OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
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INTERNAL REVENUE SERVICE NATIONAL OFFICE FIELD SERVICE ADVICE

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MEMORANDUM FOR ASSISTANT DISTRICT COUNSEL

FROM: ASSISTANT CHIEF COUNSEL (FIELD SERVICE)
CC:DOM:FS

SUBJECT:

This Field Service Advice responds to your memorandum dated February 4, 1999. Field Service Advice is not binding on Examination or Appeals and is not a final case determination. This document is not to be cited as precedent.

LEGEND:

Decedent =
Trustor =
C =
D =
E =
F =
G =
H =

X =
Y =

State =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Date 5 =
Date 6 =

$a =
$b =

STATE CODE 1 =
STATE CODE 2 =
STATE CODE 3 =

STATE CODE 4 =

Case 1 =
Case 2 =
Case 3 =
Case 4 =
Case 5 =
Case 6 =

ISSUES:

1. Under Internal Revenue Code (Code) § 2041(a)(2), did the Decedent possess at his death a general power of appointment over the corpus of the trust created by indenture on Date 2 so that the entire corpus is includible in his gross estate?

2. If Decedent did not possess a general power of appointment over all of the trust property at his death, can the trust instrument be construed to confer a general power of appointment over twenty-five percent of the trust property at his date of death?

3. If Decedent did not possess a general power of appointment over any of the trust property at his date of death, is the Decedent deemed to have held a general power of appointment over twenty-five percent of the trust property while his children were minors because Decedent could have used the trust income to satisfy his legal obligation to support his children, and if so, did the

power of appointment lapse when his children reached the age of majority, resulting in taxable gifts?

CONCLUSIONS:

1. Under the facts presented, we conclude that Decedent did not possess a general power of appointment at the time of his death.

2. Under the facts presented, Decedent did not have a general power of appointment over twenty-five percent of the trust property at the time of his death.

3. Under the facts presented, Decedent did not have a general power of appointment over twenty-five percent of the trust property while his children were minors.

FACTS:

Decedent died on Date 1. At that time, he was sole remaining trustee of the trust created on Date 2. The trust had been created by the Decedent's father, trustor. Trustor designated the Decedent and two siblings, C and D, as trustees. The trust corpus consisted of X shares of the capital stock of E and Y shares of the capital stock of F. The pertinent provisions of the trust are detailed below.

The stated purposes of the trust are to provide for the stability and management of the business and affairs of E corporation and F corporation and to bring about an equal distribution of trust property to the named beneficiaries (trustor's grandchildren). The stated consideration in transferring the property to the trust is "the premises and the mutual love and affection existing between the said Trustor and his hereinafter named beneficiaries. . . ." The designated beneficiaries of the trust were trustor's grandchildren.

The trustor retained a life income interest in the trust property. The trustor additionally reserved the power to revoke the trust and the right to direct the trustees in the voting of the shares of stock. The trust became irrevocable upon trustor's death on Date 3.

The trust further provides:

> Upon the death of the Trustor, the beneficial interest of the above designated Beneficiaries shall vest, subject to the following provisions of the trust.

The trust provides for the termination of the trust and the distribution of trust assets upon the death of the survivor of the named trustees. The trustees are granted the power to terminate the trust at an earlier time upon agreement of all the then living trustees and successor trustees.

The trustees are required to manage trust property "as a block in accordance with the judgment and decision of a majority of said Trustees." In the event of the death of any named trustee, the surviving trustees have the power, but not the obligation, to designate a successor trustee.

The last paragraph of the trust indenture provides as follows:

> Subsequent to the death of the Trustor and prior to the death of the survivor of the individuals last above named this Trust Indenture may be amended in whole or in part by written document executed and acknowledged by all then acting Trustees or successor Trustees.

Under the terms of the trust, no beneficial interest was granted to any of the trustees.

C died on Date 4 and D died on Date 5. The authority to appoint successor trustees was never exercised. Upon the death of C, Decedent became the sole trustee of the trust. After becoming the sole surviving trustee, Decedent amended the trust four times. It is our understanding that these amendments related solely to administration and management of the trust.

