

**Internal Revenue Service**

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:

CC:DOM:P&SI:4- PLR-114706-98

Date:

March 16, 1999

Re:

Legend

Settlor =  
Grandmother =  
Daughter =  
Grandson =  
Granddaughter =  
Trust =  
Great Grandson 1 =  
Great Grandson 2 =  
Local Court =

This is in response to a January 13, 1999 letter, and prior correspondence, submitted by you on behalf of the taxpayer (Grandson) requesting estate tax rulings on a proposed division of a trust.

Prior to 1942, Settlor created Trust for the benefit of his daughter (Daughter) and her children, Grandson and Granddaughter. Upon Daughter's death, the trust was to continue in existence for the benefit of Grandson and Granddaughter; however, one separate share was to be held for Granddaughter and one separate share was to be held for Grandson. The separate share for the benefit of Grandson is subject to this ruling.

Trust provides Grandson with a lifetime income interest and also states that:

Upon the death of [Grandson] at any time, all the property, both principal and undistributed income then constituting his or her share hereunder, or the share to which such deceased grandchild would otherwise be entitled hereunder when set apart, shall be transferred as such deceased grandchild may direct in his or her last will or testament duly probated and established, or in the absence of any such testamentary disposition, then to such deceased grandchild's then living lineal descendants, per stirpes, if any. . . .

Grandson had two children, Great Grandson 1 and Great Grandson 2. Great Grandson 2 died in 1995, survived by descendants. Great Grandson 1 is still living. At Grandson's death, any unappointed trust property will pass, under the governing instrument, one-half to Great Grandson 1 (or to his then living descendants, per stirpes, should Great Grandson 1 predecease Grandson) and one-half to the then living descendants, per stirpes, of Great Grandson 2.

The ruling request states that:

[Grandson] intends to seek an order from the [Local Court], authorizing and directing the trustee immediately to divide the Trust Property into two separate, equal trusts. Each such separate trust would continue to be held, administered and distributed as provided in the governing instrument, except that, at [Grandson's] death, absent any exercise of [Grandson's] general power of appointment, one such separate trust ("[Great Grandson 1's Trust]") would pass entirely to [Great Grandson 1] (or to [Great Grandson 1's] then living descendants should [Great Grandson 1] predecease [Grandson]) or, if neither [Great Grandson 1] nor any descendant of [Great Grandson 1] is then living, to [Grandson's] then living lineal descendants, per stirpes, and one such separate trust ("[Great Grandson 2's Trust]") would pass entirely to [Great Grandson 2's] then living descendants or, if no descendant of [Great Grandson 2] is then living, to [Grandson's] then living lineal descendants, per stirpes.

Grandson intends to exercise, by will, his general power of appointment with respect to all or a portion of the property in Great Grandson 2's trust. Grandson does not intend to exercise his general power of appointment with respect to the trust for Great Grandson 1.

## LAW and ANALYSIS

Section 2041(a)(1) 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 a general power of appointment created on or before October 21, 1942, is exercised by the decedent-- (A) by will, or (B) 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 to 2038, inclusive; but the failure to exercise such a power or the complete release of such a power shall not be deemed an exercise thereof.

Section 2041(b)(1) defines the term "general power of appointment" as a power exercisable in favor of the decedent, the decedent's estate, the decedent's creditors, or creditors of the decedent's estate.

Section 20.2041-1(d) of the Estate Tax Regulations provides, in part, that whether a power of appointment is in fact exercised may depend upon local law. For example, the residuary clause of a will may be considered under local law as an exercise of a testamentary power of appointment in the absence of evidence of a contrary intention drawn from the whole of the testator's will. However, regardless of local law, a power of appointment is considered as exercised for purposes of § 2041 even though the exercise is in favor of the taker in default of appointment, and irrespective of whether the appointed interest and the interest in default of appointment are identical or whether the appointee renounces any right to take under the appointment.

Section 20.2041-2(a) provides that property subject to a general power of appointment created on or before October 21, 1942, is includible in the gross estate of the holder of the power under § 2041 only if exercised under specified circumstances. Section 2041(a)(1) requires that there be included in the gross estate of a decedent the value of property subject to the power only if the power is exercised by the decedent either (1) by will, or (2) by a disposition which is of such nature that, if it were a transfer of property owned by the decedent, the property would be includible in the decedent's gross estate under §§ 2035, 2036, 2037 or 2038.

In this case, under the instrument, Grandson has a lifetime interest in the income of the trust and an unlimited power to dispose of the trust property at his death. Therefore, Grandson has a general power of appointment over the property. Fidelity-Philadelphia Trust Co. v. McCaughn, 34 F.2d 600 (3<sup>rd</sup> Cir. 1929). The power of appointment, however, was created prior to 1942, when the Trust came into existence. Accordingly, the value of the property in Trust will be included in Grandson's gross estate for federal estate tax purposes only if he actually exercises the power. Section 2041(a)(1).

The issue in this case is whether Grandson's division of the Trust by court order constitutes an exercise of the general power of appointment. Generally, there are three circumstances under which a power has been held to have been intended to be exercised. These circumstances are (1) where there is an express reference to the power, (2) where there is a reference to the property that is subject to the power, and (3) where the provision in question would be inoperative unless construed as an exercise of the power. Stewart v. United States, 512 F.2d 269 (5<sup>th</sup> Cir. 1975).

After the trust is divided, each separate share will be administered under the terms of the governing instrument of Trust. However, if Grandson fails to exercise his power of appointment at his death, one-half of the corpus of each of the respective trusts will not pass to Great Grandchild 1 or to the family of Great Grandchild 2 in default of Grandson's exercise of his power of appointment. Instead, each trust will pass to the family for whom it was designated under the terms of the court order. In this case, one trust will pass to Great Grandson 1 or his family if he should predecease Grandson. The other trust will pass to the family of Great Grandson 2. The act of dividing the trust and designating the beneficiary or beneficiaries to whom the trust property will pass at his death is sufficient enough to be considered an exercise of Grandson's testamentary power. Under these circumstances, Grandson will be considered to have exercised his general power of appointment at his death and the value of the entire property in Trust will be includible in Grandson's gross estate for federal estate tax purposes under § 2041(a)(1).

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.

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.

Sincerely yours,

Assistant Chief Counsel  
(Passthroughs and Special  
Industries)

By \_\_\_\_\_  
Katherine A. Mellody  
Senior Technician Reviewer  
Branch 4

Enclosure  
Copy for 6110 purposes