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, ID No.

Telephone Number:

Refer Reply To:
CC:PSI:B04
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Date: SEPTEMBER 07, 2005

Re:

LEGEND:

Settlor	=
Child A	=
Child B	=
Child C	=
Corporate Trustee	=
Local Court	=
Date 1	=
Date 2	=
Date 3	=
Date 4	=
Date 5	=
Settlor's Trust 1	=
Original Trust 1	=
Appointment Trust	=
Trust 1	=

Settlor's Trust 2 =

Original Trust 2 =

Trust 2 =

University =
State =
State Law =

Dear :

This responds to your letter of March 10, 2005, and prior correspondence requesting rulings on the income, gift, and generation-skipping transfer tax consequences of a proposed partition of Trust 1 and Trust 2.

Settlor irrevocably created and funded Settlor's Trust 1 before September 25, 1985. Under Article First, paragraph (A), of Settlor's Trust 1, a share of the principal is to be immediately identified by Spouse's name and administered as a separate trust (Original Trust 1). Under paragraph (B)(5), at her death, Spouse may appoint by will the principal and/or income of Original Trust 1 outright or subject to other trusts or limitations or conditions. Under Article Third, paragraph (1), Spouse's power of appointment is exercisable only in favor of one or more of Settlor's issue, in any degree of consanguinity. Under paragraph (B)(7), in default of Spouse's exercise of her power of appointment, the remaining property in Original Trust 1 is to be distributed to Settlor's then living issue per stirpes or, if there are no such issue, to University.

Under Article First, paragraph (B)(1), Settlor's Trust 1 and any trust created thereunder must terminate no later than 21 years after the death of the survivor of the persons named on Schedule A attached thereto. Under Article Eleventh, the trusts created under Settlor's Trust 1 are to be governed by the laws of State.

Settlor irrevocably created and funded Settlor's Trust 2 before September 25, 1985. The provisions of Settlor's Trust 2 are virtually identical to those of the Settlor's Trust 1. Under Article First, paragraph (A) of Settlor's Trust 2, a share of the principal is to be immediately identified by Spouse's name and administered as a separate trust (Original Trust 2). Under paragraph (B)(5), at her death, Spouse may appoint by will the principal and/or income of Original Trust 2 outright or subject to other trusts or limitations or conditions. Under Article Third, paragraph (1), Spouse's power of appointment is exercisable only in favor of one or more of Settlor's issue, in any degree of consanguinity.

Under paragraph (B)(6), in default of Spouse's exercise of her power of appointment, the property remaining in Original Trust 2 is to be distributed to Settlor's then living issue per stirpes or, if there are no such issue, to University.

Under Article First, paragraph (B)(1), Settlor's Trust 2 and any trust created thereunder must terminate no later than 21 years after the death of the survivor of the persons named on Schedule A attached thereto. Under Article Tenth, the trusts created under Settlor's Trust 2 are to be governed by the laws of State.

On Date 3, after September 25, 1985, Spouse executed Appointment Trust which was revocable until her death. Settlor died on Date 4. Spouse died on Date 5. Spouse was survived by the three children of Settlor and Spouse (Child A, Child B, and Child C) and the children's issue. In her will, Spouse exercised her powers of appointment by directing that the property of Original Trust 1 and Original Trust 2 be distributed to Appointment Trust. Child A and Corporate Trustee are currently serving as the trustees.

Under Article Second of Appointment Trust, paragraphs (C) and (D), the property of Original Trust 1 passing to Appointment Trust pursuant to Spouse's exercise of her power of appointment over that property is to be held as a separate trust (Trust 1). The property of Original Trust 2 passing to Appointment Trust pursuant to Spouse's exercise of her power of appointment over that property is to be held as another separate trust (Trust 2).

Appointment Trust generally provides identical terms regarding the administration of Trust 1 and Trust 2. Under Article Second, paragraph (E)(2), of Appointment Trust, the trustees are to pay as much of the income and principal of Trust 1 and Trust 2 as the corporate trustee determines, in its discretion, to any one or more persons within a group consisting of Spouse's issue, in any degree of consanguinity, living from time to time during the trust term.

