

Internal Revenue Service

Department of the Treasury
Washington, DC 20224

Number: **200446018**

Release Date: 11/12/04

Index Number: 2601.00-00, 2041.02-00,
2511.00-00, 2514.02-00

Person To Contact:

, ID #

Telephone Number:

Refer Reply To:

CC:PSI:B09 – PLR-140416-03

Date:

July 01, 2004

Re

LEGEND

Decedent =

Trust 1 =

Date 1 =

Child 1 =

Child 2 =

Grandchild A =

Grandchild B =

Grandchild C =

Grandchild D =

Grandchild E =

Grandchild F =

Grandchild G =
Individual 1 =
Individual 2 =
Bank =
Trust 1-A =

Trust 1-B =

Trust 1-C =

Trust 1-D =

Trust 1-E =

Trust 1-F =

Trust 1-G =

Foundation =
District Court =

Date 2 =
Family 1 =
Family 2 =
Family Foundation =
Date 3 =
State Statute 1 =

Dear _____ :

This is in response to your authorized representative's letter of July 1, 2003, requesting rulings regarding the application of the gift, estate and generation-skipping transfer ("GST") tax consequences of a proposed transaction. This letter responds to that request.

FACTS

The information submitted and representations made are as follows: Decedent created Trust 1 on Date 1, a date prior to September 25, 1985. There have been no additions to Trust 1 after September 25, 1985.

Decedent has two daughters, Child 1 and Child 2, and seven grandchildren, Grandchild A, Grandchild B, Grandchild C, Grandchild D, Grandchild E, Grandchild F, and Grandchild G. Each of the seven grandchildren is referred to in the trust as a "Primary Beneficiary." Trust 1 is an irrevocable trust for the benefit of Decedent's grandchildren. Individual 1, Individual 2, and Bank are the current trustees of Trust 1.

Trust 1 provides that the share for each grandchild shall be held as a separate trust. Therefore, the trust agreement governs the administration of Trust 1-A, Trust 1-B, Trust 1-C, Trust 1-D, Trust 1-E, Trust 1-F, and Trust 1-G.

Article III of Trust 1 provides that the trust shall continue until the death of the survivor of certain individuals who are living at the time of the creation of the trust and for twenty-one years thereafter.

Article V provides, generally, that each separate trust share shall be held primarily for the benefit of a Primary Beneficiary and his or her descendants. At the end of the trust period, the remaining trust fund shall be distributed among the then living Primary Beneficiary or Primary Beneficiaries, or, if none, to the other lawful descendants of the Primary Beneficiary or Beneficiaries, per stirpes. If there are no lawful descendants of the Primary Beneficiary or Beneficiaries, the trustees shall distribute the trust estate to the then living descendants of Decedent, excluding Decedent, or, if none, to Foundation.

Article VI, paragraph A provides that the trust agreement is irrevocable.

Article VII sets forth the powers of the trustees. Paragraph A of Article VII provides that the trustee shall have the power to retain trust property, or any part thereof, in the same form as it now is or in which it may be later received.

Article VII, paragraph K provides that in exercising any of the powers conferred upon the trustees by the trust instrument, the action of a majority of the trustees shall be sufficient to bind the trust and to make effective any act or decision of the whole body of trustees, except that the trustees must act unanimously: (1) in the matter of dissolution or termination of the trust or any part thereof; (2) in the matter of the distribution of any of the principal of the trust property; (3) in the appointment of a Trust Manager and the fixing of his powers and authorities; and (4) in investing or loaning money to any corporation, association, or firm in which the trustees, or any of them, are individually interested.

Article VII, paragraph L(1) provides that with respect to the powers and authorities that the trustees have, the trustees originally named in the trust agreement (the "Original Trustees") may exercise any and all of their powers and authorities conferred by the trust or refrain from so doing in cases where they, or any of them, have or might be considered to have an interest adverse to the trust or any beneficiary. In addition, the Original Trustees are relieved from any and all liability, responsibility, or accounting to the trust and each beneficiary thereof in respect to any action taken or not taken by them as Original Trustees.

Article VII paragraph L(2) provides that with respect to the powers and authorities of any trustee other than the Original Trustees, if it appears that such other trustee has or might be considered to have an interest adverse to the trust or any beneficiary, such trustee may join in taking action as trustee, if such action or omission of action is authorized or approved by a court having jurisdiction after notice prescribed by the court has been given to all living beneficiaries. In addition, with respect to any trustee other than an Original Trustee, it is hereby declared the policy of this trust that if the action proposed to be taken or refrained from being taken is such as is reasonably prudent, that the court may approve the same even though the trustee concerned may have an interest adverse to the trust or to any beneficiary. A trustee having an interest adverse to the trust or any beneficiary shall not be subject to removal on that account.