On the date of Decedent's death, the value of the trust corpus, as determined by the estate tax examiner, was $a. On Date 6, the executor of Decedent's estate timely filed a United States Estate Tax Return. The estate tax return reported a gross estate of $b. No portion of the trust corpus was included in the gross estate reported on the estate tax return.

ISSUE 1

Under section 2041(a)(2), did the Decedent possess at the time of his death a general power of appointment over the corpus of the trust so that the entire corpus is includible in his gross estate?

LAW AND ANALYSIS

Section 2041(a)(2) provides, in part, that the value of the gross estate shall include the value of all property with respect to which the decedent possessed at the time

of his death a general power of appointment created after October 21, 1942. Section 2041(b)(1) provides, in part, that the term "general power of appointment," subject to certain exceptions, is a power that is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate. Section 2041(b)(1)(A) provides that "[a] power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard shall not be deemed a general power of appointment."

You have inquired whether, under the facts of this case, the power to amend the trust "in whole or in part" necessarily includes the power to change beneficial interests, and accordingly, to appoint property for one's own benefit. Treas. Reg. § 20.2041-1(b)(1) provides, in part:

> [A] power given to a decedent to affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument or terminating the trust is a power of appointment.

Not all powers of appointment are deemed to be general powers of appointment for purposes of inclusion in the gross estate under section 2041. To be a general power of appointment, the holder must have the ability to affect the beneficial enjoyment of the trust property for his own benefit. Treas. Reg. § 20.2041-1(b)(1) further provides, in part:

> [A] power to amend only the administrative provisions of a trust instrument, which cannot substantially affect the beneficial enjoyment of the trust property or income, is not a power of appointment. The mere power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity, whereby the holder has no power to enlarge or shift any of the beneficial interests therein except as an incidental consequence of the discharge of such fiduciary duties is not a power of appointment.

We look to state law in determining whether the power conferred on Decedent amounted to a power to change beneficial interests of the trust, so that he could have exercised such power in favor of himself. State law determines the nature and extent of the powers and rights, whereas federal law determines how such powers and rights are taxed. Morgan v. Commissioner, 309 U.S. 78 (1940). The controlling state law in this case is that of State.

There is no judicial precedent in State directly on point. Although under different facts and circumstances, a power to amend or revoke was held to constitute a

general power of appointment in State,[1] it has never been held that a trustee holding such a power is deemed to have a general power of appointment when that trustee has no retained interest or beneficial interest in the trust property.

Normally, a trustee is bound by his fiduciary duty to administer the trust solely in the interest of the beneficiaries. See STATE CODE 1. The fiduciary duty owed by a trustee is discussed in STATE CODE 2. It provides:

> The grant of a power to a trustee, whether by the trust instrument, by statute, or by the court, does not in itself require or permit the exercise of the power. The exercise of the power by a trustee is subject to the trustee's fiduciary duties.

We believe that the fiduciary obligations of the Decedent as trustee would prevent him from eliminating the beneficial interests of the designated beneficiaries in favor of appointing the property to himself, his estate, his creditors, or the creditors of his estate. However, a trustee's fiduciary obligations may be "overridden where in conflict with a specific direction in the governing instrument." Case 2. Whether the power to "amend in whole or in part" amounts to a specific direction to override the trustees' fiduciary obligations depends on the intent of the trustor. Generally, a will or trust will be construed and interpreted according to the intent of the trustor as manifested in the instrument itself.

> Insofar as the trust instrument expressly or by implication imposes duties or confers powers on the trustee, the terms of the trust determine the extent of his duties and powers. . . .

IIA SCOTT ON TRUSTS § 164 at 250 (4th ed. 1987). Further:

> The extent of the powers conferred on the trustee does not depend only on the language used by the settlor in creating the trust but may depend also on the purposes for which the trust is created.

III SCOTT ON TRUSTS § 186 at 7 (4th ed. 1987). In reference to the creation of a power of appointment, the court in Case 3 stated:

> Unless the language used unambiguously creates a general power of appointment as a matter of law, the ascertainment of the breadth of the trustee's power is to be ascertained with reference to the intent of the trust's creator.

