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Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:PSI:B09-PLR-120950-00
Date:
March 8, 2001

LEGEND:

- Grantor =
- Trust =
- Date =
- Sibling =

Dear

This is in response to your letter dated February 28, 2001, and prior correspondence, in which you requested rulings regarding §§ 2503 and 2033 of the Internal Revenue Code. This letter responds to your request.

The facts and representations submitted are summarized as follows: Grantor established Trust on Date.

Item I of Trust provides that the trust is irrevocable and that Grantor shall have no right, title or interest in or power, privilege or incident of ownership in regard to any of the property in the trust and no right to alter, amend, modify, revoke or terminate the trust or any of its provisions. The Trust provides that the initial trustee is Grantor. If Grantor is unable or unwilling to serve at any time, or upon Grantor's death, Sibling will serve as trustee. The Trust also provides that any trustee may resign or be removed by Grantor during Grantor's lifetime. Should any vacancy occur in the office of trustee during Grantor's lifetime, the successor trustee or trustees shall be the individual(s) whom Grantor shall appoint.

Item II(c) provides, generally, that it is Grantor's wish and desire that the trustee, during Grantor's life, refrain from making distributions from the trust. Notwithstanding the foregoing provisions of this Item, during Grantor's lifetime, the trustee may distribute the trust property, in part or in whole, per stirpes, to Grantor's children who are then

PLR-120950-00

living, if the trustee determines that the distribution is appropriate for the health, education, support or maintenance of Grantor's children. No distribution shall be made under this paragraph which would relieve any legal obligation of Grantor or the trustee, of support or otherwise.

Item III(c) provides for the administration of Trust following Grantor's death and provides that after Grantor's death, the trustee shall divide the trust property into as many separate and equal trusts as Grantor has children then living and, per stirpes to the descendants of Grantor's deceased children.

Item III(d) further provides that the trustee may pay or use for the benefit of any child so much of the net income as it deems necessary for the health, education, support or maintenance of such child, accumulating any income not paid out or used currently as principal and that the trustee may encroach upon the principal of the trust of any such child in such amounts as it may deem necessary in its judgment to provide for the health, education, support or maintenance of such child.

Item III(d)(3) provides that if and when a child for whose primary benefit a trust is created hereunder has attained forty years of age, the trustee shall distribute to such child one-fifth of the property then in the trust of such child; and if and when such child has attained fifty years of age, the trustee shall distribute to such child one-third of the property then in the trust of such child; and if and when such child has attained sixty years of age, the trustee shall distribute to such child all of the property then in the trust of such child and terminate said trust.

Item IV(a) provides that after each direct or indirect contribution to the trust that is treated as a gift under the federal gift tax law, each then living child of Grantor shall have the absolute right and power to withdraw from this trust an amount equal to the contribution, divided by the number of Grantor's then living children, subject to the limitations in this Item.

Item IV(b)(1) provides that in no event can Grantor exercise the demand power on behalf of any such child who has not reached the age of twenty-one years or is unable to exercise such demand power because of other legal disability.

Item IV(b)(2) provides that the trustee must reasonably notify the person who would exercise the demand power of its existence and of any contributions that are made to the trust that are subject to the power. If any child of Grantor is serving as trustee of this trust, then he or she shall be deemed automatically to have received the notice required to be given by the trustee under this Item.

Item IV(b)(3) provides that the maximum amount that any child of Grantor may withdraw with respect to all contributions made by the same donor during a single calendar year shall be the lesser of the total amount of such annual contributions

PLR-120950-00

subject to withdrawal by such child pursuant to paragraph (a) of this Item or the amount of the federal annual gift tax exclusion in effect on the date of the earliest of such contributions. If Grantor is married on the date of a contribution, the alternative limitation based on the gift tax annual exclusion shall be two times the amount of the gift tax annual exclusion.

Item IV(b)(4) provides that each child's unexercised right to demand a contribution shall lapse on December 31 of each year (whether or not a contribution was made in that year); however, withdrawal rights in Grantor's children for contributions made in December shall not lapse in the year when the contribution was made, but shall continue to be exercised in the following year.

Item IV(b)(6) provides that notwithstanding the foregoing provisions of this Item, a child of Grantor shall exercise his or her demand power by a written request delivered to the trustee within thirty days of being notified of any contribution that is made to the trust with respect to the child.

You have requested the following rulings: (1) Transfers and proposed transfers by Grantor to Trust qualify as gifts of present interests and qualify for the annual exclusion under § 2503(b) of the Internal Revenue Code; and (2) Assets transferred to Trust will not be included in Grantor's gross estate for federal estate tax purposes.