Article IX, sets forth various trustee provisions for Trust 1. Paragraph A provides that in case any of the Original Trustees shall die, resign, or become legally incapacitated, or if for any other reason there shall be a vacancy in the number of trustees, the surviving or remaining Original Trustees shall fill the vacancy or vacancies thus arising; thereafter, if none of the Original Trustees is acting the then acting trustees shall fill all vacancies arising thereafter, and in the event that they fail to do so within sixty days after the vacancy occurs, then any trustee or any beneficiary may apply to District Court for the appointment of a trustee or trustees to fill such vacancy and said court shall, upon such application, appoint a suitable trustee or trustees.

Article IX, paragraph B provides that a written instrument by the surviving or remaining Original Trustee or Original Trustees or by the then acting successor trustee shall be sufficient authority for the trustee or trustees so appointed to act and the trust property in all cases shall, upon the written acceptance of the trustee or trustees, vest in

the new trustee or trustees therein designated or appointed as a co-trustee without any conveyance or transfer of trust property or any part thereof and shall invest them with a trustee's authority hereunder.

Article IX, paragraph C provides that while the trustees consist of at least two of the Original Trustees they are empowered to amend, alter or change the provisions of this section providing for the appointment or the manner of appointment, or both, of any and all trustees to fill vacancies. Such modification shall be made by an instrument in writing signed by the Original Trustees then acting, and shall be attached to an executed copy of the trust instrument and when so attached shall have the same force and effect as though originally incorporated herein.

Article IX, paragraph D provides that none of the Original Trustees shall be required to furnish a bond. However, a trustee, other than one of the Original Trustees, shall be required to furnish a bond, conditioned to faithfully perform his duties as a trustee with surety or sureties acceptable to the then acting trustees. The amount of the bond shall not be less than five percent of the book value of the trust property at the end of the preceding calendar year, and said amount shall be fixed by the then acting trustees. The expense of procuring the bond, if any, shall be paid by the trust.

Article IX, paragraph E provides that in all cases the number of trustees shall be three.

Article IX, paragraph F provides that notwithstanding anything in the trust instrument to the contrary, neither Decedent nor a "related or subordinate party" as that term is defined for federal tax purposes, shall be appointed or act as a trustee hereunder.

Article X sets forth additional provisions relating to trustees. Paragraph A provides that the trustees shall keep complete books and records of the trust property and of their accounts, subject at all times to the inspection of a Primary Beneficiary and his parents or guardian and shall furnish any beneficiary, upon request, with annual statements of the condition of the trust.

Article X, paragraph B provides that the trustees may from time to time hire suitable offices for the transaction of the trust business, employ counsel, a Trust Manager, and such other agents as the trustees may deem suitable, define their duties and fix and pay their compensation.

Article X, paragraph C provides that the trustees, or any of them, may receive compensation for their services as a trustee, only if all three trustees previously authorize said compensation and fix its amount or rate in writing.

Article X, paragraph D provides that each of the trustees shall only be responsible for his own willful and corrupt breach of trust and not one for another.

Article X, paragraph E provides that the trustees, or any of them, may act as directors, employees, agents or in any official capacity for any corporation, association or firm, the stock of or interest in which is owned or held directly or indirectly by the trust, and as such may receive compensation from such corporation, association or firm and may vote salaries or increases in salaries to trustees, or any of them, as directors, agents, employees or officials of any such corporation, association or firm either to themselves or to other trustees, and in so doing shall incur no liability whatsoever to the trust and shall not be accountable to the trust or any beneficiary thereunder.

Article X, paragraph F provides that no successor trustee shall be liable or responsible in any way for the acts or defaults of any predecessor trustee, nor for any loss or expense caused by anything done or neglected to be done by any predecessor trustee, but such successor trustee shall be liable only for his or her own acts and defaults with respect to the trust funds actually received by him or by her as trustee. Every successor trustee shall be vested with all the duties, rights, titles, and powers, whether discretionary or otherwise, of the Original Trustees, except as herein specifically provided to the contrary.

Article XIII provides that the trustees are empowered at any time and from time to time to amend, modify or alter any term or provision of the trust agreement, by written instrument executed unanimously by all trustees, provided that: (A) no such amendment, modification or alteration shall be effective until written consents are obtained from a majority of the then living legally competent adults who would be entitled to trust property if the trust were entirely terminated; (B) the rights of the beneficiaries with respect to distribution of principal and income shall not be impaired, except that discretionary payments of income to a beneficiary may be made mandatory; (C) no amendment, modification, or alteration may be made whereby any portion of the trust property shall or may be distributed to Decedent or may inure to Decedent's benefit; (D) the duties of the trustees to keep and render accounts shall not be abrogated or diminished; and (E) where unanimous action by the trustees is required under the terms of the trust instrument, such requirement shall not be changed.

On Date 2, the trustees of Trust 1 unanimously exercised their limited power of amendment under Article XII of each trust to modify the terms of the trusts (the "Trustees' Exercise"). The Trustees' Exercise modifies each trust instrument as follows:

Article III will be modified, generally, to provide that each trust will be administered by four trustees, two Family Trustees and two Independent Trustees. The Family Trustees will consist of one trustee from Family 1 and one trustee from Family 2. The Independent Trustees will consist of any corporate or individual trustee who is neither issue of Decedent nor related to or subordinate (within the meaning of § 672(c)

of the Code) to any issue of Decedent. In addition, the definition of the term Foundation will be revised to include Family Foundation.

Article VII, paragraph A will be modified to allow the trustees to retain assets in any family business.

Article VII, paragraph K will be modified, generally, to require unanimous action by the trustees: (1) in the dissolution or termination of any trust fund under the trust instrument; (2) in the distribution of any principal of any trust; (3) in the delegation of powers and duties to a non-trustee, the appointment of one or more Trust Managers and the determination of the Trust Managers' powers and authority; (4) in investing or loaning money to any corporation, association, or firm in which any trustee is interested; (5) in the exercise of any power granted to the trustees under Article XIII of the trust agreement; and (6) whenever only two trustees are empowered to act. All other acts may be performed by a majority of the Trustees.

Article VII, paragraph L will be modified, generally, to add a statement to the effect that the power of Family Trustees to participate in decisions to distribute principal to any of their respective issue shall not be treated as conferring on them an interest adverse to the trust or any beneficiary, and the exercise or nonexercise of that power shall not require the authorization or approval of any court.

Article IX will be modified, generally, to provide that the Family 1 Trustee shall consist of one or more of Child 1 and her issue. The Family 1 Trustee will initially be Child 1. Similarly, the Family 2 Trustee shall consist of one or more of Child 2 and her issue. The Family 2 Trustee will initially be Child 2. The balance of Article IX, as modified, will contain provisions regarding the method of administration when more than one Family Trustee is serving for a particular family and the manner of selecting successor Family 1 and Family 2 Trustees. In addition, Article IX, as modified, will provide that upon the appointment of a Family 1 Trustee and a Family 2 Trustee, Individual 1 will be deemed to have retired as a trustee and shall no longer serve as a trustee of any of the trusts.

A new paragraph G will be added to Article X that sets forth certain limitations that will apply to the rights, powers, responsibilities, and discretion granted to the trustees under each trust agreement.

The new Article X, paragraph G(3) will provide generally that no Family Trustee may participate in any discretionary decision to withhold or distribute income or principal to any individual who is acting as a Family Trustee or to distribute income or principal in a manner that would satisfy a legal obligation of any Family Trustee, except that under certain circumstances Child 1 and Child 2 may participate in discretionary decisions to distribute to their issue.

The new Article X, paragraph G(7) will provide generally that no trustee shall participate in exercising any power under Article XIII in a manner that would allow the trustee to exercise any discretion prohibited by this paragraph G; (b) possess or exercise any power or discretion that would cause assets of any trust to be subject to the estate tax; or (c) possess or exercise any power or discretion that would cause the assets of any trust to be subject to gift tax or generation-skipping transfer tax. Any provision of the agreement incapable of being so construed or applied shall be inapplicable to the trustee in question.

A new paragraph H will be added to Article X to provide that a trustee's duty to disclose information to co-trustees and the right of a trustee to receive information from the co-trustees shall not be affected by any limitations on that trustee's powers.

Article XIII, paragraph A will be modified to incorporate references to the Family 1 line and the Family 2 line. More specifically, that paragraph will be modified to provide that no amendment, modification, or alteration to the trust shall be effective until consented to by the adult, competent beneficiaries of all trusts under each agreement by written instrument executed by (1) at least fifty percent of such beneficiaries who are issue of Child 1 if there are more than two such beneficiaries, or by each such beneficiary if there are only one or two such beneficiaries; and (2) at least fifty percent of such beneficiaries who are issue of Child 2 if there are more than two such beneficiaries, or by each such beneficiary if there are only one or two such beneficiaries.