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[1] Case 1.

Accordingly, the grant to the trustees and the successor trustees of the power to amend "in whole or in part" should be construed according to the provisions of the trust and the purposes for which the trust was created. The paragraphs under the "Witnesseth" subheading in the trust set forth the purposes and the intentions of the trustor. In relevant part, it provides:

> WHEREAS, the Trustor desires to bring about an eventual equal distribution of the property herein described among his hereinafter named beneficiaries and, pending said distribution, to the safe conduct and prudent management of said abovementioned businesses by said Trustees upon the complete termination of the Trustor's interest therein.

The stated consideration for placing the property in trust for the beneficiaries is the "mutual love and affection existing *between the said Trustor and his hereinafter named beneficiaries* . . . ." (Emphasis added). The trust property is directed to be "divided into separate equal portions one of which shall be held for the equal use and benefit of the children of [H], one for the equal use and benefit of the children of [C], one for the equal use and benefit of the children of [D] and one for the equal use and benefit of the children of [Decedent], *said children being my beneficiaries hereunder* . . . ." (Emphasis added).

Further, the trust provides that *the beneficial interests of the designated beneficiaries shall vest upon the death of the trustor*, but that the trust shall terminate and the assets shall be distributed to the beneficiaries upon the death of the survivor of the named trustees, unless sooner terminated. (Emphasis added). The trust additionally provides that "the whole of the income of said Trust estate *shall go to and be applied by said Trustee solely for the benefit of said Beneficiaries* . . . ." (Emphasis added).

Finally, the trust instrument confers upon the trustees and the successor trustees the power to amend "in whole or in part." This provision sets no parameters for the exercise of the power conferred and accordingly, we must review the entire trust instrument to ascertain the intent of the trustor as to the nature of this power.

The language of the trust instrument conveys the overriding intent of the trustor to benefit his grandchildren, not the trustees, and to provide for the stable management of the trust property. There are many clear expressions of trustor's intent to benefit his grandchildren within the trust instrument and no clear expressions indicating a contrary intent. Further, there is absolutely no evidence trustor intended to create a beneficial interest in the trustees. Accordingly, we believe the extent of the power conferred on the trustees to amend the trust in

whole must be limited by the language used by the trustor in creating the trust and the purposes therein to manage the affairs of E and F corporation and to bring about an eventual equal distribution of the trust property among his grandchildren.

Under these facts, to interpret the conferral of the power to amend "in whole or in part" to include the power to eliminate the beneficial interests of the designated beneficiaries would be at odds with the clear purposes and the plan of the trust agreement. To interpret in this manner would also require the finding that the trustor intended the last surviving original trustee to have the ability to eliminate the beneficial interests of any and all of the grandchildren. We see no support that the trustor intended the last surviving trustee to have such a power.

Moreover, the power to amend in this case does not amount to the specific direction required to override the fiduciary obligation imposed by STATE CODE 2. An analysis into the nature and extent of the power was required precisely because the power conferred was nonspecific and without parameters for its use. We have determined that use of the power conferred was limited by the purposes of the trust and intent of the trustor to benefit the grandchildren. Accordingly, the power conferred did not amount to a *specific direction* to allow the trustees to ignore their fiduciary obligation. In exercising the power to amend, Decedent was prevented by his fiduciary obligations from eliminating the beneficial interests of the beneficiaries in favor of himself.

When doubt arises as to meaning in an instrument, extrinsic evidence can also be used to glean the intent of a trustor. See Case 4; Case 5. In this case, trustor provided for his children, including Decedent, during trustor's lifetime by transferring substantial assets to them, and provided for them at his death by giving each of them a remainder interest in the trust established for the lifetime benefit of his wife. The fact that trustor used other means to provide for his children supports the finding that the trust at issue was intended to benefit trustor's grandchildren, not his children. Also relevant is the fact that trustor only appointed three out of his four sons to act as trustees over property held for the benefit of all four of his sons' children, combined with the fact that the trust instrument did not mandate the appointment of successor trustees, allowing the surviving trustee to act independently, as happened in this case. We believe trustor did not intend to allow the original trustees in the first instance, and the last surviving trustee in the second instance, to eliminate the beneficial interests of the entire class of named beneficiaries and to appoint the trust property for their own benefit.

