



OFFICE OF
CHIEF COUNSEL

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, D.C. 20224

NOV 20 2000

CC:P&SI:4
FREV-119212-00

MEMORANDUM FOR DIRECTOR, EMPLOYEE PLANS RULINGS AND
AGREEMENTS (TE/GE)

Attn: Larry Heben

FROM: Assistant to the Branch Chief, CC:P&SI:4

SUBJECT: [REDACTED]

We received your request for technical assistance dated September 19, 2000, regarding whether a disclaimer made on behalf of the estate of [REDACTED] is a qualified disclaimer for purposes of § 2518(b). This memorandum responds to your request.

FACTS

[REDACTED] ("Wife") died on [REDACTED]. Section II of Wife's will devised Wife's estate to her spouse, [REDACTED] ("Husband"). In the event that Husband did not survive Wife, Wife's will provided that her estate was to go to their children, [REDACTED] ("Daughter") and [REDACTED] ("Son") to share and share alike. Pursuant to Wife's will, Husband was appointed the Independent Executor of Wife's estate.

Husband died on [REDACTED]. As provided in Husband's will, Daughter was appointed the Independent Executrix of Husband's estate. Daughter also succeeded Husband as the Independent Executrix of Wife's estate as provided in Wife's will.

On [REDACTED], as permitted by [REDACTED] state law, Daughter, in her capacity as the Independent Executrix of Husband's estate, executed a written disclaimer on Husband's behalf. The disclaimer disclaims all of Husband's rights to any probate property, real or personal, and to any non-probate property, real or personal, passing to Husband as a result of Wife's death. Husband had not accepted any benefit from the

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disclaimed property. The disclaimer was delivered to the appropriate party and filed with the appropriate court within nine months of Wife's death.

At the time of his death, Husband was the owner of two Individual Retirement Accounts ("IRAs"). Wife was the primary beneficiary on both IRAs and Daughter and Son were the secondary beneficiaries. Husband and Wife were residents of [REDACTED] a community property state. You have advised us that your office has not resolved the issue as to whether, for federal tax purposes, the IRAs are community property such that at Wife's death, Wife owned a one-half community property interest in both IRAs. You have asked our office to rule on whether the disclaimer executed by Daughter in her capacity as the Independent Executrix of Husband's estate is a qualified disclaimer under § 2518(b), without regard to the community property issue to be resolved by your office.

LAW

Section 2518(a) provides that, if a person makes a qualified disclaimer with respect to any interest in property, Subtitle B (relating to the estate, gift and generation-skipping transfer taxes) shall apply with respect to such interest as if the interest had never been transferred to such person.

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

- (1) such refusal is in writing,
- (2) such writing is received by the transferor of the interest, the transferor's legal representative, or the holder of the legal title to the property to which the interest related not later than the date which is 9 months after the later of—
 - (A) the date on which the transfer creating the interest in such person is made, or
 - (B) the day on which such person attains age 21,
- (3) such person has not accepted the interest or any of its benefits, and
- (4) as a result of such refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either—
 - (A) to the spouse of the decedent, or
 - (B) to a person other than the person making the disclaimer.

Section 2518(b)(2) requires that a disclaimer be made within nine months of the date of the transfer creating the interest. With respect to transfers made by a decedent at death, or transfers that become irrevocable at death, the transfer creating the interest occurs on the date of the decedent's death, even if an estate tax is not imposed on the transfer. Section 25.2518-2(a)(3).

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Section 25.2518-2(d)(2) provides that if a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary powers to preserve or maintain the disclaimed property shall not be treated as an acceptance of such property or any of its benefits. Under this rule, for example, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. For example, a fiduciary's disclaimer of a beneficial interest does not meet the requirements of a qualified disclaimer if the fiduciary exercised or retains a discretionary power to allocate enjoyment of that interest among members of a designated class.

Under § 25.2518-2(e)(1), in order to constitute a qualified disclaimer, the disclaimed interest must pass without any direction on the part of the person making the disclaimer to a person other than the disclaimant. The requirements of a qualified disclaimer under § 2518 are not satisfied if the disclaimant, either alone or in conjunction with another, directs the redistribution or transfer of the property or interest in property to another person (or has the power to direct the redistribution or transfer of the property or interest in property to another person unless such power is limited by an ascertainable standard).

Section 25.2518-2(c)(5), Example (11), addresses disclaimers in a community property state. In Example (11), H and W, husband and wife, reside in state X, a community property state. On April 1, 1978, H and W purchase real property with community funds. The property is not held by H and W as jointly owned property with rights of survivorship. H and W hold the property until January 3, 1985, when H dies. H devises his portion of the property to W. On March 15, 1985, W disclaims the portion of the property devised to her by H. Assuming all the other requirements of § 2518(b) have been met, W has made a qualified disclaimer of the interest devised to her by H. However, W could not disclaim the interest in the property that she acquired on April 1, 1978.

Under [REDACTED] state law, any independent executrix of a deceased person, without prior court approval, may disclaim the whole or any part of property passing to the disclaimant. Unless the decedent's will provides otherwise, the property subject to the disclaimer passes as if the person disclaiming or on whose behalf a disclaimer is made had predeceased the decedent. The disclaimer must be in writing, acknowledged by a notary public, and filed with the appropriate court. A copy of the written disclaimer must be delivered to the legal representative of the transferor of the interest to which the disclaimer relates not later than 9 months after the death of the decedent. Any disclaimer filed and served becomes irrevocable.

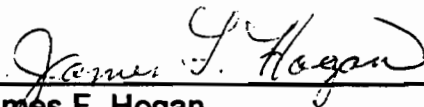
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CONCLUSION

In the present case, the Independent Executrix of Husband's estate executed a written disclaimer on Husband's behalf. Husband did not accept any benefits from any disclaimed property. The disclaimer was valid under [REDACTED] state law, was filed with the court having jurisdiction over Decedent's estate, and was delivered to the appropriate party within 9 months of Wife's death. Therefore, we conclude that the disclaimer constitutes a qualified disclaimer for purposes of § 2518(b).

The resolution of your office with respect to whether the IRAs are community property does not change our conclusion. Husband disclaimed all of his rights to any property, real or personal, not just his rights in the IRAs. Therefore, the determination by your office as to whether the IRAs are community property for federal tax purposes does not affect our conclusion that the disclaimer is a qualified disclaimer.

If you have any questions concerning this assistance, please contact Mary Berman at 622-3497.



James F. Hogan