Internal Revenue Service

Department of the Treasury

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Person to Contact:

Telephone Number:

Refer Reply To:
CC:DOM:P&SI:4/PLR-110736-99
Date:
December 21, 1999

Re:

Legend:

Decedent -

Father -

Mother -

Date -

Year 1 -
Year 2 -
Year 3 -
Year 4 -

Dear

This is in response to your letter dated June 8, 1999, requesting a ruling concerning the estate and gift tax treatment of certain powers held by the Decedent during the Decedent's life.

The facts submitted and representations made are as follows:

Father, a resident of , died testate on Date, which is before October 21, 1942. He was survived by his wife (hereinafter referred to as Mother) and three children, one of whom was Decedent. Under the terms of Father's will, all of Father's real and personal property, after payment of debts, was to be held in trust for the benefit of Father's children and grandchildren. Income from the property was to be divided equally among Father's three children after payment of taxes, insurance, and cost of repairs to property. In addition, the children were required to "see that their mother . . . have enough from rents or other income for actual living expenses only."

Upon the death of a child, the income from the property was to be paid to the remaining children, or child, as the case may be. Upon the death of the last living child, Father's will provided that his property be divided equally among Father's grandchildren.

It is represented that Father's estate was never closed and that decedent served as personal representative of the estate until her death in Year 4.

It is also represented that, during Decedent's life, income from Father's property was distributed to Decedent and her siblings (during their respective lives) pursuant to the terms of Father's will. In addition, during Mother's life, distributions from income were made to Mother for Mother's actual living expenses pursuant to the terms of Father's will. However, no distributions were ever made from principal. Mother died in Year 1 and Decedent's two siblings died in Year 2 and Year 3, respectively.

Under the terms of Decedent's will, after specific bequests, the residue passed in equal shares to Decedent's specified nephews. Decedent's will did not acknowledge the existence of any power held by Decedent during her life and, thus, does not attempt to exercise any power held by Decedent during her life.

The following rulings are requested:

1. No part of Father's estate is includible in Decedent's gross estate for federal estate tax purposes.

2. Decedent did not make a gift for federal gift tax purposes in any year by virtue of her position as personal representative of Father's estate.

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 2031(a) states that the value of the gross estate of a decedent shall include the value at the time of the decedent's death of all property, real or personal, tangible or intangible, wherever situated, to the extent of the interest therein of the decedent.

Section 2041(a)(1) provides that the value of the gross estate includes the value of any property with respect to which a general power of appointment created on or before October 21, 1942, is exercised by the decedent by will, or by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under §§ 2035 through 2038.

Section 2041(b)(1) defines a general power of appointment as an unlimited power held by the decedent to consume, invade, or appropriate property for the benefit of the decedent, the decedent's estate, the decedent's creditors, or creditors of the decedent's estate. A power limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is not a general power of

appointment.

Section 20.2041-1(b)(1) of the Estate Tax Regulations states that the term "power of appointment" includes all powers which are in substance and effect powers of appointment regardless of the nomenclature used in creating the power and regardless of local property law connotations. 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.

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 the decedent's estate, or (b) expressly not exercisable in favor of the decedent or his creditors, or the decedent's estate or creditors of his estate.

Under the terms of Father's will, income of the real and personal property must be divided equally among Father's living children. The division and distribution of income to specified beneficiaries is a mandatory duty of the personal representative that must be exercised in a fiduciary capacity and, thus, is not a power of appointment. The only discretionary distribution under the terms of the will is the payment from income to Mother, if necessary, for actual living expenses. There are no other discretionary distributions that may be made from either income or the actual property. Thus, Decedent, as the personal representative of Father's estate, was limited to making mandatory distributions of income to herself and her siblings and discretionary distributions from income to Mother that were necessary to meet Mother's actual living expenses. Consequently, other than the mandatory distributions of income, Decedent could not make distributions of the property to herself, her estate, or the creditors of either.

Only if Decedent had the power to appoint income, other than the mandatory distribution of her share of income, and/or the property to herself, her creditors, her estate, or the creditors of her estate, would such a power be a general power of appointment. As personal representative, Decedent's management of the assets and power to make distributions of income to Mother for living expenses can not be construed as a general power.

Consequently, the Decedent's power, as personal representative, to distribute income for the benefit of Mother is not a general power of appointment the exercise of which would result in the value of the property being included in Decedent's gross estate under § 2041(a)(1).

Therefore, based on the facts submitted and representations made, we conclude that § 2041(a)(1) does not apply to any interest in Father's estate held by Decedent at the time of her death and that no part of Father's estate is included in Decedent's gross estate for federal estate tax purposes.

Section 2501(a)(1) imposes a tax on the transfer of property by gift by an individual.

Under § 2514(a), the exercise of a general power of appointment created on or before October 21, 1942, is deemed a transfer of property that is subject to the gift tax by the individual possessing the power, but the failure to exercise such a power or the complete release of such a power is not deemed to be an exercise of the power.

As discussed above, under the terms of Father's will, we have concluded that Decedent did not possess a general power of appointment. Thus, any transfer by Decedent of any interest in Father's estate would not be an exercise of a general power of appointment that would be subject to the gift tax under § 2514(a).