Even if we assume Decedent's power to amend in whole or in part constituted the power to take or distribute trust property for his own benefit, we believe STATE CODE 3 limits this power to invasions for Decedent's health, education, support, or

maintenance. In discussing a power held individually, or by a trustee or cotrustee, to take or distribute income or principal to or for one's own benefit, STATE CODE 3, part (b)[2] provides, in part:

> In any case in which the standard governing the exercise of the power does not *clearly indicate* that a broader power is intended, the holder of the power may exercise it in his or her favor only for his or her health, education, support, or maintenance. (Emphasis added).

The provision granting the power to amend in whole or in part does not indicate the intent for the trustees to have the limitless power to distribute property at will to themselves or for their sole benefit. Accordingly, even if we believed the trustees had a power to invade for their own benefit, under State law, Decedent's exercise of the power in his favor would be limited to use for his health, education, support, or maintenance. Under section 2041(b)(1)(A), a power exercisable only in accordance with an ascertainable standard relating to the decedent's health, education, support, or maintenance is not treated as a general power of appointment.

Under the facts presented, we conclude that the power held by Decedent was not a general power of appointment.

ISSUE 2

If Decedent did not possess a general power of appointment over all of the trust property at his death, can the trust instrument be construed to confer a general power of appointment over twenty-five percent of the trust property at his date of death?

LAW AND ANALYSIS

If Decedent did not hold a general power of appointment over the entire trust, you have inquired in the alternative whether, under the facts of this case, Decedent held a power of appointment over twenty-five percent of the trust property because the trustor intended for each son, while acting as trustee, to have at least the power to determine how his family's one quarter share of the trust was used. This construction of the trust would result in inclusion of twenty-five percent of the trust corpus in the Decedent's gross estate under section 2041.

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[2]STATE CODE 4 dictates that STATE CODE 3, as well as the remaining laws in the division, are applicable to "all trusts regardless of whether they were created before, on, or after July 1, 1987," unless otherwise provided by statute.

There is no evidence the trustor intended that each trustee have a power over one-quarter of the trust property and that each trustee have the power to appropriate this portion for his own benefit. As we concluded under the first issue, we believe that the trustor intended for the trust to benefit his grandchildren, not his children. Based upon our analysis of the trust instrument, Decedent could not have invaded, consumed, or appropriated any of the trust property in favor of himself, his estate, his creditors, or the creditors of his estate. Accordingly, he did not have a general power of appointment over any of the trust property.

ISSUE 3

If Decedent did not possess a general power of appointment over any of the trust property at his date of death, is the Decedent deemed to have held a general power of appointment over twenty-five percent of the trust property while his children were minors because Decedent could have used the trust income to satisfy his legal obligation to support his children, and if so, did the power of appointment lapse when his children reached the age of majority, resulting in taxable gifts?

LAW AND ANALYSIS

Alternatively, you have inquired whether, under the facts presented, Decedent held a general power of appointment while his children were still minors because Decedent could have used a portion of the trust to discharge his legal obligation to support any of his children. Under this theory, one quarter of the trust property would have been subject to Decedent's general power of appointment. When Decedent's youngest child reached majority, Decedent's general power of appointment would have lapsed, resulting in a gift tax liability owed by the Decedent.

Treas. Reg. § 20.2041-1(c)(1) provides, in pertinent part:

> A power of appointment exercisable for the purpose of discharging a legal obligation of the decedent or for his pecuniary benefit is considered a power of appointment exercisable in favor of the decedent or his creditors.

Pursuant to section 2514(b), "[t]he exercise or release of a general power of appointment created after October 21, 1942, shall be deemed a transfer of property by the individual possessing such power." Section 2514(e) provides:

> The lapse of a power of appointment created after October 21, 1942, during the life of the individual possessing the power shall be

> considered a release of such power. The rule of the preceding sentence shall apply with respect to the lapse of powers during any calendar year only to the extent that the property which could have been appointed by exercise of such lapsed powers exceeds in value the greater of the following amounts: (1) $5,000, or (2) 5 percent of the aggregate value of the assets out of which, or the proceeds of which, the exercise of the lapsed powers could be satisfied.

