

## Internal Revenue Service

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Department of the Treasury

Washington, DC 20224

Third Party Communication: None

Date of Communication: Not Applicable

Person To Contact:

Telephone Number:

Refer Reply To:

CC:PSI:B04

PLR-139282-16

Date:

June 14, 2017

### Legend

Grantor

Spouse

Date 1

Date 2

Date 3

Trust

County Court

State Statute 1

State Statute 2

State

Dear :

This letter responds to your authorized representative's letter dated December 15, 2016, and subsequent correspondence, requesting rulings on the federal estate and gift tax consequences of a judicial reformation of Trust.

The facts and representations submitted are summarized as follows:

On Date 1, Grantor created Trust, an irrevocable trust to benefit Spouse, Grantor's spouse, and descendants. Trust is administered under the laws of State.

Section 7.3 of Trust is entitled "Special Power of Appointment" and provides that on the death of Spouse the trustee is to distribute such amounts of principal and income as Spouse is to direct to such persons, or charities, for such estates and interests and outright or upon such terms, trusts, conditions and limitations as Spouse is to appoint by her last will made either before or after Grantor's death, making specific reference to

this power, and which is to be admitted to probate in a formal or informal proceeding. Spouse may release such power of appointment in whole or in part, by any method recognized by law.

The terms of section 7.3, however, did not specifically limit the exercise of the power of appointment to persons other than Spouse, the estate of Spouse, the creditors of Spouse or the creditors of Spouse's estate. It is represented that Grantor intended for the power of appointment to be a limited power of appointment.

Section 3.01 of Spouse's most recent will refers to section 7.3 of Trust. The will states, in relevant part, "[i]n section 7.3 of [Trust], I am granted the limited power to appoint the assets of such trust to persons or charities other than myself, my creditors, my estate, or the creditors of my estate."

On Date 2, Grantor filed a petition with County Court to reform section 7.3 of Trust to provide that the trustee is to distribute such amounts of principal and income as Spouse is to direct to such persons, or charities other than Spouse, the creditors of Spouse, the estate of Spouse, and the creditors of the estate of Spouse. On Date 3, County Court entered an order retroactively reforming and modifying section 7.3 of Trust to conform to Grantor's intent consistent with the petition.

You have requested the following rulings:

- 1) The power of appointment granted to Spouse by section 7.3 of Trust, as reformed by County Court to correct the scrivener's error, does not constitute a general power of appointment under § 2041(b) of the Internal Revenue Code over the assets of Trust, and Trust assets will not be included in Spouse's gross estate.
- 2) The reformation of Trust is not an exercise or release of a general power of appointment under § 2514 so as to constitute a gift by Spouse for federal gift tax purposes.

## LAW AND ANALYSIS

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

Section 2031(a) provides that the value of the gross estate of the decedent shall be determined by including to the extent provided for in §§ 2031 through 2046, the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated.

Section 2041(a)(2) provides, in relevant part, 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 which 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 through 2038, inclusive.

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.

Section 2041(b)(2) provides, in relevant part, that the lapse of a power of appointment created after October 21, 1942, during the life of the person possessing the power shall be considered the release of such power.

Section 2501(a) imposes a gift tax for each calendar year on the transfer of property by gift during the year by an individual.

Section 2511 provides that the gift tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible.

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.

Section 2514(c) provides that the term “general power of appointment” means a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or the creditors of his estate.

In Commissioner v. Estate of Bosch, 387 U.S. 456, 87 S. Ct. 1776, 18 L. Ed. 2d 886 (1967), the Supreme Court considered whether a state trial court's characterization of property rights conclusively binds a federal court or agency in a federal estate tax controversy. The Court concluded that the decision of a state trial court as to an underlying issue of state law should not be controlling when applied to a federal statute. Rather, the highest court of the state is the best authority on the underlying substantive rule of state law to be applied in the federal matter. If there is no decision by that court, then the federal authority must apply what it finds to be state law after giving “proper regard” to the state court's determination and to relevant rulings of other courts of the state. In this respect, the federal agency may be said, in effect, to be sitting as a state court.

State Statute 1 provides that a court may reform the terms of a governing instrument, even if unambiguous, to conform the terms to the transferor's intention if it is proved by clear and convincing evidence that the transferor's intent and the terms of the governing instrument were affected by a mistake of fact or law, whether in expression or inducement. State Statute 2 provides that to achieve the transferor's tax objectives, the court may modify the terms of a governing instrument in a manner that is not contrary to the transferor's probable intention. The court may provide that the modification has retroactive effect.

In this case, it is represented that Grantor did not intend for Spouse to have a general power of appointment. Based upon the facts submitted and the representations made, we conclude that the County Court's Date 3 order to reform Trust was to correct a scrivener's error. The order is consistent with applicable state law that would be applied by the highest court of State.

Accordingly, we conclude that the power of appointment granted to Spouse by section 7.3 of Trust, as reformed by County Court to correct the scrivener's error, does not constitute a general power of appointment under § 2041(b) over the assets of Trust, and Trust assets will not be included in Spouse's gross estate. Further, we conclude that the reformation of Trust was not the exercise or release of a general power of appointment under § 2514 so as to constitute a gift by Spouse for federal gift tax purposes.

In accordance with the Power of Attorney on file with this office, we have sent a copy of this letter to your authorized representatives.

Except as expressly provided herein, we neither express nor imply any opinion 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.

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

Sincerely,

*Lorraine E. Gardner*

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Lorraine E. Gardner  
Senior Counsel, Branch 4  
Office of the Associate Chief Counsel  
(Passthroughs and Special Industries)

Enclosures

Copy for § 6110 purposes  
Copy of this letter

cc: