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Department of the Treasury

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Washington, DC 20224

Person to Contact:

Telephone Number:

Refer Reply To:

CC:PSI:4-PLR-158587-02

Date:

SEPTEMBER 24, 2003

In Re:

Legend

Husband =

Wife =

Trust =

Will =

State =

Dear :

This responds to a letter dated October 8, 2002, and subsequent correspondence, requesting rulings regarding the federal estate and gift tax consequences of the proposed creation of a trust.

FACTS

The facts submitted and representations made are as follows. Husband will execute Trust and fund it with his own assets.

Under the terms of Trust, Article 3 provides that Husband reserves "personal rights, " including the right to amend or revoke Trust and to withdraw income or principal. Husband's personal rights will be suspended while Husband is absent for reasons specified in Trust or while he is incompetent as determined under procedures specified in Trust.

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If these personal rights are suspended, the trustees are authorized to make gifts from Trust to Wife and descendants or to trusts primarily for their benefit, but not in excess of the exclusion amounts under § 2503 of the Internal Revenue Code. If an individual eligible to receive gifts is acting as trustee, the aggregate gifts to that individual in any calendar year cannot exceed the greater of \$5,000 or 5% of the aggregate value of the trust estate.

During Husband's life, the trustees will pay to Husband any income or principal they deem necessary or advisable for his best interests. If Husband's personal rights are suspended, the trustees will also pay any income or principal the trustees deem necessary or advisable for the health, education, support, and maintenance of Husband's descendants and of Wife.

Article 4.5 provides:

At my wife's death, if I am still living, I give to my wife a testamentary general power of appointment, exercisable alone and in all events to appoint part of the assets of the Trust Estate, having a value equal to (i) the amount of my wife's remaining applicable exclusion amount less (ii) the value of my wife's taxable estate determined by excluding the amount of those assets subject to this power, free of trust to my deceased wife's estate or to or for the benefit of one or more persons or entities, in such proportions, outright, in trust, or otherwise as my wife may direct in her Will.

The trust assets distributed in satisfaction of Wife's exercise of this power will be selected by the trustee and valued as of Wife's date of death.

Trust further provides that, at Husband's death, if Wife survives Husband, after the payment of taxes, administration expenses, and other costs, the trustees will distribute to Wife as the "marital gift" a fraction (determined under a formula) of the residue of Trust. The balance of the residue will be held as Husband's Family Trust. Any portion of the marital gift that Wife disclaims will be held as part of Husband's Family Trust. If Wife does not survive Husband, the entire residue will be held as Husband's Family Trust.

During Wife's life, Wife will receive any of the income and principal of Husband's Family Trust that the trustees in their discretion deem necessary or advisable for her health, education, support, and maintenance. The trustees may also pay any income and principal they deem necessary or advisable for the health, education, support, and maintenance of Husband's descendants. If Husband's Family Trust holds Husband's residence, Wife will have the exclusive use of that residence for life or until the trustees determine that the residence is no longer needed for such purpose. No rent or other costs will be charged to Wife, and the trustees will pay all of the expenses of maintaining the residence. The trustees may not sell the residence without Wife's consent unless she is disabled. If the residence is sold, the trustees may purchase or build a replacement residence which will be subject to the provisions applicable to the

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residence that was sold.

Wife is granted a testamentary special power to appoint the assets of Husband's Family Trust remaining at Wife's death to any of Husband's descendants. Upon the death of the survivor of Wife and Husband, any assets of Husband's Family Trust that Wife does not appoint will be distributed to Husband's then living descendants, per stirpes, or one-half to Wife's heirs and one-half to Husband's heirs determined under State law as if Wife and Husband had each died on that date as residents of State.

Husband is named as the trustee of all trusts to be established under Trust until his death or disability with two individuals named as successors.

Wife plans to execute Will. Article 2.1 of Will makes gifts of Wife's tangible personality.