Under Article Second, paragraphs (E)(1) and (7), Trust 1 must terminate 21 years after the death of the survivor of the persons named in Schedule B attached thereto, or earlier if at any time there is no issue of Spouse living. (The persons listed in Schedule B are all persons listed in Schedule A of Original Trust 1.) Trust 2 must terminate 21 years after the death of the survivor of the persons named in Schedule C attached thereto, or earlier if at any time there is no issue of Spouse living. (Schedule C is identical to Schedule A of Original Trust 2.) Under paragraph (E)(6), on termination of Trust 1 and Trust 2, the then remaining principal (if any) of each trust is to be distributed to Spouse's then living issue per stirpes.

Under Article Second, paragraph (A), on Spouse's death, the children of Spouse may appoint a bank or trust company as trustee. If no bank or trust company is appointed, then a trust company designated in the instrument is to be appointed trustee.

Under Article Sixth, paragraph (A) of Appointment Trust, if a corporate trustee resigns or otherwise ceases to act as trustee, another corporate trustee must be appointed to serve in its place. Under Paragraph (C), the corporate trustee may be removed at any time provided that another bank or trust company is appointed to serve in its place. This is to be accomplished by an instrument signed by all of Settlor's then living children or, if no such children are then living, by at least two-thirds of the then current beneficiaries.

It is represented that Article Sixth, paragraph (C) will be modified in accordance with a court order to provide that if a corporate trustee is removed, the successor corporate trustee appointed in its place may not be related or subordinate (within the meaning of § 672(c)) to any beneficiary.

Under Article Twelfth, Paragraph (A), of Appointment Trust, the trusts created under Appointment Trust are to be governed by the laws of State. Under Paragraph (B), the trustees may, in their discretion, transfer the situs of any trust and the location of the property of that trust to another jurisdiction (either foreign or domestic) and may direct that the administration of the trust shall thereafter be governed by the laws of such other jurisdiction**.**

The trustees propose to divide Trust 1 into three equal trusts: Trust 1-A, Trust 1-B, and Trust 1-C. Trust 1-A will be administered for the benefit of Child A and Spouse's issue who are Child A's lineal descendants. Child A will serve as the individual trustee. Trust 1-B will be administered for Child B and Spouse's issue who are Child B's lineal descendants. Child B will serve as the individual trustee. Trust 1-C will be administered for Child C and Spouse's issue who are Child C's lineal descendants. Child C will serve as the individual trustee.

Likewise, the trustees propose to divide Trust 2 into three equal trusts: Trust 2-A, Trust 2-B, and Trust 2-C. Trust 2-A will be administered for Child A and Spouse's issue who are Child A's lineal descendants. Child A will serve as the individual trustee. Trust 2-B will be administered for Child B and Spouse's issue who are Child B's lineal descendants. Child B will serve as the individual trustee. Trust 2-C will be administered for Child C and Spouse's issue who are Child C's lineal descendants. Child C will serve as the individual trustee.

Corporate Trustee will serve as co-trustee of each partitioned trust resulting from the division. After the division, the assets of Trust 1-A, Trust 1-B, and Trust 1-C will be held and administered in accordance with the provisions of Trust 1 prior to the division, as modified only to provide that the beneficiaries of the partitioned trusts are as described above. Likewise, the assets of Trust 2-A, Trust 2-B, and Trust 2-C will be held and administered in accordance with the provisions of Trust 2 prior to the division, as modified only to provide that the beneficiaries of the partitioned trusts are as described above.

The trustees have received an order from Local Court approving the division of Trust 1 and Trust 2 and the distribution of the assets to the resulting separate trusts, contingent on receiving a favorable ruling from the Internal Revenue Service.

Under State Law, the trustee of an express trust may divide the trust into two or more separate trusts, with the consent of all persons interested in the trust but without prior court approval, for any reason which is not directly contrary to the primary purpose of the trust.

