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Department of the Treasury
Washington, DC 20224

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Person To Contact:
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Refer Reply To:
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PLR-123785-09
Date:
October 21, 2009

In Re:

<u>LEGEND</u>:
Donor =
A =
B =
C =
D =
E =
Taxpayer =
Trust 1 =

Trust 2 =

Date 1 =
Date 2 =
Date 3 =
Date 4 =
Corporate Trustee =

Individual Trustee A =
Individual Trustee B =
State =

Dear :

This responds to your authorized representative's letter of April 8, 2009, in which a ruling is requested on the gift tax consequences of your proposed disclaimers. The facts and representations are as follows.

<u>Trust 1</u>

Donor executed Trust 1, an irrevocable trust, on Date 1. Under Article Second, paragraph (b), of the Trust 1 instrument, the trustees are to pay such sum or sums from time to time out of the income, accumulated income or principal of Trust 1 to or for the benefit of A (Donor's child) or any of A's descendants, in the trustees' sole and absolute discretion in the event of illness, accident, or other misfortune, or in the event of any emergency, or if in the trustees' judgment, it is necessary. Trust 1 will terminate twenty years after the death of the survivor of A, B, C, and all of Donor's descendants living on Date 1. On termination, the remaining Trust 1 principal and undistributed income will be distributed to the descendants of A who have no living ancestor who is a descendant of A, per stirpes.

Under Article Seventh, the trust is to be construed in accordance with the laws of State. The current trustees of Trust 1 are Corporate Trustee and Individual Trustee A.

On the date Trust 1 was executed, Donor had eleven living descendants consisting of three children (A, B, and C) and eight grandchildren, all of whom are still living. A's child, D, was born on Date 2, after the Trust 1 instrument was executed. Taxpayer is D's child and A's grandchild. As A's descendant, the trustees may, in their discretion, make distributions of income and principal to Taxpayer during the trust term. Further, Taxpayer, as a descendant of A will be entitled to receive a share of the per stirpital portion of the Trust 1 remainder if D dies prior to the termination of Trust 1, and Taxpayer survives. Taxpayer has received discretionary distributions from Trust 1.

Trust 2

Trust 2, an irrevocable trust, was executed by A on Date 3. Under Paragraph First of the Trust 2 instrument, the trust is to be held in three equal shares. Under Paragraph First, subparagraph (a), the income derived from one share is to be accumulated and added to principal. Under Paragraph First, subparagraph (b), the income of the second one-third share is to be paid to A, and, on his death, to E, if she survives him as his spouse. However, under Paragraph Third, subparagraph (d), A reserved the right, exercisable by will, to direct a contrary disposition of the income of this one-third share to be effective after A’s death or E’s death if she survives A as his spouse. Under Paragraph First, subparagraph (c), the income of the remaining one-third share is to be paid to E so long as she is A's spouse or has survived A as his spouse, or to any of A's descendants in the event of need occasioned by illness, accident or other misfortune, or in any emergency, or if in the trustee's discretion it is necessary for the comfortable maintenance, support or education of any beneficiary or of his or her family.

Under Paragraph First, subparagraph (d), after A's death, or on E's later death if she survives A as his spouse, all of the one-third shares of Trust 2 are to be combined into a single trust (less any portion of the second one-third share for which A has made a contrary testamentary disposition of the income) along with accumulated income. Trust 2 is then to be divided into equal shares, one such share for each of A's then living children and deceased children leaving surviving issue, the surviving issue to take the deceased child's share by representation. During the continuation of the trust term, the trustee is to pay to the beneficiaries (A's children or their surviving issue by representation) of a respective share so much income of that share as the trustee in the trustee's discretion determines.

Under Paragraph First, subparagraph (e), after A's death, the trustee may, as to any beneficiary, who, from time to time is receiving or entitled to receive trust income, in the trustee's discretion in the event of illness, accident, or other misfortune, or in the event of any emergency, or if in the judgment of the trustee it is necessary for the comfortable maintenance, support or education of any beneficiary or of the beneficiary's family, pay to or for the beneficiary such principal as the trustee deems necessary. However, the amount so paid is to be charged against the share from which the beneficiary is then receiving or entitled to receive income.

Under Paragraph First, subparagraph (d), Trust 2 is to terminate twenty years after the death of the last survivor of A, E, and those of A's children living on the date A executed Trust 2. On termination, the Trust 2 principal and accumulated income will be distributed, per stirpes, to A's descendants then living who have no living ancestor who is a descendant of A.

Under Article Fourth, the trust is to be construed in accordance with the laws of State. The current trustees of Trust 2 are Corporate Trustee and Individual Trustee B.

D was not yet born when A executed Trust 2 on Date 3. Because D's life is not one of the lives measuring the duration of Trust 2, D is a potential recipient of a one-third share of the remainder. Taxpayer, as A's descendant, is entitled to distributions of income from a one-third share, described above, in the event certain needs arise. After A and E have both died, and if D has also died, Taxpayer, if then living, will be entitled, as D’s surviving issue, to: (i) distributions of income and principal of the Trust 2 share set aside with respect to D, and (ii) on termination of Trust 2, distribution of all or a portion of the remainder of that share, by representation.

Taxpayer will attain the age of majority under State law on Date 4. With respect to Trust 1 and Trust 2, Taxpayer proposes to disclaim her contingent right to receive the trust corpus on termination of the trust. The disclaimers will be executed by Taxpayer within nine months after attaining her majority.

Taxpayer requests a ruling that the execution and delivery of the proposed disclaimers will not constitute a transfer subject to federal gift tax.

Law and Analysis:

Trust 1 and Trust 2 are governed by the laws of State. Under State Rev. Stat.

§ 469.010, any individual to whom property or an interest therein is donatively transferred by any means, including a transfer resulting from another disclaimer, may disclaim all or any portion of the transfer. Unless the terms of the transfer otherwise provide, the disclaimer shall cause the terms of the transfer to be applied to the disclaimed transfer and to any future interests taking effect thereafter as if the disclaimant had died immediately before the transfer.

State Rev. Stat. § 469.020 provides that a disclaimer is made by a writing showing an unconditional refusal to accept a transfer, or a portion thereof, signed by the disclaimant, or representative, and delivered on or before nine months after the transfer, or by any later time provided in the particular case or pursuant to other provisions of chapter 469, and before any acceptance of the disclaimed interest. Delivery of a disclaimer may be accomplished by delivery to the transferor, the transferor's personal representative or other legal representative, or the holder of legal title to the property to which the interest is related.

State Rev. Stat. § 469.050 provides that each separate interest in property is subject to disclaimer or acceptance and each separate interest, including any specific amount, part, fraction or asset thereof, or formula amount based on present or future facts independent of the disclaimant's volition, is subject to disclaimer or acceptance.

State Rev. Stat. § 469.070 provides that a contingent future interest may be disclaimed in whole or in part at any time before, or within nine months after, beneficiaries of the interest have been fully ascertained and their interests vested.

Section 2501(a) of the Internal Revenue Code imposes a tax on the transfer of property by gift. Section 2511(a) provides that the gift tax imposed under § 2501 applies 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 25.2511-1(c)(2) of the Gift Tax Regulations provides that, in the case of transfers creating an interest in the beneficiary disclaiming made before January 1, 1977, where the law governing the administration of the decedent's estate gives the beneficiary a right completely and unqualifiedly to refuse to accept ownership of property transferred from a decedent, a refusal to accept ownership does not constitute the making of a gift if the refusal: (1) is made within a reasonable time after knowledge of the existence of the transfer; (2) is unequivocal; (3) is effective under local law; and (4) is made before the disclaimant has accepted the property. Compare § 2518 and §§ 25.2518-1 through 25.2518-3, providing rules for determining whether a disclaimer is a qualified disclaimer effective for estate and gift tax purposes, in the case of the disclaimer of an interest in property that is created in the beneficiary disclaiming by a transfer made after December 31, 1976.

As noted above, under § 25.2511-1(c), if the interest to be disclaimed was created before January 1, 1977, the disclaimant must disclaim the interest in the property within a reasonable time after knowledge of the existence of the transfer creating the interest to be disclaimed. In the case of a disclaimer of an interest in trust, in general, the transfer occurs when the trust is established rather than when the interest actually vests in the disclaimant, if the transferor has not reserved any power over the trust. See Jewett v. Commissioner, 455 U.S. 305 (1982). However, the time limitation for making the disclaimer does not begin to run until the disclaimant has attained the age of majority and is no longer under a legal disability to disclaim. See Jewett v. Commissioner, supra, 455 U.S. at 318. See also, § 2518(b)(2)(B) and § 25.2518-2(c)(1)(ii).

In this case, Taxpayer proposes to disclaim her contingent right to receive trust corpus on the termination of Trust 1 and Trust 2. She will execute the disclaimers within nine months after reaching age 18. Under these circumstances, the proposed disclaimers will be considered to be made within the time prescribed in § 25.2511-1(c).

Under § 25.2511-1(c)(2), the disclaimers must be unequivocal. Rev. Rul. 76-156, 1976-1 C.B. 292, which considers the application of § 25.2511-1(c), concludes that a disclaimer is unequivocal if the disclaimant's act of refusal is unambiguous in its consequences; that is, the disclaimant must unqualifiedly refuse to accept ownership of the property. For example, a disclaimer is unequivocal if the disclaimed property must pass as otherwise provided in the instrument, and not pursuant to the direction of the disclaimant. Similarly, a disclaimer is unequivocal if the disclaimant does not accept the benefits from the property interest disclaimed. In this case, the disclaimed interests will not pass pursuant to any direction on the part of Taxpayer. Further, Taxpayer will not accept the benefits of the disclaimed interests after the disclaimers. See § 25.2518-2(d)(3). Cf. §§ 25.2518-3(a)(1)(i) and 25.2518-3(d), Examples (10) and (11), regarding treatment of certain interests in the same property as separate interests eligible for qualified disclaimer treatment under § 2518.

Under § 25.2511-1(c)(2), the disclaimers must be effective under local law. In this case, State law specifically provides that an individual may make a valid disclaimer of any separate interest in property while retaining other separate interests in the same property. Further, the disclaimers will be timely under State Rev. Stat. § 469.070. Consequently, if Taxpayer satisfies the procedural requirements prescribed under State law, the disclaimers will be valid under local law. Finally, under § 25.2511-1(c), the disclaimant must not have accepted the property before the disclaimer.

We conclude that, based on the representations made, if the disclaimers are executed as proposed, and assuming that Taxpayer has not accepted or received any of the benefits of the disclaimed interests (the terminating distributions), the disclaimers will not constitute transfers subject to the federal gift tax.

The ruling contained in this letter is 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 ruling, it is subject to verification on examination. 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.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent. In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to your representative.

Sincerely yours,

Office of Associate Chief Counsel
(Passthroughs and Special Industries)
James F. Hogan
Senior Technician Reviewer, Branch 4

Enclosure

cc: