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Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:4/PLR-112057-00

Date:

April 30, 2001

In Re:

Legend:

- Wife -
- Husband -
- Trust -
- Date -
- Child 1 -
- Child 2 -
- Child 3 -

Dear :

This is in reference to your June 9, 2000 correspondence requesting rulings regarding the effect for federal gift and generation-skipping transfer tax purposes of the transfers in trust as proposed.

The facts submitted are as follows:

Wife and Husband have three children, Child 1, Child 2 and Child 3, all of whom are minors. On Date, Wife created Trust, an irrevocable trust primarily for the benefit of Husband and Child 1, Child 2, and Child 3. Husband is the trustee of Trust.

Under Article 4 of Trust, the trustee has the discretion to distribute to Husband as much of the trust income and principal as the trustee deems necessary for Husband's "health and maintenance in reasonable comfort." The trustee also has the discretion to make discretionary distributions of income and principal to Wife's descendants for their "health, education (including, but not limited to, primary, secondary, vocational, collegiate and postgraduate, which may include room, board, tuition and books), and maintenance in reasonable comfort." The trustee is prohibited from making any distribution that would have the effect of discharging a legal obligation of Wife or Husband. Any discretionary distributions made by Husband, serving in the capacity as trustee, to himself must be made in a fiduciary capacity. The trust will terminate upon the death of the last to die of Husband and Wife, provided all the children of Husband and Wife are over 25 at that time. Husband has the testamentary

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power to appoint the corpus to one or more descendant of Wife but, if he fails to do so, the trust will be separated into three equal shares, one for each of Child 1, Child 2, and Child 3 (or the issue of any predeceased child). The shares are to be held in separate trusts. Each child will receive, in the trustee's discretion, distributions for that child's "health, maintenance in reasonable comfort and education." Each child has a testamentary special power to appoint the corpus of their respective trust to one or more descendants of Wife (other than that child). Any trust corpus not appointed by the child will pass in trust for the benefit of that child's descendants under similar dispositive provisions.

Article 9.1 of Trust provides that, upon each transfer by gift to the trust, each descendant of Wife may withdraw an amount from the trust equal to the lesser of the annual exclusion amount as provided for under § 2503 of the Internal Revenue Code or a pro rata share of the contribution based on the number of beneficiaries at that time. The withdrawal right must be exercised within 30 days of receiving notice from the trustee of the contribution. Trust provides that, if not exercised, the right of withdrawal will lapse with respect to the greater of \$5,000 or 5 per cent of the assets subject to withdrawal. Any unexercised withdrawal right that does not lapse will carry forward to future years and will lapse on January 1st of each succeeding year to the extent of the greater of \$5,000 or 5 per cent of the assets subject to withdrawal.

Article 4.1 of Trust provides that the trustee's power to make any discretionary distributions of income and principal is subject to the withdrawal rights held by each child.

It is represented that Wife will make annual contributions to Trust. The amount transferred each year will not exceed twice the amount allowable as an exclusion from taxable gifts under § 2503(b) as in effect on the date of the contribution, multiplied by the number of Wife's descendants possessed of a withdrawal power under Article 9.1.

You request the following rulings:

1. In each year that Wife makes a transfer to Trust as proposed (double the amount excludible under § 2503(b), multiplied by the number of Wife's descendants possessed of a withdrawal power under Article 9.1 of Trust), the transfer will be treated as made one-half by Wife and one-half by Husband for gift tax purposes under § 2513, provided the requirements of § 2513 are otherwise satisfied.
2. If the transfers to Trust by Wife are treated under § 2513 as being made one-half by Husband and one-half by Wife, Husband will be deemed the transferor of the gifts attributable to him for federal generation-skipping transfer tax purposes.
3. Upon Husband's death, no portion of Trust will be includible in Husband's gross estate for federal estate tax purposes.