RULING REQUEST 1

Section 2501 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(a) provides that, subject to certain limitations, 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 2503(b)(1) provides, generally, that 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 such person shall not be included in the total amount of gifts made during such year. The \$10,000 annual exclusion is only available for gifts of present interests in property.

Section 25.2503-3(a) of the Gift Tax Regulations provides that the term "future interest" includes reversions, remainders, and other interest or estates, whether vested or contingent, and whether or not supported by a particular interest or estate, which are limited to commence in use, possession, or enjoyment at some future date or time.

PLR-120950-00

Section 25.2503-3(b) defines a present interest in property as an unrestricted right to the immediate use, possession, or enjoyment of property or the income from property (such as a life estate or term certain).

The courts have recognized that if the beneficiaries are given the power to demand immediate possession and enjoyment of corpus or income, they have a present interest. Crummey v. Commissioner, 397 F.2d 82 (9th Cir. 1968). See also Rev. Rul. 73-405, 1973-2 C.B. 321. It is also necessary, however, to consider not only the terms of the trust, but also the circumstances in which the gift was made in order to determine whether the gift is a present or future interest. When the delivery of property to a trust is accompanied by limitations upon the donee's present enjoyment of the property in the form of conditions, contingencies or the will of another, either under the terms of the trust or other circumstances, the interest is a future interest, even if enjoyment is deferred only for a short time. The question is not when title vests, but when enjoyment begins. Disston v. Commissioner, 325 U.S. 442 (1945); Fondren v. Commissioner, 324 U.S. 18 (1945); Ryerson v. United States, 312 U.S. 405 (1941); Roderick v. Commissioner, 57 T.C. 108 (1971).

In the present case, the trustee of Trust is required to provide Grantor's children reasonable notice of contributions to Trust. In addition, Grantor's children are granted adequate time following notice in which to exercise their right of withdrawal. Upon exercising the withdrawal right, Grantor's children will have the immediate and unrestricted right to an amount equal to the amount contributed divided by the number of Grantor's then living children. Accordingly, if the trustee gives prompt notice of the contribution to Trust to Grantor's children, or their custodian, and assuming there is no understanding or agreement, express or implied, that the withdrawal right will not be exercised, a contribution to Trust will qualify as a present interest and will qualify for the gift tax annual exclusion under § 2503(b). The gift tax annual exclusion will not be available to Grantor to the extent Grantor excludes any individual who would otherwise have a demand right over such contribution from exercising that right.

RULING REQUEST 2

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 his death. Section 2033 applies generally to property that is owned outright by the decedent and that may be passed by the decedent's will to the beneficiaries of the probate estate. The section does not apply to property interests that are extinguished at death.

PLR-120950-00

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 and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period that does not in fact end before his 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 2038 provides, generally, 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 and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of 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.

Under the terms of Trust, Trust is irrevocable and Grantor shall have no right, title or interest in or power, privilege or incident of ownership in regard to any trust property. In addition, Grantor's powers as trustee to distribute income or corpus are restricted by definite ascertainable standards. Grantor has not, therefore, retained any right to alter, amend, revoke, or terminate the Trust within the meaning of § 2038, or the right "to designate the persons who shall possess or enjoy the property or the income therefrom" within the meaning of § 2036. See Rev. Rul. 73-143, 1973-1 C.B. 407.

The Trust provides that if a trustee resigns or ceases to act as trustee, Grantor will appoint a successor trustee. The retained power to remove the trustee and the power to appoint a successor will not cause inclusion of the Trust property in Grantor's estate because the powers of the trustee are sufficiently limited by an ascertainable standard as described above.

Pursuant to Item II(c), no distribution may be made from Trust which would relieve any legal obligation of the Grantor or the trustee, of support or otherwise. Accordingly, Grantor will not be considered to have retained any right to have the use, possession, right to income, or enjoyment of the property applied towards the discharge of a legal obligation of Grantor, or otherwise for Grantor's pecuniary benefit.

Based on the facts submitted and the representations made, we conclude that property transferred to Trust will not be included in Grantor's gross estate for federal estate tax purposes.

PLR-120950-00

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.

Except as specifically ruled herein, we express or imply no opinion on the federal tax consequences of the transaction under the cited provisions or under any other provisions of the Code.

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.

Sincerely,
Melissa C. Liquerman
Acting Branch Chief, Branch 9
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter