trust, and that the proceeds of such insurance shall be payable to the trust."

The will also provided that, "Notwithstanding anything herein contained to the contrary, any power, duty, or discretionary authority granted to my Fiduciary hereunder shall be absolutely void to the extent that either the right to exercise or the exercise thereof, shall in any way affect, jeopardize or cause my estate to lose all or any part of the tax benefit afforded my estate by the Marital Deduction under either Federal or State law."

The revenue ruling notes that under the facts presented, the trustee's unconditional power to invest in insurance policies, an unproductive asset, would normally preclude the marital trust from qualifying for a marital deduction.

However, the ruling concludes that a reading of the entire will evidences an intent on the part of the decedent to restrict the power to invest in unproductive property to only the trustees of the residuary trust. The savings clause was viewed as an aid in determining the testator's intent. The existence of the savings clause that would "void" a disqualifying power was relevant because it was indicative of the testator's intent not to give the trustees of the marital trust a disqualifying power. Accordingly, the marital deduction was held to be allowable.

In the present case, the first sentence of Article Third, Paragraph A(1), directs the trustees to pay Spouse the entire net income from the Trust in quarter annual or more frequent intervals. The second sentence authorizes the trustees to pay to or for the benefit of Spouse, trust principal as deemed advisable, in their sole and absolute discretion. The third sentence voids any "authorization, direction or other provision," that would prevent eligibility for, or cause loss of governmental benefits.

However, the fourth sentence of Article Third, Paragraph A(1), expresses Decedent's intent that the trust "assets" only be used to supplement and not impair the availability of governmental benefits. Article Third, Paragraph A(3) authorizes the trustees to expend trust "funds" for medical and support needs not otherwise provided for by governmental units. Article Third, Paragraph A(4), provides that the trustees are not to exercise discretion to utilize trust "funds" for the payment of services that would otherwise be borne by any publicly funded program.

In view of the reference to trust "assets" in the fourth

sentence of Article Third, Paragraph A(1), and the reference to trust "funds" in Article Third, Paragraphs A(3) and (4), we believe that a reasonable question is presented regarding whether the restriction in the third sentence of Article Third, Paragraph A(1), was intended to apply only to the trustees' power to invade trust principal for Spouse (contained in the second sentence) or was also intended to apply to the Spouse's right to receive trust income (contained in the first sentence.) Under these circumstances, as was the case in Rev. Rul. 75-440, the savings clauses in Articles Third and Fourth, may be viewed as aids in discerning Decedent's intent in resolving this ambiguity.

In accordance with the analysis applied in Rev. Rul. 75-440, we believe that the clauses in Article Third that reference the trustees' use of trust "assets" and trust "funds" as described above, when considered in conjunction with the savings clauses, evidence an intent on the part of the Decedent that the third sentence of Article Third, Paragraph A(1), voiding any "authorization, direction, or other provision," that would prevent eligibility for, or cause loss of government benefits, should be applied only to the trustees' discretionary power to distribute principal to or for the benefit of Spouse. The third sentence of Article Third, Paragraph A(1) is not applicable to the Spouse's entitlement to the net income from Trust.

Accordingly, we conclude that the terms of Trust provide Spouse with a qualifying income interest for life within the meaning of § 2056(b)(7)(B)(ii) such that Trust qualifies for the estate tax marital deduction.

Caveat:

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

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