Rulings requested

You have requested the following rulings.

(1) Spouse's exercise of the powers of appointment created in Original Trust 1 and Original Trust 2, by appointing the property to Appointment Trust to be distributed to Trust 1 and Trust 2, did not cause those trusts to lose exempt status for generation-skipping transfer tax purposes.

(2) The proposed division of Trust 1 and Trust 2 will not cause the resulting partitioned trusts to lose exempt status for generation-skipping transfer tax purposes.

(3) The proposed division of Trust 1 and Trust 2 will not result in a transfer subject to gift tax under § 2501.

(4) The proposed division of Trust 1 and Trust 2 and the pro rata distribution of the Trust 1 and Trust 2 assets to the resulting partitioned trusts will not result in a recognition of gain or loss from a sale or other disposition of property under §§ 61 and 1001.

(5) The basis of the resulting partitioned trusts in each asset received from Trust 1 or Trust 2 will be the same as the basis of Trust 1 or Trust 2, as the case may be, in such asset.

(6) The holding period of a resulting partitioned trust will include the holding period of Trust 1 or Trust 2, as the case may be, for such asset.

Rulings 1 and 2:

Under §§ 2041(b)(1) and 2514(c) of the Internal Revenue Code, the term "general power of appointment" means a power that is exercisable in favor of the individual possessing the power, the individual's estate, the individual's creditors, or the creditors of the individual's estate, except that a power to consume, invade, or appropriate property for the benefit of the individual that is limited by an ascertainable standard relating to the health, education, support, or maintenance of the individual is not deemed a general power of appointment.

Under § 20.2041-1(c)(1) of the Estate Tax Regulations and § 25.2514-1(c)(1) of the Gift Tax Regulations, a power of appointment is not a general power of appointment if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the possessor of the power or his creditors, or the possessor's estate or the creditors of his estate, or (b) expressly not exercisable in favor of the possessor or his creditors, or the possessor's estate or the creditors of his estate.

Section 2601 imposes a tax on each generation skipping transfer. Under section 1433(b)(2)(A) of the Tax Reform Act of 1986 (the Act) and § 26.2601-1(b)(1)(i) of the Generation-Skipping Transfer Tax Regulations, the generation-skipping transfer (GST) tax does not apply to any generation-skipping transfer under a trust that was irrevocable on September 25, 1985. The rule does not apply to a pro rata portion of any generation-skipping transfer under an irrevocable trust if additions are made to the trust after September 25, 1985.

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)(v)(A) provides that, except as provided under § 26.2601-1(b)(1)(v)(B), where any portion of a trust remains in the trust after the post-September 25, 1985 release, exercise, or lapse of a power of appointment over that portion of the trust, and the release, exercise or lapse is treated to any extent as a taxable transfer under chapter 11 or 12, the value of the entire portion of the trust subject to the power is treated as if that portion had been withdrawn and immediately retransferred to the trust at the time of the release, exercise or lapse.

Section 26.2601-1(b)(1)(v)(B) provides that the release, exercise, or lapse of a power of appointment (other than a general power of appointment as defined in § 2041(b)) is not treated as an addition to a trust if -

(1) The power of appointment was created in an irrevocable trust that is not subject to chapter 13 under paragraph (b)(1) of § 26.2601-1(b)(1); and

(2) In the case of an exercise, the power of appointment is not exercised in a manner that may postpone or suspend the vesting, absolute ownership or power of alienation of an interest in property for a period, measured from the date of creation of the trust, extending beyond any life in being at the date of creation of the trust plus a period of 21 years plus, if necessary, a reasonable period of gestation (the perpetuities period).

