

Dear _____ :

This is in response to your letter dated September 16, 2004, concerning the gift tax and income tax consequences of proposed disclaimers.

The facts and representations submitted are summarized as follows. Decedent, a resident of State, died testate on Date 1, survived by his wife, Spouse, and two children, Daughter 1 and Daughter 2. Spouse was appointed the personal representative of Decedent's estate. At the time of his death, Decedent was the owner of an individual retirement account, IRA, described in section 408(a) of the Internal Revenue Code, that had a date of death value of approximately \$y. At the time of his death, Decedent, whose birth date was Date 2, had not attained his "required beginning date" as that term is defined in section 401(a)(9)(C).

Spouse's date of birth is Date 3. Daughter 1's date of birth is Date 4 and Daughter 2's date of birth is Date 5.

On Date 6, Decedent executed two irrevocable trusts, Marital Trust and Family Trust. On Date 7, Decedent executed a beneficiary designation with respect to his IRA.

Section 1 of the IRA beneficiary designation named Spouse as the primary beneficiary of IRA. Section 2 provides that if Spouse disclaims any part or all of the benefits of IRA, then the beneficiary of the disclaimed portion is the trustee of Marital Trust. The beneficiary designation further provides that:

If [Spouse] survives [Decedent] and disclaims any part or all of the benefits payable pursuant to section 1 and section 2 above, then the beneficiary of such disclaimed portion, or all, of the account is the trustee of [Family Trust], as amended from time to time, to be paid over the nonrecalculated life expectancy of [Spouse].

Daughters 1 and 2 were named third contingent beneficiaries of IRA to take in the event Spouse, Spouse as a beneficiary of Marital Trust, and Spouse as a beneficiary of Family Trust disclaimed the respective interests in IRA.

Pursuant to the terms of Marital Trust, an irrevocable trust, upon Decedent's death, the trustees are to pay all of the net income from Marital Trust to Spouse during her lifetime, in quarterly or more frequent installments. Income is to include the income of IRA, which is to be distributed from Marital Trust to Spouse no later than the end of the calendar year. Section 4.1 of Marital Trust further provides that the trustee of Marital Trust shall have the power to direct that distributions from IRA be made to Marital Trust in such manner that the minimum annual IRA distribution shall be the greater of (a) the amount necessary to comply with the requirements of sections 401(a)(9) and 408(a)(6) or (b) all income earned by IRA during the course of a year.

The trustee may also invade principal, including the principal of IRA, for Spouse's benefit to provide for her reasonable health, support and maintenance. Spouse is granted certain non-cumulative rights to withdraw all or a portion of the property of Marital Trust. Spouse also has the power to appoint by her will all or any part of the assets of Marital Trust to or for the benefit of any issue of Decedent or their spouse as Spouse may determine. Upon Spouse's death, subject to Spouse's limited testamentary power of appointment, Marital Trust will be distributed to the living children of Decedent, by right of representation. Daughter 1 and Daughter 2 are the co-trustees of Marital Trust.

Pursuant to the terms of Family Trust, an irrevocable trust, as modified by Court Order dated Date 8, upon Decedent's death, the trustee may make discretionary distributions of income to or for the benefit of Spouse as the trustee deems necessary for her health, support and maintenance. If the trustee determines that Spouse's reasonable needs will be comfortably met from other resources, the trustee may make unequal discretionary distributions of income to or for the benefit of Decedent's issue for their health, support, maintenance, and education. The trustee may also make discretionary distributions of principal to any one or more of a group consisting of Spouse and the Decedent's issue, as necessary for their health, support, maintenance, and education. Spouse has the power to appoint by her will all or any part of the assets of Family Trust to or for the benefit of any issue of the Decedent as Spouse may determine. Upon the death of Spouse, subject to Spouse's testamentary power of appointment, the assets of Trust shall be distributed equally to Daughter 1 and Daughter 2, by right of representation. Daughter 1 and Daughter 2 are the co-trustees of Family Trust.