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Ruling Request #1:

Section 2501 of the Internal Revenue Code 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 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Under § 2503(b)(1), in the case of gifts (other than gifts of future interests in property) made to any person by the donor during the calendar year, the first \$10,000 of such gifts to the donee (adjusted for inflation as provided in § 2503(b)(2)) is excluded from the total amount of taxable gifts made by the donor.

Section 2513(a) provides that, for gift tax purposes, a gift made by one spouse to any person other than his or her spouse shall be considered as made one-half by him or her and one-half by his or her spouse. This “split-gift” treatment does not apply with respect to a gift by the spouse of an interest in property if the donor spouse creates a general power of appointment under § 2514(c) in his or her spouse over such property. In order to qualify for “split gift” treatment, both husband and wife must signify their consent to treat the gifts as made one-half by each spouse and must satisfy the requirements set forth under § 2513(b) regarding the time and manner of signifying consent.

Section 25.2513-1(b)(4) provides that if one spouse transfers property in part to his or her spouse and in part to third parties, “split gift” treatment is effective with respect to the interest transferred to third parties only insofar as the interest transferred to third parties is ascertainable and severable from the interest transferred to the spouse.

A general power of appointment is defined in § 2514(c) as a power exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate. Under § 2514(c)(1), a power that is limited by an ascertainable standard relating to health, education, support, or maintenance of the possessor, is not a general power of appointment.

Under § 25.2514-1(c)(2) of the Gift Tax Regulations, a power is limited by an ascertainable standard relating to the possessor’s health, education, support or maintenance, if the extent of the possessor’s duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). The regulation provides that a power to invade for the power holder’s “support in reasonable comfort” or “maintenance in health and reasonable comfort” meets this standard.

In the present case, when a contribution is made by Wife to Trust, each

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descendant of Wife has the right to withdraw for their own benefit an amount from the trust equal to the lesser of the annual exclusion amount under § 2503(b) or a pro rata share of the contribution based on the number of Wife's descendants at that time. This right must be exercised within 30 days of receiving notice from the trustee of the contribution. The right of the trustee to make discretionary distributions to either Husband or the descendants of Wife is subordinate to right of the descendants to exercise their withdrawal rights.

We conclude that, assuming Husband and Wife satisfy the requirements under § 2513(b) for signifying consent, in each year that Wife makes a transfer to Trust in the amount as represented above, the transfer will be treated as made one-half by Wife and one-half by Husband.

Ruling Request #2:

Section 2601 imposes a tax on every generation-skipping transfer (GST) made after October 26, 1986, by a "transferor" to a "skip person."

A generation-skipping transfer is defined under § 2611(a) as: (1) a taxable distribution; (2) a taxable termination; and (3) a direct skip. Section 2612(a) provides that the term taxable termination means a termination (by death, lapse of time, release of a power, or otherwise) of an interest in property held in trust where the property passes to a skip person with respect to the transferor of the property. Section 2612(b) provides that the term taxable distribution means any distribution from a trust to a skip person other than a taxable termination or a direct skip. Under § 2612(c)(1), a direct skip is a transfer subject to federal estate or gift tax made by a transferor to a skip person.

Under § 2652(a)(1), generally, the transferor for purposes of the GST tax is, in the case of property subject to gift tax under chapter 12, the donor of the property.

Section 2652(a)(2) provides that, if, under § 2513, one-half of the gift is treated as made by an individual and one-half is treated as made by the spouse of the individual, then for purposes of the GST tax, each spouse is treated as the transferor of one-half of the entire value of the property transferred by the donor spouse.

As noted above, the transfers to Trust by Wife in the amount as represented will be eligible to be treated as made one-half by Wife and one-half by Husband under § 2513. Accordingly, if the requirements for signifying consent under § 2513(b) are satisfied, Husband will be deemed the transferor for federal generation-skipping transfer tax purposes of one-half of the value of such gifts made by Wife to Trust. See § 26.2652-1(a)(4). See, however, § 26.2652-1(a)(5), Example 5, regarding the identity of the transferor in the case of the lapse of a withdrawal power.