Section 26.2601-1(b)(1)(v)(D), Example 4, considers a situation where, on March 1, 1985, T established an irrevocable trust. Under the terms of the trust, the trustee is required to distribute the entire income annually to T's child, C, for life, then to T's

grandchild, GC, for life. GC has the power to appoint any or all of the trust assets to Trust 2 which is an irrevocable trust that was established on August 1, 1985. The terms of Trust 2 provide that the trustee shall pay income to T's great-grandchild, GGC, for life. Upon GGC's death, the remainder is to be paid to GGC's issue. GGC was alive on March 1, 1985, when Trust 1 was created. C died on . On , GC exercised the power of appointment. The exercise of GC's power does not subject future transfers from Trust 2 to GST tax because the exercise of the power in favor of Trust 2 does not suspend the vesting, absolute ownership, or power of alienation of an interest in property for a period, measured from the date of creation of Trust 1, extending beyond the life of GGC (a beneficiary under Trust 2 who was in being at the date of creation of Trust 1) plus a period of 21 years. The example provides that the result would be the same if Trust 2 had been created after the effective date of chapter 13 (September 25, 1985).

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 rules contained in the paragraph are generally applicable only for purposes of determining whether an exempt trust retains its exempt status for generation-skipping transfer tax purposes. Unless specifically providing otherwise, the rules do not apply in determining, for example, whether the transaction results in a gift subject to gift tax, or may cause the trust to be included in the gross estate of a beneficiary, or may result in the realization of capital gain for purposes of § 1001.

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 paragraph (b)(4)(i)(A), (B), or (C) of this section) 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, if 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 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.

Section 26.2601-1(b)(4)(i)(E), Example 5, describes a situation where, in 1980, Grantor established an irrevocable trust for the benefit of his two children, A and B, and their issue. Under the terms of the trust, the trustee has the discretion to distribute income and principal to A, B, and their issue in such amounts as the trustee deems appropriate. On the death of the last to die of A and B, the trust principal is to be distributed to the living issue of A and B, per stirpes. In 2002, the appropriate local court approved the division of the trust into two equal trusts, one for the benefit of A and A's issue and one for the benefit of B and B's issue. The trust for A and A's issue provides that the trustee has the discretion to distribute trust income and principal to A and A's issue in such amounts as the trustee deems appropriate. On A's death, the trust principal is to be distributed equally to A's issue, per stirpes. If A dies with no living descendants, the principal will be added to the trust for B and B's issue. The trust for B and B's issue is identical (except for the

beneficiaries), and terminates at B's death at which time the trust principal is to be distributed equally to B's issue, per stirpes. If B dies with no living descendants, principal will be added to the trust for A and A's issue. The example concludes that the division of the trust into two trusts does not shift any beneficial interest in the trust 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 division. In addition, the division does not extend the time for vesting of any beneficial interest in the trust beyond the period provided for in the original trust. Therefore, the two partitioned trusts resulting from the division will not be subject to the provisions of chapter 13.

In this case, Original Trust 1 and Original Trust 2 were irrevocable on September 25, 1985. It is represented that there have been no actual or constructive additions to Original Trust 1, Trust 1, Original Trust 2, or Trust 2 after September 25, 1985.

The powers of appointment granted Spouse in Original Trust 1 and Original Trust 2 were not general powers of appointment within the meaning of §§ 2041(b)(1) and 2514(c). Pursuant to Spouse's exercise of her power over Original Trust 1, the corpus passed to Appointment Trust, to be distributed to Trust 1. Trust 1 must terminate no later than the expiration of 21 years after the death of the survivor of the persons whose lives measure the duration of Original Trust 1 (i.e., persons named in Schedule A of Settlor's Trust 1). Likewise, pursuant to Spouse's exercise of her power over Original Trust 2, the corpus passed to Appointment Trust, to be distributed to Trust 2. Trust 2 must terminate no later than the expiration of 21 years after the death of the survivor of the persons whose lives measure the duration of Original Trust 2 (i.e., persons named in Schedule A of Settlor's Trust 2). Consequently, Spouse's exercise of the powers did not suspend the vesting, absolute ownership, or power of alienation of any interest for a period, measured from the date of creation of Original Trust 1 or Original Trust 2, as the case may be, extending beyond any life in being at the date of creation of such trust, plus 21 years**.**

Accordingly, based on the representations made, and provided the court issues the order amending the trust, as noted above, we conclude that pursuant to § 1433(b)(2)(A) of the Act and § 26.2601-1(b)(1)(i), Spouse's exercise of the powers of appointment created in Original Trust 1 and Original Trust 2 did not cause Original Trust 1, Original Trust 2, Appointment Trust, Trust 1, or Trust 2 to lost exempt status for GST tax purposes.

We further conclude that the division of Trust 1 will not shift any beneficial interest in Trust 1 to a person who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the division. Likewise, the division of

Trust 2 will not shift any beneficial interest in Trust 2 to a person who occupies a lower generation (as defined in § 2651) than the person or persons who held the beneficial interest prior to the division. Moreover, the modification does not extend the time for vesting of any beneficial interest in Trust 1 and Trust 2 beyond the period provided for in those trusts. See, e.g., § 26.2601-1(b)(4)(i)(E), Example 5. Accordingly, based on the facts submitted and the representations made, the proposed division of Trust 1 and Trust 2

will not adversely affect the GST status of the partitioned trusts resulting from the division.

Ruling 3

Section 2501(a) provides that a tax is imposed for each calendar year on the transfer of property by gift during such calendar year.

Section 2511(a) provides that the gift tax 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 2512(a) provides that, if a gift is made in property, the value thereof at the date of the gift shall be considered the amount of the gift.

In this case, upon the division of Trust 1 into three equal trusts and Trust 2 into three equal trusts, each beneficiary will have substantially the same beneficial interest as he or she had under Trust 1 and Trust 2, respectively, prior to the division. Because the beneficial interests of the beneficiaries are substantially the same both before and after the proposed division, no transfer of property will be deemed to occur as a result of the division.

Accordingly, we conclude that the division of Trust 1 and Trust 2 and the pro rata allocation of the assets of those trusts to the resulting partitioned trusts will not result in a transfer subject to gift tax under § 2501 by any of the beneficiaries.

Ruling 4:

Section 61(a)(3) provides that gross income means all income from whatever source derived, including gains derived from dealings in property.

Section 1001(a) provides that the gain from the sale or other disposition of property is the excess of the amount realized over the adjusted basis provided in § 1011 for determining gain, and the loss is the excess of the adjusted basis provided in § 1011 for determining loss over the amount realized. Under § 1001(c), the entire amount of gain or loss must be recognized, except as otherwise provided.

Section 1.1001-1(a) of the Income Tax Regulations provides that except as otherwise provided in subtitle A of the Code, the gain or loss realized from the exchange of property for other property differing materially either in kind or in extent, is treated as income or as loss sustained.

A partition of jointly owned property is not a sale or other disposition of property where the co-owners of the joint property sever their joint interests, but do not acquire a new or additional interest as a result of the transaction. Thus, neither gain nor loss is realized on a partition. See Rev. Rul. 56-437, 1956-2 C.B. 507.

In Rev. Rul. 69-486, 1969-2 C.B. 159, a non-pro rata distribution of trust property was made in kind by the trustee, although the trust instrument and local law did not convey authority to the trustee to a make a non-pro rata distribution of property in kind. The distribution was effected as a result of a mutual agreement between the trustee and the beneficiaries. Because neither the trust instrument nor local law conveyed authority to the trustee to make a non-pro rata distribution, Rev. Rul. 69-486 held that the transaction was equivalent to a pro rata distribution followed by an exchange between the beneficiaries, an exchange that required recognition of gain under § 1001.

The present case is distinguishable from Rev. Rul. 69-486 because the assets of Trust 1 and Trust 2 will be distributed pro rata to the three respective subtrusts pursuant to State law. Therefore, each beneficiary will continue to have the same share of each asset of Trust 1 and Trust 2 after the partition as each had before the partition. Accordingly, the partition of Trust 1 and Trust 2 will not be treated as a pro rata distribution followed by an exchange of assets among the beneficiaries.

An exchange of property results in the realization of gain or loss under § 1001 if the properties exchanged are materially different. Cottage Savings Association v. Commissioner, 499 U.S. 554 (1991). Properties exchanged are materially different if the properties embody legal entitlements "different in kind or extent" or if the properties confer "different rights and powers." Id. at 565. In Cottage Savings, the Supreme Court held that mortgage loans made to different obligors and secured by different homes did embody distinct legal entitlements, and that the taxpayer realized losses when it exchanged interests in the loans. Id. at 566. In defining what constitutes a "material difference" for purposes of § 1001(a), the Court stated that properties are "different" in the sense that is "material" to the Code so long as their respective possessors enjoy legal entitlements that are different in kind or extent. Id. at 564-65.

In the present case, the provisions of each partitioned trust resulting from the division of Trust 1 will be identical to the provisions of Trust 1, except that each resulting trust will only have one of Spouse's children and his or her family as a beneficiary. Likewise, the provisions of each partitioned trust resulting from the division of Trust 2 will be identical to the provisions of Trust 2, except that each resulting trust will only have one of Spouse's children and his or her family as a beneficiary. The beneficiaries of each resulting partitioned trust will have the same property interests and legal entitlements as they had under Trust 1 or Trust 2, as the case may be. Accordingly, it is consistent with Cottage Savings to find that the beneficiaries' interests after the distribution of the Trust 1 and Trust 2 principal into the resulting partitioned trusts will not differ materially from the beneficiaries' interests under the original trusts (i.e., Trust 1 and Trust 2). Thus, the division of Trust 1 and Trust 2 into the partitioned resulting trusts will not be a sale, exchange, or other disposition of property of Trust 1 and Trust 2 and will not result in any gain or loss to any beneficiary, Trust 1, Trust 2, or the resulting partitioned trusts under §§ 61 and 1001.

Rulings 5 and 6:

Section 1015(b) provides that if property is acquired by a transfer in trust (other than a transfer in trust by a gift, bequest, or devise), the basis shall be the same as it would be in the hands of the grantor increased in the amount of gain or decreased in the amount of loss recognized to the grantor on such transfer.

Section 1.1015-2(a)(1) provides that in the case of property acquired after December 31, 1920, by transfer in trust (other than by transfer in trust by gift, bequest, or devise) the basis of property so acquired is the same as it would be in the hands of the grantor increased by the amount of gain or decreased in the amount of loss recognized to the grantor on the transfer under the law applicable to the year in which the transfer was made. If the taxpayer acquired the property by transfer in trust, this basis applies whether the property be in the hands of the trustee, or the beneficiary, and whether acquired prior to termination of the trust and distribution of the property, or thereafter.

Section 1223(2) provides that, in determining the period for which the taxpayer had held property however acquired, there shall be included the period for which such property was held by any other person, if under Chapter 1 of Subtitle A of the Internal Revenue Code such property has, for the purpose of determining gain or loss from a sale or exchange, the same basis in whole or in part in his hands as it would have in the hands of such other person. See also § 1.1223-1(b).

In the instant case, after the property division of Trust 1 and Trust 2, we believe the holding period for property held by the partitioned trusts resulting from the division should be the same as that of the respective Trust 1 or Trust 2. Pursuant to § 1015, the basis of each asset received by Trust 1-A, Trust 1-B, and Trust 1-C is the same as the basis of Trust 1. Likewise, the basis of each asset received by Trust 2-A, Trust 2-B, and Trust 2-C is the same as the basis of Trust 2. Accordingly, the holding period for the assets received by the partitioned trusts resulting from the division should include the holding period of the respective Trust 1 or Trust 2 for that asset, pursuant to § 1223(2).

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 who requested it. Section 6110(k)(3) provides that it may not be used or cited as precedent.

Pursuant to a power of attorney on file with this office, a copy of this letter is being sent to the taxpayer.

Sincerely yours,

George Masnik
Chief, Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Enclosure
Copy for section 6110 purposes