On Date 3, District Court approved the proposed modifications. District Court's order is contingent upon a favorable private letter ruling from the Service. Accordingly, you now request the following rulings:

1. After the proposed modifications, Trust 1 and each of the separate trusts thereunder will be considered to have been created and to have been irrevocable on September 25, 1985, and will be exempt from the GST tax imposed by chapter 13 of the Code;
2. After the proposed modifications, no interest in any trust will be includible in the estate of any beneficiary or family individual trustee for purposes of the estate tax imposed by chapter 11 of the Code by reason of any power or discretion exercisable by such beneficiary or Family Trustee with respect to that trust, including such beneficiary's or Family Trustee's power to consent to or approve any future modification to that trust.
3. After the proposed modifications, no beneficiary or family individual trustee will be treated as making a gift that is subject to the gift tax imposed by chapter 12 of the Code as a result of any power or discretion exercisable by such beneficiary or Family Trustee with respect to that trust, including

such beneficiary's or Family Trustee's power to consent to or approve any future modification to that trust.

LAW & ANALYSIS

Ruling 1

Section 2601 imposes a tax on every generation-skipping transfer.

Section 1433(b)(2)(A) of the Tax Reform Act of 1986 and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations provide that the generation-skipping transfer tax shall not apply to any generation-skipping transfer under a trust that was irrevocable on September 25, 1985, but only to the extent that such transfer is not made out of corpus added to the trust after September 25, 1985 (or out of income attributable to corpus so added).

Section 26.2601-1(b)(1)(ii)(A) provides that any trust in existence on September 25, 1985, will be considered an irrevocable trust except as provided in § 26.2601-1(b)(1)(ii) (B) or (C) (relating to property includible in the grantor's gross estate under §§ 2038 and 2042).

Section 26.2601-1(b)(1)(iv) provides that if an addition is made after September 25, 1985, to an irrevocable trust, which is excluded from the application of chapter 13 by § 1433(b)(2)(A) of the 1986 Act, a pro rata portion of subsequent distributions from (and terminations of interests in property held in) the trust is subject to the provisions of chapter 13.

Section 26.2601-1(b)(4)(i) provides rules for determining when a modification, judicial construction, settlement agreement, or trustee action with respect to a trust that is exempt from the generation-skipping transfer tax will not cause the trust to lose its exempt status. The regulation provides that the rules contained in the paragraph are applicable only for purposes of determining whether an exempt trust retains its exempt status for generation-skipping transfer tax purposes.

Section 26.2601-1(b)(4)(i)(D) provides that a modification of the governing instrument of an exempt trust (including a trustee distribution, settlement, or construction that does not satisfy paragraphs (b)(4)(i)(A), (B), or (C) of this subsection) by judicial reformation, or nonjudicial reformation that is valid under applicable state law, will not cause an exempt trust to be subject to the provisions of chapter 13, but only if -- (1) the modification does not shift a beneficial interest in the trust to any beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification, and (2) the modification does not extend

the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust.

In this case, Trust 1 and the individual trusts thereunder, are considered irrevocable because neither § 2038 nor § 2042 apply. Also, it is represented that no additions have been made to Trust 1 or any of the individual trusts thereunder after September 25, 1985. Consequently, Trust 1 and the individual trusts thereunder are currently exempt from the GST tax.

The proposed modifications to Trust 1, including the individual trusts thereunder, will not shift any beneficial interest to a beneficiary who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the modification. In addition, the proposed transaction will not extend the time for vesting of any beneficial interest in the trusts beyond the period provided for in the original trusts. Further, the modifications will not result in an actual or constructive addition to any of the trusts.

Thus, after the proposed modifications each of the trusts will be deemed to have been irrevocable on September 25, 1985, and will be exempt from the GST tax.

Ruling 2

Section 2001 imposes a tax on the transfer of the taxable estate of every decedent who is a citizen or resident of the United States.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to the extent of any property with respect to which the decedent has, at the time of his death, a general power of appointment created after October 21, 1942, or with respect to which the decedent has at any time exercised or released a power of appointment by a disposition that is of such nature that if it were a transfer of property owned by the decedent the property would be includible in the decedent's gross estate under §§ 2035 to 2038, inclusive. For purposes of § 2041(a)(2), the power of appointment shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the exercise of the power takes effect only on the expiration of a stated period after its exercise, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised.