In Case 6, at issue was the effect, if any, of a child's independent source of income on the statutory obligation of child support imposed on parents in State. The court concluded that "the soundest and most substantial statutory and judicial authority supports the rule that parents bear the primary obligation to support their child and that resort may be had to the child's own resources for his basic needs only if the parents are financially unable to fulfill that obligation themselves." Id. at 943. In the present case, the evidence indicates that Decedent was able to provide for his children. Accordingly, we believe the trust income could not be used to discharge Decedent's legal obligation of support.

The court suggests in Case 6 that resort to a child's independent resources may be proper when a trust instrument clearly authorizes the trust property to be used for the support and maintenance of the child. In Case 6, the grandfather created a trust, naming his son and son's wife as trustees and granting an income interest to their children. The court stated that in the absence of an evident purpose in the trust to contribute to the support and maintenance of the children, "we decline to impute to a trustor the intent to relieve a parent of his or her support obligation." In the present case, there is similarly no evident purpose or express provision to authorize use of the trust property for the support and maintenance of Decedent's children, and thus, no clear intent to relieve Decedent of his support obligation.

In Estate of Chrysler v. Commissioner, 44 T.C. 55 (1965), rev'd, 361 F.2d 508 (2d Cir. 1966), the decedent held property for his children as custodian. A New York statute at the time granted extensive power to the custodian, including the power to apply so much income as the custodian "may deem advisable for the support, maintenance, education and benefit of the minor." Id. at 510. The court found it unnecessary to address the Commissioner's contention that the power of the Decedent under this statute meant that the decedent "could use income from the property held as custodian to discharge his legal obligation to support his children, and that therefore he had retained a life estate in the property sufficient to warrant its inclusion in his gross estate under section 2036(a)." Id. at 510. The court determined that decedent had relinquished all beneficial interest in the source of funds and was acting with respect to the funds "in purely a fiduciary capacity." Id. at 511. In this capacity, decedent lacked the independent authority to assert the

powers under the statute to apply the funds for the support and maintenance of his children without their consent. Similarly in the present case, notwithstanding the power to amend in whole or in part, Decedent owed a fiduciary obligation to the beneficiaries, which prevented him from amending the trust to provide for discharging his own obligation to support his minor children. If Decedent amended the trust to allow the trust income payments to be used to satisfy his legal obligation of support, Decedent would be misappropriating for his own benefit payments from the trust intended to benefit all of trustor's grandchildren.

The above two cases demonstrate that Decedent could not have used income from the trust to satisfy his support obligation to his children. There is no evidence indicating that Decedent lacked the capacity to support his children with his own funds, and no express provision exists in the trust which authorizes the use of trust property for this purpose. Further, although the trust instrument granted the power to amend in whole or in part to the trustees, Decedent, as trustee, owed a fiduciary obligation to all the beneficiaries, which prevented him from amending the trust for his own benefit.

Based upon the analysis provided, we do not believe that Decedent had a general power of appointment over any of the trust property while his children were minors. Accordingly, there was not a lapse of a general power of appointment under section 2514(e) in the year Decedent's youngest child reached majority.

CASE DEVELOPMENT, HAZARDS, AND OTHER CONSIDERATIONS

Although many cases have been cited to support the theory that the power conferred on Decedent was a power of appointment, no case has been presented with similar facts. The principal factors distinguishing the cited cases from the facts of this case are the capacity in which the power is held and the provisions of the trust instrument.

In Reinecke v. Smith, 289 U.S. 172 (1933), the court held that where a trustor vests the power to modify or revoke the trust in himself and the trustee, the trustee is under no fiduciary obligation to the beneficiaries to refrain from exercising the power. Reinecke v. Smith is distinguishable because the power to modify or revoke was retained by trustor, concurrent with the trustee. A trustor owes no fiduciary duty to trust beneficiaries. When a trustor, in conjunction with a trustee, retains a power to modify or revoke, it is logical to presume the trustor intends the trustee to have the ability to exercise the power the same as he would, unrestricted by any fiduciary obligation. In State, a trustee's fiduciary obligation can only be overridden by specific direction. In the present case, there was no such direction in the trust instrument, nor can one be inferred.

