Office of Chief Counsel
Internal Revenue Service
memorandum

date: JUL 2 7 2004

to: Director, Employee Plans Determinations Redesign
Attn: Larry Heben, T:EP:RA

from: Chief Branch 4, Office of Passthroughs and Special Industries, CC:PSI:4

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subject: PRENO-122593-04

This is in response to your request for technical assistance on the above referenced case.

Legend:

Decedent =

Spouse =

Daughter 1 =

Daughter 2 =

Grandchild 1 =

Grandchild 2 =

Sister-in-law =

Sister =

Nephew 1 =

Niece 1 =

Nephew 2 =

Niece 2 =

Nephew 3 =

Nephew 4 =

Nephew 5 =

Trustee =

Year 1 =

Date 1 =

Date 2 =

Date 3 =

Trust 1

Trust 2 =

State =

County =

State Statute 1 =

State Statute 2 =

State Statute 3 =

State Statute 4 =

State Statute 5 =

According to the facts submitted, Decedent died on Date 3, survived by his spouse (Spouse), two children (Daughter 1 and Daughter 2) , two grandchildren (Grandchild 1 and Grandchild 2), a sister (Sister) , and a sister-in-law (Sister-in-law). In addition, Sister had two children, Nephew 1 and Niece 1, and Sister-in-law had five children, Nephews 2-5 and Niece 2. Sister died seven days after Decedent.

Decedent had been employed by State from Year 1 until his death. Decedent was a participant in State's SERS (Salaried Employees Retirement System). It is represented that SERS is a qualified defined benefit plan under section 410 of the Internal Revenue Code. Decedent also participated in State's Deferred Compensation

Plan (DCP). It is represented that DCP is an eligible deferred compensation plan as defined in section 457(b) of the Internal Revenue Code.

Under the terms of both SERS and DCP, upon a participant's death, the plan proceeds become payable to the participant's designated beneficiary. However, under the terms of both plans, and consistent with State law, if the participant does not have a valid beneficiary designation in effect at the time of death, the proceeds are paid to the participant's estate.

Decedent had designated Trust 1, an inter vivos trust established by Decedent, as the beneficiary of Decedent's interests in SERS and DCP. However, on Date 2, Decedent established Trust 2, a revocable trust, and executed a new Last Will and Testament. At the same time, Decedent destroyed the Trust 1 agreement and his prior will, thereby revoking both instruments.

After revoking Trust 1, Decedent failed to designate a new beneficiary of Decedent's interests in SERS and DCP. Consequently, at the time of Decedent's death there was no valid beneficiary designation in effect with respect to Decedent's interests in SERS and DCP. Accordingly, the proceeds from each plan became payable to Decedent's estate.

Article Four of Decedent's will provides that the residue of Decedent's estate is to pass to Trust 2.

Upon Decedent's death, Trust 2 is to be divided into Trust A and Trust B, both of which are intended to provide for Spouse's needs during her lifetime.

Article 1(A)(1) of Trust A provides that if Decedent's Spouse survives Decedent or is presumed to have survived him, Trust A is to be established. Trust A is to be funded with a share of Decedent's estate that is determined by a fraction. The numerator of the fraction is the amount that, if deductible as a marital deduction, will produce a federal taxable estate of a value that, after allowing for the available unified credit and the credit for state death taxes other than those imposed solely for the purpose of obtaining the unified credit allowed under section 2011 will result in no federal estate tax being imposed on Decedent's estate. The denominator of the fraction is the value of the trust estate. The fractional share is to be determined on the basis of the amounts finally determined for federal estate tax purposes. The fractional share is to contain only assets that qualify for the marital deduction and assets, to the extent possible, upon which there is available no foreign tax credit. The fractional share is to be undiminished by any estate, inheritance or other death taxes.

Article 1(A)(2) provides that Trust A is to be held for the benefit of Spouse. Trustee is to pay Spouse, or expend for her benefit, all of the net income received after the Decedent's date of death in quarter-annual installments or more frequent installments for Spouse's life. In addition, Trustee is to pay such amounts of principal

from Trust A to Spouse as she may request, up to and including the whole thereof, or in the event that Spouse is incapacitated and unable to make the request, Trustees may expend such amounts from principal of Trust A as it may deem, in their discretion, necessary for Spouse's health, comfort, welfare, maintenance and support.