Spouse proposes to execute a disclaimer pursuant to which she, as primary beneficiary of IRA, will disclaim a fractional interest (defined by a formula) in IRA, plus any post-death income earned that is attributable to the disclaimed portion. In a separate disclaimer, Spouse also proposes to disclaim any and all interest in Marital Trust. Finally, Spouse will disclaim Spouse's power to exercise her limited testamentary power of appointment under the Family Trust with respect to that portion of the Family Trust attributable to the portion of the IRA that passed to the Family Trust as a result of the disclaimers described above. The portion of the Family Trust subject to this disclaimer will be determined under section 25.2518-2(e)(5), Example 5, of the Gift Tax Regulations. The proposed disclaimers will be in writing and will be received by the holder of the legal title to the property no later than 9 months after the date of Decedent's death. The proposed disclaimers will also comply with the State disclaimer law (State Law 1). It has been represented that Spouse has not accepted any interest or any benefit from the IRA.

It has been represented that the documentation described in section 1.401(a)(9)-4 of the "Final" Income Tax Regulations, Question and Answer-6, will be provided to the IRA administrator no later than Date 9. Furthermore, it has also been represented that all debts, taxes and expenses associated with the estate of Decedent will be paid from

assets other than IRA. Finally, it has been represented that section 1 of State Law 2, in relevant part, exempts from the concept "debtors interest in or right to receive" assets held or amounts payable under an individual retirement account.

You have requested the following rulings:

- 1) The proposed disclaimers that will be executed by Spouse will be qualified disclaimers under section 2518(b).
- 2) Family Trust is a qualified beneficiary within the meaning of section 1.401(a)(9)-4, Question and Answer 5.
- 3) With respect to the portion of IRA payable to the Family Trust, required minimum distributions within the meaning of section 401(a)(9) may be calculated based upon the life expectancy of Spouse using the single life table found at section 1.401(a)(9)-9 of the "Final" Regulations, Question and Answer 1.

Ruling 1

Section 2518(a) provides that, if a person makes a qualified disclaimer with respect to any interest in property, then for purposes of the estate, gift, and generation-skipping transfer taxes, the interest will be treated as if it had never been transferred to the disclaimant. Section 2518(b) defines the term "qualified disclaimer" to mean 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 relates not later than the date which is nine months after the later of the date on which the transfer creating the interest in such person is made, or 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 to the spouse of the decedent, or to a person other than the person making the disclaimer.

Section 25.2518-1(b) provides, in part, that if a person makes a qualified disclaimer then, for purposes of federal estate, gift, and generation-skipping transfer tax provisions, the disclaimed interest in property is treated as if it had never been transferred to the person making the qualified disclaimer. Instead, it is considered as passing directly from the transferor of the property to the person entitled to receive the

property as a result of the disclaimer. Accordingly, a person making a qualified disclaimer is not treated as making a gift.

Section 25.2518-2(e)(2) provides that in the case of a disclaimer made by a decedent's surviving spouse with respect to property transferred by the decedent, the disclaimer will satisfy the requirements of section 2518(b)(4), if the interest passes as a result of the disclaimer without any direction on the part of the surviving spouse either to the surviving spouse or to another person. If the surviving spouse, however, retains the right to direct the beneficial enjoyment of the disclaimed property in a transfer that is not subject to Federal estate and gift tax (whether as trustee or otherwise), such spouse will be treated as directing the beneficial enjoyment of the disclaimed property, unless such power is limited by an ascertainable standard.

Section 25.2518-2(e)(5), Example 5, describes a situation where B's will established both a marital trust and a nonmarital trust. B's surviving spouse, A, is an income beneficiary of the marital trust and has a testamentary general power of appointment over trust assets. A also has an income interest in the nonmarital trust and possesses a testamentary nongeneral power to appoint among designated beneficiaries. The will provides that any portion of the marital trust disclaimed is to pass to the nonmarital trust. A disclaimed 30 percent of the marital trust. The example concludes that the requirements of section 2518(b)(4) are not satisfied unless A also disclaims the nongeneral power to appoint the portion of the trust corpus that is attributable to the property that passed to the nonmarital trust as a result of A's disclaimer. Assuming that the fair market value of the disclaimed property on the date of the disclaimer is \$250,000 and that the fair market value of the nonmarital trust (including the disclaimed property) immediately after the disclaimer is \$750,000, A must disclaim the power to appoint one-third of the nonmarital trust's corpus.

Under section 25.2518-3(a)(1), the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest. For example, if an income interest in securities is bequeathed to A for life, then to B for life, with the remainder interest in such securities bequeathed to A's estate, and if the remaining requirements of 2518(b) are met, A could make a qualified disclaimer of either the income interest or the remainder, or an undivided portion of either interest.