In Rubinson v. Rubinson, 620 N.E.2d 1271 (1993), appeal denied, 624 N.E.2d 816 (1993), an original beneficiary of a trust petitioned the court to find that the amendment by the trustees divesting the petitioner of her beneficial interest was invalid. The court reversed the trial court's finding that the main purpose of the trust was to benefit the children and grandchildren of Fannie Rubinson. In determining whether the trustees could exercise their amendatory power to extinguish absolutely the interest of a named beneficiary, the court found that the language bestowed extensive amendatory power upon the trustees which would authorize this amendment. Rubinson is easily distinguished from the present case. First, in Rubinson, the terms of the trust conferred absolute discretion upon the trustees. For instance, although the stated purpose was to comply with Fannie Rubinson's request that the property be used to express her love for her grandchildren and children, the request was limited by the language "in any manner considered suitable by the trustees." Moreover, the trustees had complete and unfettered discretion with regard to payment of any monies out of the trust. Second, the power to amend in the Rubinson case set broad parameters by authorizing the trustees to make any amendment or include any provision which could have been incorporated in the original Declaration of Trust. Third, one of the original trustees in Rubinson was also the settlor and drafter of the trust and the other trustee was a beneficiary of the trust. In the present case, Decedent never actually owned the trust property and never held any beneficial interest in the property. Fourth, Rubinson was decided under Illinois law, not the law of State. Finally, this case is consistent with our position that in determining the extent of any power conferred on the trustee, unless unambiguous, one must look to the four corners of the document and the purposes of the trust. Indeed the court in Rubinson cited the Restatement in support of their finding that the power to modify may be used by a *settlor or trustee* to terminate the trust or change beneficiaries; the Restatement provides that a *settlor's* reserve of a power to modify is a power to revoke the trust if the exercise thereof, is, determined in view of the language used and circumstances, subject to no restrictions. This provision does not refer to a power to modify held by a trustee, and even if it did, the provision makes clear that the power is viewed in relation to the language of the trust and the attendant circumstances. In the present case, we have determined that the language of the trust and the fiduciary obligation owed to the beneficiaries restrict the power of the trustees.

Lombard v. Commissioner, 46 T.C. 310 (1966), is also cited as support for the finding that the power conferred was a general power of appointment. In that case the decedent was a beneficiary and was given the power to "alter or amend this instrument in whole or in part, at any time or times and to change the beneficiaries or their shares hereunder." Both parties in that case agreed that this language created a general power of appointment. In the present case, the power conferred

on Decedent did not specifically authorize him to change beneficial interests of the trust. Decedent also held this power in a fiduciary capacity and at no time held any beneficial interest in the trust.

In State Street Trust Co. v. Crocker, 28 N.E.2d 5 (1940), the court upheld the amendment by the trustees which eliminated the beneficial interest of one of the beneficiaries. The trust was created for the benefit of trustor, trustor's wife and trustor's issue. The trust provided for amendment to the trust at any time by written agreement of all of trustor, trustor's wife and trustor's son and daughter then living, and if either son or daughter was deceased, by the agreement of their living issue. After the death of trustor and trustor's wife, but while both son and daughter were still living, the son and daughter amended the trust to create a beneficial interest in the wife of the son. When the son died, the daughter and the issue of the son amended the trust to revoke the previous amendment. The son's widow petitioned the court to find that the second amendment was invalid because trustor did not intend a continuing power to amend. The court disagreed, determining the trustor's dominating purpose was to provide for himself, his widow and his issue and thus, a construction limiting the amending power to a single amendment would fall far short of accomplishing the trustor's purpose. State Street Trust Co. is distinguishable because the power to amend was conferred on the trustor and the beneficiaries, not on a trustee with no beneficial interest as in the present case. Moreover, the reasoning in State Street Trust Co. is consistent with the reasoning used to reach our conclusion. The court stated: "This question of intent is, of course, to be determined upon a survey of the whole instrument the general plan or scheme of which may in appropriate instances indicate that particular words or phrases are to be read in a sense somewhat different from that which might be attributed to them if they stood alone." Id. at 7.