Under Article 1(A)(3), on the death of Spouse, Trustee is to distribute the principal of Trust A to Trust B.

Article 1(B) provides that, Trust B, to be established upon Decedent's death, is to be comprised of the fractional part of the trust estate remaining after the establishment of Trust A. The net income of Trust B is to be paid to or for the benefit of Spouse in quarter annual or more frequent installments for Spouse's life. In addition, Trustee may pay to Spouse, or expend for her benefit as much of the principal of Trust B as Trustee in its sole discretion, may deem necessary for Spouse's health, maintenance and support.

Upon Spouse's death the property of Trust B is to pass to Decedent's then living issue, per stirpes. The share of any daughter who is then deceased will be distributable to the deceased daughter's then living issue, per stirpes, or if she has no then living issue, to the Decedent's other living issue in the same manner. If the Decedent has no then living issue, the remaining trust property will be distributable one-half to Sister-in-law, or if she is not then living to Sister-in-law's then-living issue per stirpes, and one-half to Sister, or if she is not then living to Sister's then-living issue per stirpes.

It is proposed that, Spouse, Child 1, Child 2, Grandchild 1, Grandchild 2, Sister (through her legal representative), Sister-in-law, Nephew 1 and Niece 1, Nephews 2-5 and Niece 2 will disclaim their respective interests under Trust 2. In addition, it is represented that in the case of three beneficiaries who are minors, a guardian will be appointed for purposes of executing their disclaimers.

Under State law, as a result of the disclaimers by all the beneficiaries of Trust 2, the disclaimants will be treated as if they had all predeceased Decedent. Accordingly, the estate residue (which includes the proceeds of SERS and DCP), after the payment of debts and expenses, will become distributable to Decedent's heirs determined under State law.

It is further proposed that Child 1, Child 2, Grandchild 1 and Grandchild 2 will disclaim each of their intestate interests in the residue of Decedent's estate. These disclaimants will also be treated as predeceasing the Decedent with respect to the disposition of the residue. Under State Statute 1, if a decedent dies intestate survived by a spouse, with no surviving issue or parents, the spouse will receive the decedent's entire estate. Accordingly, Spouse will become the sole beneficiary of Decedent's residuary estate, including the interests in SERS and DCP benefits.

It is represented that at the time of his death, Decedent was a resident of County, and that Decedent's will has been probated before the Register of Wills of County in accordance with State law.

It is represented that the proposed disclaimers will be in writing. It is represented that the disclaimers of the beneficiaries of Trust 2 will be filed with Decedent's executor and the trustees of Trust 2, and that the disclaimers of the intestate interests will be filed with Decedent's executor and the County Register of Wills within nine months of the Decedent's date of death to be approved by the appropriate County Court.

It is represented that none of the disclaimants will have accepted any of the income or other benefits of the disclaimed property prior to making the disclaimers.

The following rulings are requested.

1. The proposed disclaimers will be qualified disclaimers for purposes of section 2518.

2. The amount passing to Spouse by intestacy as a result of the disclaimers will be treated as passing directly from Decedent to Spouse, and will qualify for the estate tax marital deduction.

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 2056(a) provides that, for purposes of the tax imposed by § 2001, the value of the taxable estate is to be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property that passes or has passed from the decedent to the surviving spouse.

Under § 20.2056(d)-2 of the Estate Tax Regulations, if an interest in property passes from a decedent to a person other than the surviving spouse, the person makes a qualified disclaimer with respect to such interest, and as a result of the disclaimer, the property passes to the surviving spouse, then the disclaimed interest is treated as passing directly to the surviving spouse from the decedent, for purposes of section 2056.

Under section 2046(a), provisions relating to the effect of a qualified disclaimer for purposes of the estate tax chapter are found in section 2518.

Section 2518(a) provides that, if a person makes a qualified disclaimer with respect to any interest in property, the disclaimed interest will be treated for gift, estate, and generation-skipping transfer tax purposes as if the interest had never been transferred to such person.