It is represented that Father's estate was administered by Decedent from the date of Father's death until the date of Decedent's death, which was a period of more than 50 years. Section 1.641(b)-3(a) of the Income Tax Regulations provides that the period of administration of an estate cannot be unduly prolonged and, if the period of administration is unreasonably prolonged, the estate is considered terminated for Federal income tax purposes. Section 1.641(b)-3(d) provides that if an estate is considered terminated for federal income tax purposes, the gross income, deductions, and credits of the estate are, subsequent to termination, considered the gross income, deductions, and credits of the person or persons succeeding to the property of the estate. Moreover, law provides in § 62-3-101 of S.C. Code Ann. (Law. Co-op. 1987):

> Upon the death of a person, his real property devolves to the persons to whom it is devised by his last will . . . subject to exempt property, to rights of creditors, and to administration, and his personal property devolves, first to his personal representative, for the purpose of satisfying claims as to exempt property rights and the rights of creditors, and the purposes of administration, . . . and, at the expiration of three years after the decedent's death, if not yet distributed by the personal representative, his personal property devolves to those persons to whom it is devised by will or who are his heirs in intestacy, or their substitutes, as the case may be, just as with respect to real property.

Father's will in the present case provided that his property was to be held in trust for his children and grandchildren until the death of his last surviving child. Although the

taxpayer has characterized the arrangement as an "estate," we believe that the proper characterization is as a trust for federal tax purposes.

Based on this characterization, we now consider whether Decedent made transfers subject to the gift tax under § 2511.

Section 2511(a) states that the gift tax shall apply 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(g)(1) of the Gift Tax Regulations states that a transfer by a trustee of trust property in which he has no beneficial interest does not constitute a gift by the trustee. Section 25.2511-1(g)(2) states that if a trustee has a beneficial interest in trust property, a transfer of the property by the trustee is not a taxable transfer if it is made pursuant to a fiduciary power the exercise or nonexercise of which is limited by a reasonably fixed or ascertainable standard which is set forth in the trust instrument. For instance, a power to distribute corpus for education, support, maintenance, or health of the beneficiary; for his reasonable support and comfort; to enable him to maintain his accustomed standard of living; or to meet an emergency, would be such a standard.

Under the terms of Father's will, other than mandatory distributions of income to the children of Father (including Decedent), the only authorized discretionary distributions that Decedent could make were distributions of income to Mother "for actual living expenses only." Decedent, as an income beneficiary, had a beneficial interest in the property. Thus, a distribution of income by Decedent to Mother would be a taxable transfer unless the distribution was made pursuant to a fiduciary power, the exercise of which was limited by a reasonably fixed or ascertainable standard.

In determining whether the exercise of a power is limited to an ascertainable standard, the test is the measure of control over the property by virtue of the grant of power; i.e., whether the exercise of the power is restricted by definite bounds. See Rev. Rul. 78-398, 1978-2 C.B. 238, where the trustee/beneficiary's right to distribute principal to himself, as the beneficiary, in any amount necessary for his own maintenance and medical care was a power limited by an ascertainable standard.

Although federal statute controls in determining how the powers and rights possessed by the decedent are taxed, state law prevails in determining the nature and extent of the powers and rights possessed by the decedent. See Morgan v. Commissioner, 309 U.S. 78 (1940), 1940-1 C.B. 229. Thus, whether Decedent's power is limited by an ascertainable standard relating to health, education, support, and maintenance is a matter of state law.

Under South Carolina law, the intent of the testator must be gathered from the

whole instrument, giving due weight to all of its language, considered in the light of the circumstances known to the testator at the time of execution. See Estate of Theodore Geddings Tarver v. Commissioner, 26 T.C. 490 (1956). In Bowers v. South Carolina National Bank of Greenville, 228 F.2d 4 (4th Cir. 1955), the trustees were directed to pay $150 per month to each of two sisters for their lives, all the expenses of the upkeep of their joint home, and all necessary medical and hospital expenses in the case of illness of either or both of the sisters. The court concluded that the trustees did not have the broad discretion under the will to use the corpus as they saw fit during the lifetime of the sisters and that the value of the beneficial interest was then presently ascertainable.

In the present case, Father gave his personal representative, Decedent, the duty to distribute income to Mother "for actual living expenses only." There were no other provisions in Father's will for payments for the support of Mother or any other person. Since there is no indication in the will that Father intended that Mother receive distributions for anything other than essential living expenses, we believe that Father intended that any payments from income to Mother be restricted solely to payments necessary for her support and maintenance.

Thus, we conclude that Decedent's duty, as fiduciary, to make distributions of income to Mother was limited by an ascertainable standard of support, maintenance, and health of Mother to enable her to maintain her accustomed standard of living as described under § 25.2511-1(g)(2). Any such transfers would have been made pursuant to Decedent's fiduciary duties and would not be a transfer from Decedent that would be subject to gift tax.

We note that you have represented that there have been no distributions from principal during the estate administration and that the only distributions from income are those described above. Therefore, based on the facts submitted and representations made, we conclude that Decedent did not make a gift for federal gift tax purposes in any year by virtue of her position as personal representative of Father's estate.

A copy of this letter should be attached to any gift, estate, or generation-skipping transfer tax returns that you may file relating to these matters.

The rulings contained in this letter are based upon information and representations submitted by the taxpayer and accompanied by a penalty of perjury statement executed by the 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. Except as specifically ruled above, no opinion is expressed as to the federal tax consequences of the facts described above under the cited provisions or any other provisions of the Code or regulations.

This ruling is directed only to the taxpayer who requested it. Section 6110(k)(3) of the Code provides that it may not be used or cited as precedent.

Sincerely,
Assistant Chief Counsel
(Passthroughs and Special Industries)
By Katherine A. Mellody
Senior Technician Reviewer, Branch 4

Enclosure
Copy for 6110 purposes