Article 2.2 of Will provides:

I exercise in favor of my estate the power of appointment given to me by Section 4.5 of the Trust created by [Husband] dated [], and direct that assets having a value equal to (i) the amount of my remaining applicable exclusion amount less (ii) the value of my taxable estate, determined by excluding the amount of those assets subject to this power, be distributed to my estate as soon after my death as possible.

Article 2.3 of Will provides that if Husband survives Wife, Husband will receive a fraction of Wife's residuary estate, after the payment of estate taxes, debts, and expenses, determined as follows:

The numerator of the fraction will be the smallest pecuniary amount that, if given outright to [Husband], would eliminate or reduce to the lowest possible sum the state and federal estate tax liability of [Wife's] estate. This amount will be calculated by taking into account [Wife's] applicable exclusion amount and all other tax credits, deductions, and other preferences allowed to [Wife's] estate.

The balance of the residuary estate will be held as a separate trust (Wife's Family Trust). If Husband does not survive Wife, the entire residuary estate will be held as the Family Trust. Under Article 3 of Will, any part of the gift to Husband that he disclaims will become part of Wife's Family Trust.

Article 4.1 of Will provides that, during Husband's life, Husband will receive any of the income and principal of Wife's Family Trust that the trustees deem necessary or advisable for his health, education, support, and maintenance. The trustees may also pay any income and principal they deem necessary or advisable for the health, education, support, and maintenance of Husband's descendants. If Wife's Family Trust holds Wife's residence, Husband will have the exclusive use of that residence for life or until the trustees determine that the residence is no longer needed for such purpose.

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No rent or other costs will be charged to Husband, and the trustees will pay all of the expenses of maintaining the residence. The trustees may not sell the residence without Husband's consent unless he is disabled. If the residence is sold, the trustees may purchase or build a replacement residence to which the provisions of article 4.1 will apply.

Under article 4.1(d), Husband is granted a testamentary special power to appoint the assets of Wife's Family Trust remaining at his death to any of his descendants.

Under article 4.2, upon the death of the survivor of Wife and Husband, any assets of Wife's Family Trust that Husband does not appoint will be distributed to Wife's then living descendants, per stirpes, or one-half to Wife's heirs and one-half to Husband's heirs determined under State law as if Wife and Husband had each died on that date as residents of State.

Husband is named as the trustee of all trusts to be established under Will with two individuals named as successors.

You have requested the following rulings:

1. On the death of Wife during Husband's lifetime, if Wife exercises the power of appointment granted her under article 4.5 of Trust, Husband will be treated as making a gift that qualifies for the federal gift tax marital deduction to Wife with respect to that portion of Trust appointed by Wife.

2. If Wife predeceases Husband, of the assets in Trust, the value of Trust assets over which Wife holds a power of appointment under article 4.5 of Trust will be included in Wife's gross estate.

3. Any assets that originated in Trust and that pass to or from Wife's Family Trust established under Will will not constitute a gift from Husband to the other beneficiaries of Wife's Family Trust.

4. Any assets that originated in Trust and that pass to Wife's Family Trust established under Will will not be included in Husband's gross estate.

LAW AND ANALYSIS

Section 2001(a) of the Internal Revenue Code 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.

Under section 2036(a), the value of the gross estate includes the value of all property to the extent of any interest in the property which the decedent has transferred

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without receiving adequate and full consideration in money or money's worth, by trust or otherwise, retaining for life either (1) the possession or enjoyment of, or the right to 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(a) provides that the value of the gross estate includes the value of all property of which the decedent has at any time made a transfer (except where there has been a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property, or where the decedent relinquished this power within the three-year period ending on the date of the decedent's death.

Section 2041(a)(2) provides for the inclusion in the gross estate of any property over which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

Section 2041(b)(1) provides that the term "general power of appointment" means 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, except that a power to consume property for the benefit of the decedent that is limited by an ascertainable standard relating to health, education, support, or maintenance of the decedent is not deemed a general power of appointment.

Section 20.2041-1(b)(2) of the Estate Tax Regulations provides that the term power of appointment does not include powers reserved by the decedent to himself within the concepts of §§ 2036 to 2038.

Section 20.2041-1(c)(1) provides that a power of appointment is not a general power if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of his estate, or (b) expressly not exercisable in favor of the decedent or his creditors, or the decedent's estate, or the creditors of his estate.

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 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. Section 25.2511-2(c) provides that a gift is incomplete in every instance in which a donor reserves the power to re-vest the beneficial title to the property to himself or herself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse,

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there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

Rulings #1 and #2:

Husband proposes to execute Trust and transfer to it property held in Husband's separate name. Husband will retain the power to amend or revoke Trust and to withdraw assets from Trust (unless these powers are suspended due to Husband's incapacity or absence under limited circumstances) until his death. Thus, under § 25.2511-1(c), Husband's initial contribution of assets to Trust will not be a completed gift, because he will retain the right to withdraw assets and to revoke his transfer and re-vest title in himself.

Under article 4.5 of Trust, if Wife predeceases Husband, at her death Wife will possess a testamentary general power to appoint to Wife's estate or to or for the benefit of one or more persons or entities, Trust assets equal in value to Wife's remaining applicable exclusion amount less the value of Wife's taxable estate determined as if she did not possess this power. Accordingly, we conclude that, if Wife predeceases Husband, the value of Trust assets over which Wife holds a power of appointment under article 4.5 of Trust will be included in Wife's gross estate.

Further, on the death of Wife during Husband's lifetime, if Wife exercises that power of appointment, Husband is treated as relinquishing his dominion and control over the property subject to that power of appointment. Accordingly, on the death of Wife during Husband's lifetime, if Wife exercises the power of appointment granted her under article 4.5 of Trust, Husband will make a completed gift under § 2501. Husband's gift will qualify for the federal gift tax marital deduction under § 2523.

Rulings #3 and #4:

Wife plans to execute Will, in which, if she predeceases Husband, she will exercise to the fullest extent the power granted under article 4.5 of Trust. Under the terms of Will, if Husband survives Wife, he will receive an outright payment of a fractional share of her residuary estate. The balance of the residuary estate will be held in Wife's Family Trust. The trustee will pay to Husband and to Husband's descendants any amount of income and principal of Wife's Family Trust that the trustees deem necessary or advisable for the health, education, support, and maintenance of Husband and his descendants. Further, if the trust holds Wife's residence, during his life, Husband will have the exclusive use of that residence, and Wife's Family Trust will pay all costs associated with that use. Husband is named as the initial trustee of Wife's Family Trust. Husband will have a testamentary special power to appoint the assets of Wife's Family Trust among his then living descendants. Any assets that he fails to appoint will be distributed to Wife's then living descendants, per stirpes, or one-half to Wife's heirs and one-half to Husband's heirs determined under State law as if Wife and Husband had each died on that date as residents of State.

Husband will be treated as making a completed gift to Wife of that portion of

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Trust appointed by Wife, if Wife predeceases Husband. Thus, at her death, Wife will be treated as the owner of the Trust assets she appoints. Under article 2.2 of Will, the Trust assets Wife appoints will be distributed to Wife's estate and will pass under Will. Under the terms of Will, those assets may be among the assets in Wife's residuary estate used to fund Wife's Family Trust. Accordingly, we conclude that any assets that originated in Trust and that pass to or from Wife's Family Trust established under Will will not constitute a gift from Husband to the other beneficiaries of Wife's Family Trust.

Under the terms of Wife's Family Trust, in his role as either a beneficiary or a trustee, Husband will not have a general power under § 2041, because distributions of income and principal from Wife's Family Trust are subject to an ascertainable standard. Further, any interest Husband might have under Wife's Family Trust in a residence in which he may have had an ownership interest would not cause that residence to be includible in his gross estate under § 2036. Accordingly, we conclude that any assets that originated in Trust and that pass to Wife's Family Trust established under Will will not be included in Husband's gross estate.

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

The rulings contained in this letter are based upon information and representations submitted by the trustee 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 taxpayers who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Sincerely yours,

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

Enclosure

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