In Case 1 the court held that the power to revoke the trust in whole or in part held by the surviving trustor was a general power of appointment. The provision for revoking the trust included the specific direction allowing the trustor to "alter or divest the interest of, or change beneficiaries" of the trust. Also, this power was reserved by the trustors, who were not limited by any fiduciary obligation to the beneficiaries. Even if they had such fiduciary obligation, the specific direction that allowed the trustor to divest and change beneficial interests would probably override any fiduciary duty he might have.
Welch v. Terhune, 126 F.2d 695 (1st Cir. 1942), cert. denied, 317 U.S. 644 (1942), was cited in support of the argument against a limited construction of the power to amend in the trust. In Welch v. Terhune, the court rejected the argument that the power should be strictly construed so as not to permit any amendment which would "materially vary the respective property interests of the beneficiaries," and found "nothing in the text of the trust instrument to indicate that the word 'amend' as

therein used was to have such an unusually restricted meaning." Id. at 697. The court held in this case that the power to amend held by trustor, even in the capacity of trustee, qualified as a retained power under section 302(d) of the Revenue Act of 1926. The court determined that trustor "retained a string until his death; for that reason the property is includible in his gross estate." Id. at 699. The holding illustrates the difference between retained control over property once owned and subsequently transferred by an individual and control as fiduciary over property never actually owned by an individual. The difference, as it relates to estate and gift tax, has been stated as such: "With regard to powers retained by a decedent in connection with his lifetime transfers, Congress is content to rest tax liability on a fairly slender thread. In contrast . . ., if all the decedent ever had was a power over the property, Congress requires that the power give him a more significant kind of control to be equated with ownership for estate tax purposes." RICHARD B. STEPHENS ET AL., FEDERAL ESTATE AND GIFT TAXATION ¶ 4.13[1] (7th ed. 1997). Central to the holding in Welch v. Terhune was the fact that Decedent retained an original power which he had invested in himself at the creation of the trust. In the present case, Decedent never actually owned the trust property and held only bare legal title as trustee.

Estate of Gartland v. Commissioner, 293 F.2d 575 (7th Cir. 1961), aff'g. 34 T.C. 867 (1960), cert. denied, 368 U.S. 954 (1962), was cited in support of the contention that the power to amend in whole or in part constituted a general power of appointment. However, in Estate of Gartland, the power to amend or terminate the trust was conferred on the beneficiary of the trust and the power was specified to include the power to change any beneficial interest in the trust. The trust further provided, in the event of termination of the trust, for the payment of principal to said beneficiary or to such person as the beneficiary may designate. In Estate of Gartland, there was no dispute that the power created constituted a general power of appointment. In contrast, in the present case, the language of the trust instrument does not indicate the intent for Decedent to be able to use the power to amend for his benefit; Decedent had no beneficial interest in the property and held the power in a fiduciary capacity.

The additional cases cited in support of the determination that the power to amend in whole or in part constitutes a general power of appointment are distinguishable for the same reasons outlined in the above reviewed cases. As discussed, the provision to amend in whole or in part cannot be viewed in isolation. Since the power to appoint property for the benefit of the trustees was not expressly conferred, the determination of the nature and extent of the power can only be made after reviewing the language of this particular trust instrument and the circumstances. III SCOTT ON TRUSTS § 186 at 8 (4th ed. 1987).

With respect to Issue 3, even assuming Decedent could use the trust assets to satisfy his legal obligation to support his children, Decedent would not have a general power of appointment over a full quarter share of the trust corpus. The amount of the trust over which Decedent would have a general power of appointment would be limited to the amount of corpus needed to support his minor children. See Northeastern Pennsylvania Nat'l Bank & Trust Co. v. United States, 387 U.S. 213 (1967).

Based on the above analysis of the three issues, [redacted].

Please call if you have any further questions.

By: _____
MELISSA LIQUERMAN
Senior Technician Reviewer
Passthroughs & Special Industries Branch