Section 2518(b) provides that a "qualified disclaimer" means an irrevocable and unqualified refusal by a person to accept an interest in property, but only if:

1) the disclaimer is in writing;

2) the disclaimer is received by the transferor of the interest or his legal representative no later that 9 months after the date on which the transfer creating the interest in the person making the disclaimer is made, or the date on which the person making the disclaimer attains age 21;

3) the person making the disclaimer has not received the interest or any of its benefits; and

4) as a result of the disclaimer, the interest passes without any direction on the part of the person making the disclaimer to the decedent's spouse or to a person other than the person making the disclaimer.

Section 25.2518-2(e)(1) provides that, in general, a disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant. See § 25.2518-2(e)(5), Examples 1, 2, and 3 regarding the application of this rule in the case of the disclaimer of an interest received under a will by a person who is also an heir at law. Section 25.2518-2(e)(2) provides that in the case of a disclaimer made by a decedent's surviving spouse, with respect to property transferred by the decedent, the disclaimer satisfies the requirements of § 2518(b)(4) if the interest passes as a result of the disclaimer without direction on the part of the surviving spouse to the surviving spouse or another person.

State Statute 2 provides that a person to whom an interest in property would have devolved by whatever means, including, a beneficiary under a will, a person entitled to take by intestacy, and a beneficiary of policies and pension, profit-sharing and other employee benefit plans, may disclaim the interest in whole or in part by a written disclaimer. The disclaimer must: describe the interest disclaimed; declare the disclaimer and extent thereof; and be signed by the disclaimant.

State Statute 3 provides, in part, that a disclaimer on behalf of a decedent, a minor or an incapacitated person may be made by his personal representative, or the guardian of his estate.

State Statute 4 provides that if the decedent died domiciled in State, and an interest would have devolved to the disclaimant by will or by intestacy, the disclaimer shall be filed with the clerk of the orphan's court division of the county where the decedent died domiciled and a copy of the disclaimer is to be delivered to any personal representative, trustee or other fiduciary in possession of the property.

State Statute 5 provides generally that a disclaimer relates back to the date of death of the decedent. Unless a testator or donor has provided for another disposition, the disclaimer, for purposes of determining the rights of other parties, is treated as the equivalent to the disclaimant having died before the decedent in the case of a disposition by will or intestacy.

Ruling 1.

In the present case, the estate residue (which includes Decedent's interest in SERS and DCP) will pass, under Decedent's will to Trust 2. All primary and contingent beneficiaries of Trust 2 (or their legal representatives or guardians), that is, Spouse, Child 1, Child 2, Grandchild 1, Grandchild 2, Sister (through her legal representative), Sister-in-law, Nephew 1 and Niece 1, and Sister-in-law, Nephews 2-5, and Niece 2 will disclaim their interests in Trust 2. As a result of these disclaimers, the estate residue, rather than passing to Trust 2, passes to Decedent's heirs at law determined under State law; that is, Spouse, Child 1, Child 2, Grandchild 1, and Grandchild 2.

Child 1, Child 2, Grandchild 1, and Grandchild 2 will disclaim their interests as heirs at law in the estate residue. Accordingly, under State law, the entire estate residue will pass to Spouse. Thus, as a result of the disclaimers, the disclaimed interests will pass, without any direction on the part of the disclaimants to Decedent's surviving spouse, satisfying the requirements of §2518(b)(4) and §§25.2518-2(e)(1) and (2). It is represented that the disclaimers will be valid under State law, and will be delivered to the appropriate parties no later than 9 months after Decedent's death. Further, it is represented that the disclaimants have not accepted any benefits from the interests subject to the disclaimers.

Based on the above, we conclude that the proposed disclaimers by the Trust 2 beneficiaries of their respective interests in Trust 2 will be qualified disclaimers under §2518. In addition, we conclude that the disclaimers to be executed by Child 1, Child 2, Grandchild 1, and Grandchild 2 with respect to their interests as heirs at law in the estate residue, will be qualified disclaimers under §2518.

Ruling 2

As discussed above, as a result of the disclaimers, Spouse will be entitled to receive the estate residue, which includes Decedent's interests in SERS and DCP. Further, we have concluded that the disclaimers will be qualified disclaimers under §2518, assuming the requirements of §2518(b) are otherwise satisfied. Accordingly, under §20.2056(d)-2(b), the estate residue is treated as passing from the Decedent to Spouse for purposes of §2056. Therefore, an estate tax marital deduction will be allowed under §2056 for the value of the residue passing to Spouse.

If you have any questions on this matter please contact

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