Section 25.2518-3(b) provides that a disclaimer of an undivided portion of a separate interest in property that meets the other requirements of a qualified disclaimer under section 2518(b) and the corresponding regulations is a qualified disclaimer. An undivided portion of a disclaimant's separate interest in property must consist of a fraction or percentage of each and every substantial interest or right owned by the disclaimant in such property and must extend over the entire term of the disclaimant's interest in such property and in other property into which such property is converted.

Section 25.2518-3(c) provides that the disclaimer of a specific pecuniary amount out of a pecuniary or nonpecuniary bequest or gift can be a qualified disclaimer provided that no income or other benefit of the disclaimed amount inures to the benefit of the disclaimant either prior to or subsequent to the disclaimer. Following the disclaimer, the amount disclaimed and any income attributable to such amount must be segregated based on the fair market value of the assets on the date of the disclaimer or on a basis that is fairly representative of the value changes that may have occurred between the date of transfer and the date of the disclaimer.

Under State Law 1, as a result of the disclaimer, Spouse will be treated as predeceasing Decedent with respect to the disclaimed interest.

In this case, the proposed disclaimers will be in writing. Further, it is represented that the disclaimers will be delivered within 9 months of the Decedent's death, and that prior to the execution of the disclaimers Spouse has not and will not accept any of the disclaimed interests or benefits, including any income attributable to the disclaimed portion earned after Decedent's death.

Spouse's disclaimer, as the primary beneficiary of IRA, of an undivided fractional interest in IRA constitutes the disclaimer of an undivided portion of Spouse's interest in IRA under section 25.2518-3(a)(1). Further, under the terms of Section 2 of the IRA beneficiary designation, as a result of Spouse's disclaimer of a portion of her interest as primary beneficiary of IRA, the disclaimed portion will pass to Marital Trust. Under section 3 of the IRA beneficiary designation, as a result of Spouse's disclaimer of her interest in the Marital Trust, the disclaimed portion of the IRA will pass to Family Trust. As a result of Spouse's disclaimer of her limited testamentary power of appointment under the Family Trust with respect to that portion of the Family Trust attributable to the portion of the IRA that will pass to the Family Trust, the disclaimed portion will not pass to any recipient at the direction of Spouse. Spouse's limited power of appointment under Family Trust constitutes a separate interest in the trust property for purposes of section 25.2518-3(a)(1). Accordingly, Spouse can make a qualified disclaimer with respect to the limited power of appointment over Family Trust, notwithstanding that Spouse will retain a lifetime beneficial interest in Family Trust. See section 25.2518-2(e)(5), Example 5.

We conclude, therefore, based on the representations made and information submitted, that assuming the disclaimers are valid under State law, the proposed disclaimers by Spouse will be qualified disclaimers under section 2518.

Rulings 2 and 3

Section 401(a)(9)(A) provides, in general, that a trust will not be considered qualified unless the plan provides that the entire interest of each employee-

- (i) will be distributed to such employee not later than the required beginning date, or
- (ii) will be distributed, beginning not later than the required beginning date, over the life of such employee or over the lives of such employee and a designated beneficiary or over a period not extending beyond the life expectancy of such employee or the life expectancy of such employee and a designated beneficiary.

Section 401(a)(9)(B)(ii) provides, in general, that if a plan participant (IRA holder) dies before the distribution of his interest has begun in accordance with subparagraph (A)(ii) (prior to his required beginning date), then his entire interest must be distributed within 5 years of his death.

Section 401(a)(9)(B)(iii) provides, in general, that if any portion of the interest of a deceased plan participant (IRA holder) is payable to (or for the benefit of a designated beneficiary), such portion will be distributed beginning not later than 1 year after the date of the deceased's death (or a later date as prescribed by the Secretary under Regulations) in accordance with regulations over the life of the designated beneficiary (or a period not extending beyond the life expectancy of the beneficiary).

Section 401(a)(9)(C) provides, in relevant part, that, for purposes of this paragraph, the term "required beginning date" means April 1 of the calendar year following the calendar year in which the employee attains age 70 1/2.

Section 401(a)(9)(E) defines "designated beneficiary" as any individual designated as a beneficiary by the employee (IRA holder).

"Final" Income Tax Regulations under sections 401(a)(9) and 408(a)(6) were published in the Federal Register at 67 Federal Register 18987-19028 (April 17, 2002), and in the Internal Revenue Bulletin at 2002-19 I.R.B. 852 (May 13, 2002). The Preamble to the "Final" Regulations, in relevant part, provide that the regulations apply for determining required minimum distributions for calendar years beginning after January 1, 2003. For determining required distributions for calendar year 2002, taxpayers may rely on the 1987 proposed regulations, the 2001 proposed regulations, or the "Final" Regulations.

In addition, the "Final" Regulations have been modified in part (See 2004-26 I.R.B. 1082, 1098 (June 28, 2004)). The modification to the "Final" Regulations may also be relied upon with respect to required distributions for the 2002 calendar year.

Section 1.401(a)(9)-3 of the "Final" regulations, Q&A-3(a) provides, in general, that, with respect to the life expectancy exception to the 5-year rule described in section 401(a)(9)(B)(iii), and in A-1, distributions are required to begin to a non-spouse beneficiary on or before the end of the calendar year immediately following the calendar year in which the employee died. This rule also applies if another individual is a designated beneficiary in addition to the employee's (IRA holder's) surviving spouse.

Section 1.401(a)(9)-3 of the “Final” regulations, Q&A-4(a), provides, in relevant part, that in the absence of a plan provision to the contrary, with respect to an individual who dies prior to reaching his required beginning date, if said individual has designated a beneficiary, distributions from his plan or IRA are to be made in accordance with the life expectancy rule of sections 401(a)(9)(B)(iii) and (iv).

Section 1.401(a)(9)-5 of the “Final” regulations, Q&A-5(b), provides, in general, that if an employee dies before his required beginning date, in order to satisfy the requirements of section 401(a)(9)(B)(iii) or (iv) and the life expectancy rule described in A-1 of section 1.401(a)(9)-3, the applicable distribution period for distribution calendar years after the distribution calendar year containing the employee’s date of death is determined in accordance with paragraph (c) of this A-5.

Section 1.401(a)(9)-5 of the “Final” regulations, Q&A-5(c)(1), provides, in general, that, with respect to a non-spouse beneficiary, the applicable distribution period measured by the beneficiary’s remaining life expectancy is determined using the beneficiary’s age as of the beneficiary’s birthday in the calendar year immediately following the calendar year of the employee’s death. In subsequent calendar years, the applicable distribution period is reduced by one for each calendar year that has elapsed after the calendar year immediately following the calendar year of the employee’s death.

Section 1.401(a)(9)-4 of the “Final” regulations, Q&A-1, provides, in relevant part, that a designated beneficiary is an individual who is designated as a beneficiary under a plan either by the terms of the plan or by an affirmative election by the employee. Q&A-1 further provides that a person who takes under a will or otherwise under applicable state law will not be a designated beneficiary unless that individual also takes under a plan.

Section 1.401(a)(9)-5 of the “Final” regulations, Q&A-7(a) provides, in summary, that except as otherwise provided in paragraph (c) of this A-7 (not pertinent to this ruling request), if more than one individual is designated as a beneficiary with respect to an employee as of the applicable date for determining the designated beneficiary, the named beneficiary with the shortest life expectancy will be the designated beneficiary for purposes of determining the applicable distribution period.

Section 1.401(a)(9)-4 of the “Final” regulations, Q&A-4, provides, in relevant part, that in order to be a designated beneficiary, an individual must be a beneficiary as of the date of the employee’s death. Generally, an employee’s designated beneficiary will be determined based on the beneficiaries designated as of the date of death who remain beneficiaries as of September 30 of the calendar year following the calendar year of death. Q&A-4 further provides, in relevant part, “...if a person disclaims entitlement to the employee’s benefit pursuant to a disclaimer that satisfies section 2518 by that September 30 thereby allowing other beneficiaries to receive the benefit in lieu of that

person, the disclaiming person is not taken into account in determining the person's designated beneficiary".

Section 1.401(a)(9)-4 of the "Final" regulations, Q&A-3, provides that only individuals may be designated beneficiaries for purposes of section 401(a)(9). A person who is not an individual, such as the employee's estate, may not be a designated beneficiary. However, Q&A-5 of section 1.401(a)(9)-4 provides that beneficiaries of a trust with respect to the trust's interest in an employee's benefit may be treated as designated beneficiaries if the following requirements are met:

- (1) The trust is valid under state law or would be but for the fact that there is no corpus.
- (2) The trust is irrevocable or the trust contains language to the effect it becomes irrevocable upon the death of the employee.
- (3) The beneficiaries of the trust who are beneficiaries with respect to the trust's interest in the employee's benefit are identifiable within the meaning of A-1 of this section from the trust instrument.
- (4) The documentation described in A-6 of this section has been provided to the plan administrator.

Section 1.401(a)(9)-4 of the "Final" regulations, Q&A-6(b), provides, generally, with respect to required minimum distributions after the death of the employee, that documentation described therein must be provided by the trustee of the trust/beneficiary to the plan administrator by October 31 of the calendar year following the calendar year in which the employee died.

Section 1.401(a)(9)-4 of the "Final" regulations, Q&A-5(c), provides, in relevant part, that the separate account rules under A-2 of section 1.401(a)(9)-8 are not available to beneficiaries of a trust with respect to the trust's interest in the employee's benefit.

Section 1.401(a)(9)-9, of the "Final" Regulations, Q&A-1, sets forth the "Single Life Table" used to compute the life expectancy of an individual.

As previously noted, taxpayers must compute minimum required distributions for calendar years beginning with calendar year 2003 in accordance with the "Final" regulations referenced above.

Section 408(a)(6) provides that, under regulations prescribed by the Secretary, rules similar to the rules of section 401(a)(9) and the incidental death benefit requirements of section 401(a) shall apply to the distribution of the entire interest of an individual for whose benefit the trust is maintained.

With specific respect to the second ruling request, a fractional portion of Decedent's IRA will be payable to Family Trust after Decedent files the disclaimers referenced herein. Family Trust, by its terms, is irrevocable, and Family Trust is valid under the laws of State. Furthermore, a copy of Family Trust will be timely delivered to the administrator/custodian of IRA. Finally, the identity of the beneficiaries of Family Trust can be ascertained by perusing its terms.

Thus, Family Trust constitutes a "see-through trust" within the meaning of section 1.401(a)(9)-4 of the "Final" Regulations, Q&A-5.

Therefore, with respect to the second ruling request, we conclude that Family Trust is a qualified beneficiary within the meaning of section 1.401(a)(9)-4 of the "Final" Income Tax Regulations, Question and Answer 5.

With specific respect to the third ruling request, since Family Trust is a "see-through trust" within the meaning of section 1.401(a)(9)-4 of the "Final" Regulations, Question and Answer 5, it is necessary to determine the appropriate life expectancy to be used to make required distributions. As a general rule, if a trust is named as the beneficiary of either a qualified plan or an IRA, all of the beneficiaries of said trust must be considered for purposes of determining who, if anyone, is the designated beneficiary for purposes of Code section 401(a)(9). In this regard, we note that Spouse, Daughter 1 and Daughter 2 are the beneficiaries of Family Trust. As noted above, Spouse is the eldest of the three beneficiaries. Furthermore, as noted above, Spouse is Decedent's surviving spouse.

Although Spouse is Decedent's surviving spouse, she is not the sole beneficiary of Family Trust. As a result, she cannot be treated as the sole beneficiary of Decedent's IRA. Thus, pursuant to Section 1.401(a)(9)-3 of the "Final" regulations, Q&A-3(a), required distributions from Decedent's IRA must begin no later than December 31, 2005. Furthermore, pursuant to section 1.401(a)(9)-5 of the "Final" regulations, Q&A-5(c)(1), required distributions with respect to calendar year 2005 must be computed using Spouse's age and life expectancy during that year computed pursuant to the table found in section 1.401(a)(9)-9, of the "Final" Regulations, Q&A-1. In subsequent calendar years, the applicable distribution period is reduced by one for each calendar year that has elapsed after 2005.

Thus, with respect to the third ruling request we conclude that with respect to the portion of IRA payable to Family Trust, required minimum distributions within the meaning of section 401(a)(9) may be calculated based upon the life expectancy of Spouse using the Single Life Table found at section 1.401(a)(9)-9 of the "Final" regulations, Q&A-1.

This ruling letter is based on the assumption that IRA either has met, is meeting, or will meet the requirements of section 408(a) at all times relevant thereto. It also assumes that Family Trust is valid under the laws of State as represented. Finally, it

assumes that the disclaimers referenced herein will meet the requirements of section 2518.

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) 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 authorized representative.

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,

George L. Masnik
Branch Chief, Branch 4
(Passthroughs & Special Industries)

Enclosures

Copy for section 6110 purposes
Copy of this letter

cc: