

In this ruling, the IRS acknowledged that a transfer to an Alaska Trust is a completed gift for tax purposes. Even though the IRS would not rule on the estate tax inclusion issue, we know of no court case of an IRS ruling that would allow assets to be included in the estate when the transfer to such an Alaska Trust was a completed gift.

Internal Revenue Service

Department of Treasury

Index Nos.: 2511.00-00

P.O. Box 7604
Ben Franklin Station
Washington, DC 20044

Date: June 10, 1998

Private Letter Ruling 98-37007

This is in response to your authorized representative's letter of July 3, 1997, requesting a ruling on a proposed transfer in trust.

According to the facts submitted, Donor, a resident of State, proposes to create an irrevocable trust (Trust) for the benefit of herself and her descendants. Trustee will be appointed as the only trustee. Trustee is to pay, during the Donor's lifetime, any part or all of the income and/or principal in such amounts and at such times, as the Trustee, in its sole and absolute discretion determines, among one or more of the class consisting of the Donor and the Donor's living descendants. Any income that is not distributed is to be added to the corpus of the trust. Upon the Donor's death, the corpus is to be divided into separate trusts for each then living child of Donor, and a separate trust for each child who died leaving issue. The Trustee is to distribute the income and principal, in its discretion, among the beneficiaries. If no descendant of Donor is living at the time of Donor's death, the income and principal of the Trust is to be distributed to one or more organizations described in § 170(c), 2055(a), and 2522(a) of the Internal Revenue Code, as the trustee may determine.

Under Articles SIXTH and NINTH of the Trust, Donor, her descendants, or any person related or subordinate to those persons (within the meaning of § 672(c) of the Code) are precluded from serving as trustee. Donor will not have the power to remove or replace the trustee or to appoint a successor trustee. It is represented that Donor is not a shareholder, director, officer, or employee of Trustee. If Trustee should cease to serve as trustee, Donor's authorized representative will name a successor trustee.

It is represented that there is no agreement, express or implied, between the Donor and the Trustee as to how Trustee will exercise its sole and absolute discretion to pay income and principal among the beneficiaries.

Donor proposes to fund Trust with cash, securities and/or undeveloped land located in State valued at approximately \$X. It is represented that Donor has no known or anticipated debts other than a home mortgage loan and that Donor is not under any obligation or order of child support.

Article TENTH provides that the interest of a beneficiary (including the grantor) of the trust may not be either voluntarily or involuntarily transferred before payment or delivery of the interest to the beneficiary by the trustee.

Under Article EIGHTH, § 8.1, the validity, construction and effect of Trust is to be governed by the law of State. Further, § 8.2 provides that the situs of the Trust shall be State.

State Statute provides that a person who in writing transfers property in trust may provide that the interest of a beneficiary of the trust may not be either voluntarily or involuntarily transferred before the payment or delivery of the interest to the beneficiary by the trustee. If a trust contains this transfer restriction, the restriction prevents a creditor existing when the trust is created, a person who subsequently becomes a creditor, or any other person from satisfying a claim out of the beneficiary's interest in the trust unless:

1. the transfer was intended in whole or in part to hinder, delay, or defraud creditors or other persons;
2. the trust provides that the settlor may revoke or terminate all or part of the trust without the consent of a person who has substantial beneficial interest in the trust and the interest would be adversely affected by the exercise of the power held by the settlor to revoke or terminate all or part of the trust;
3. the trust requires that all or a part of the trust's income or principal, or both, must be distributed to the settlor; or
4. at the time of the transfer, the settlor is in default by 30 or more days of making a payment due under a child support order.

Donor has requested a ruling that the transfer by Donor of property to Trustee to be held under the Trust agreement will be a completed gift for federal gift tax purposes.

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.

Section 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part thereof or interest therein, of which the donor has so parted with dominion and control as to leave in him no power to change its disposition, whether for his own benefit or for the benefit of another, the gift is complete. But if upon a transfer of property (whether in trust or otherwise) the donor reserves any power over its disposition, the gift may be wholly incomplete, or may be partially complete and partially incomplete, depending upon all the facts in the particular case. Accordingly, in every case of a transfer of property subject to a reserved power, the terms of the power must be examined and its scope determined.

Section 25.2511-2(b) provides an example where a donor transfers property to another in trust to pay the income to the donor or accumulate it in the discretion of the trustee, and the donor retains a testamentary power to appoint the remainder among his descendants. The example concludes that no portion of the transfer is a completed gift. However, if the donor had not retained a testamentary power of appointment, but had instead provided that the remainder should go to X or his heirs, the entire transfer would be a completed gift. Further, if the exercise of the trustee's powers in favor of the donor is limited by a fixed or ascertainable standard, enforceable by or on behalf of the donor, then the gift is incomplete to the extent of the ascertainable value of any rights thus retained by the donor.

In Rev. Rul. 77-378, 1977-2 C.B. 348, the grantor conveyed one-half of the grantor's income producing property to an irrevocable trust pursuant to which the trustee had the power to pay to the grantor such amounts of trust income or principal as the trustee determined in its absolute discretion. Upon the death of the grantor, any remaining principal is payable to the

grantor's spouse and children. Under applicable state law, the grantor cannot require that any trust assets be distributed to the grantor, nor can the grantor's creditors reach any of the trust assets. The ruling concludes that, under these circumstances, the gift is complete for gift tax purposes at the time the trust is created.

In the present case, Donor proposes to create Trust, to be administered under the laws of State, for the benefit of herself and her living descendants. The trustee will have sole and absolute discretion to pay, during the Donor's lifetime, part or all of the income and/or principal of Trust to Donor and the Donor's living descendants. It is represented that there is no agreement, express or implied, between the Donor and the Trustee as to how Trustee will exercise its sole and absolute discretion to pay income and principal among the beneficiaries.

In addition, under State Statute, because the trust contains certain language specified in the statute, a creditor of the grantor will be precluded from satisfying claims out of the grantor's interest in the trust.

Based on the representation that there is no express or implied agreement between the Donor and the Trustee as to how Trustee will exercise its sole and absolute discretion to pay income and principal among the beneficiaries, we conclude that the proposed transfer by Donor of property to Trustee to be held under the Trust agreement will be a completed gift for federal gift tax purposes.

We are expressly not ruling on whether the assets held under the Trust agreement at the time of Donor's death will be includible in Donor's gross estate for federal estate tax purposes.

Except as we have specifically ruled herein, we express no opinion as to the consequences of this transaction under the cited provisions or under any other provisions of the Code.

In accordance with the power of attorney on file with this office, we are sending a copy of this letter to your authorized representative.

A copy of this letter should be attached to the gift tax return when it is filed. A copy is enclosed for that purpose.

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

Sincerely yours,

Assistant Chief Counsel
(Passthroughs and Special
Industries)

By-

George Masnik
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