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Ruling Request #3:

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 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 the decedent's death.

Section 2036 provides that the value of the gross estate shall include 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 an adequate consideration in money or money's worth), by trust or otherwise, under which he or she has retained for life or for any period which does not in fact end before his or her death -- (1) the possession or enjoyment of, or the right to the income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2037 provides that the value of the gross estate shall include 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 the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if the possession or enjoyment thereof can only be obtained by surviving the decedent, and the decedent has retained a reversionary interest in the property.

Section 2038 provides that the value of the gross estate shall include 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 the case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3-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 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.

Section 2041(b)(1) defines the term "general power of appointment" as 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. A power to consume, invade, or appropriate property for the benefit of the decedent that is limited by an ascertainable

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standard relating to the health, education, support, or maintenance of the decedent is not a general power of appointment.

Section 20.2041-1(c)(2) of the Estate Tax Regulations provides that a power to consume, invade, or appropriate income or corpus is limited by an ascertainable standard if the extent of the holders duty to exercise or not exercise the power is reasonably measurable in terms of the holders needs for health, education, or support (or any combination of them). Included in examples of powers that are limited by an ascertainable standard are powers exercisable for the holder's "support in reasonable comfort," and "maintenance in health and reasonable comfort."

Section 20.2041-3(e)(1) provides that property subject to a power of appointment which is not a general power is includible in the holder's gross estate if the power is exercised by will and if the power is exercised by creating another power of appointment which, under the terms of the instrument creating and exercising the first power and under applicable local law, can be validly exercised so as to (a) postpone the vesting of any estate or interest in the property for a period ascertainable without regard to the date of creation of the first power, or (b) (if the applicable rule against perpetuities is stated in terms of suspension of ownership or of the power of alienation, rather than of vesting) suspend the absolute ownership or the power of alienation of the property for a period ascertainable without regard to the date of the creation of the first power.

In the present case, it is represented that only Wife will transfer property to Trust. Although Wife and Husband will consent under § 2513 to treat the gifts to Trust made by Wife as if made one-half by Wife and one-half by Husband, Wife will be treated as the transferor of the entire value of the gifts to Trust for purposes of §§ 2036 through 2038. Sections 2036 through 2038 do not apply to property interests that the decedent did not actually own and thus did not transfer. Accordingly, assuming only Wife makes transfers to Trust, Husband will not be the transferor of property to Trust for purposes of §§ 2036 through 2038. Therefore, no portion of the value of Trust will be includible in Husband's gross estate under §§ 2036 through 2038. See Rev. Rul. 82-198, 1982-2 C.B. 206; Rev. Rul. 74-556, 1974-2 C.B. 300; Rev. Rul. 54-246, 1954-1 C.B. 179.

Husband's power, set forth in Article 4 of Trust, to make discretionary distributions to himself of as much of the trust income and principal as he deems necessary for his own "health and maintenance in reasonable comfort" is limited by an ascertainable standard relating to Husband's health, maintenance and support. In addition, Husband, in the capacity as Trustee, is prohibited from making any distribution that would have the effect of discharging any legal obligations. In addition, the Husband's testamentary power to appoint the corpus to one or more descendant of Wife is not a power that is exercisable in favor of Husband, his estate, Husband's creditors, or the creditors of his estate. Consequently, Husband's power, exercisable in his capacity as trustee of Trust, to make discretionary distributions to himself or for his benefit and Husband's testamentary power are not general powers of appointment over the income or corpus of Trust. Accordingly, upon Husband's death, no portion of the

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value of Trust will be includible in Husband's gross estate under § 2041(a)(2).

A copy of this letter should be attached to any gift, estate, or generation-skipping transfer tax returns that you may file relating to these matters.

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 the 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. Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the facts described above under the cited provisions or any other provisions of the Code or regulations.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,
George Masnik
Chief, Branch 4
Associate Chief Counsel
(Passthroughs and Special
Industries)

Enclosure
Copy for section 6110 purposes