Section 2041(b)(1) defines the term "general power of appointment" as 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.

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

Section 2041(b)(1)(C) provides, in part, that a power of appointment created after October 21, 1942, that is exercisable only in conjunction with another person, shall not be deemed a general power of appointment (i) if the power is not exercisable by the decedent except in conjunction with the creator of the power; or (ii) if the power is not exercisable by the decedent except in conjunction with a person having a substantial interest in the property, subject to the power, which is adverse to the exercise of the power in favor of the decedent.

Section 20.2041-1(b)(1) of the Estate Tax Regulations provides, in part, that if a trust instrument provides that the beneficiary may appropriate or consume the principal of the trust, the power to consume or appropriate is a power of appointment. Similarly, a power given to a decedent to affect the beneficial enjoyment of trust property or its income by altering, amending, or revoking the trust instrument or terminating the trust is a power of appointment. In addition, a power in a donee to remove or discharge a trustee and appoint himself may be a power of appointment. For example, if under the terms of a trust instrument, the trustee or his successor has the power to appoint the principal of the trust for the benefit of individuals including himself, and the decedent has the unrestricted power to remove or discharge the trustee at any time and appoint any other person including himself, the decedent is considered as having a power of appointment.

Section 20.2041-1(c)(1) provides, in part, 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.

Under State Statute 1, a trustee who is a beneficiary of a trust is generally prohibited from exercising, or participating in the exercise of, any power of the trustee (i) to make discretionary distributions of either principal or income to or for the benefit of the trustee as beneficiary, unless such distributions are limited by an ascertainable standard relating to the trustee-beneficiary's health, education, maintenance, or support, as described in §§ 2041 and 2514 of the Code; or (ii) to discharge any legal support or other obligation of the trustee to any person.

In this case, under the new paragraph G(3) of Article X, no Family Trustee may participate in any discretionary decision to withhold or distribute income or principal to any beneficiary who is acting as a Family Trustee. In addition, no Family Trustee may participate in any discretionary decision to distribute income or principal in a manner that would satisfy a legal obligation of any Family Trustee.

Furthermore, although the trust instrument of Trust 1, as modified, provides that the trustees, acting unanimously, shall have the power to modify certain provisions of the trusts, any such amendment approved by the trustees will not become effective without the consent of a majority of the adult beneficiaries who are the issue of Child 1 and a majority of the adult beneficiaries who are the issue of Child 2. New Article X, paragraph G(7) further limits this power to modify by prohibiting any trustee from possessing or exercising any power that would cause the assets of any trust to be subject to the estate, gift, or GST tax.

Accordingly, after the proposed modifications no beneficiary or Family Trustee of any trust will be deemed to possess a general power of appointment over the assets of any such trust by reason of any power or discretion exercisable by such beneficiary or Family Trustee. Thus, no interest in any trust will be includible in the estate of any beneficiary or Family Trustee under § 2041.

Ruling 3

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 2511 provides that, subject to certain limitations, the gift tax applies whether the transfer is in trust or otherwise, direct or indirect, and whether the property transferred is real or personal, tangible or intangible.

Under § 2514(b), the exercise or release of a general power of appointment created after October 21, 1942, is deemed the transfer of property by the individual possessing such power.

Section 2514(c) defines a "general power of appointment" as a power which is exercisable in favor of the individual possessing the power, his estate, his creditors, or creditors of his estate.

In this case, after the proposed modifications, each beneficiary will have the same beneficial interest as he or she held under Trust 1. Because the beneficial interests of the beneficiaries will be substantially the same before and after the proposed modifications, no transfer will be deemed to occur as the result of the transaction.

In addition, as discussed in the previous section with regard to the applicability of § 2041, after the proposed modifications, no beneficiary or Family Trustee of any trust will be deemed to possess a general power of appointment over the assets of any such trust under § 2514.

Accordingly, we conclude that the modification and administration of each trust pursuant to the Trustees' Exercise will not result in a transfer subject to gift tax by any beneficiary or Family Trustee under § 2511 or § 2514.

Except as expressly provided herein, no opinion is expressed or implied concerning the tax consequences of any aspect of any transaction or item discussed or referenced in this letter.

This ruling is directed only to the taxpayer requesting it. Section 6110(k)(3) 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 authorized representatives.

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 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.

Sincerely,

Melissa C. Liquerman
Branch Chief, Branch 9
Office of Associate Chief Counsel

(Passthroughs & Special Industries)