

Joint Trusts in
Separate Property States:
"Just Say 'Yes' . . . Sometimes"

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I. THE IMPORTANCE OF JOINT TRUSTS

Joint trusts – avant-garde and often confused with that horrible species of instruments known as a “Joint Will” – have been shunned as an estate planning vehicle by most practitioners in common law states, such as Illinois. They are used almost exclusively for estate planning for married couples in community property states – but that is because the community property laws lend themselves (and in cases demand) that a jointly-owned trust be used to hold community assets.

In common law states it has generally been agreed that the uncertainty of the gift tax consequences and the probability of adverse estate tax consequences militated against a joint trust in all but the most modest of estates. Last year at the Institute, John Martin provided an excellent treatise on technical and structural issues involving joint trusts.

This presentation is intended to focus on the pragmatics of joint trusts; essentially, when should they be used. And when should they absolutely not be used.

The outline returns to the recent private rulings by the IRS, which provided the roadmap for how joint trusts could work in taxable estates. And it uses those PLRs to provide the key ingredients for what provisions must be included in a joint trust for it to work for tax purposes. This outline will highlight those provisions and provide drafting examples.

II. WHEN TO USE A JOINT TRUST IN SEPARATE PROPERTY JURISDICTIONS

A. What is a Joint Trust?

A joint trust is a trust document created by a married couple where both spouses are the grantors of the trust. The document usually contains provisions for the benefit of both spouses while both spouses are living (the joint lives), for the surviving spouse after the first spouse dies, and for the descendants or other beneficiaries who are to receive the trust assets after the death of the surviving spouse. This document is the primary estate planning document for the couple, and each of them has a pour-over will naming this joint trust as the beneficiary of his or her estate. It is essentially a funnel through which all of the married couple’s property passes.

B. Change of Property Character for Marital Purposes.

Property in a joint trust is not kept separate for marital deduction purposes, as would be the case with a community property joint trust (which details out each spouse’s separate property and community property throughout the document and in the schedules attached). Though it is possible to draft a joint trust to preserve the marital or non-marital character of the property, this is not generally recommended in a common law property state. As noted below, in those instances in which the marital nature of the property is to be preserved, it is best to use separate living trusts.

C. Practical Uses of the Joint Trust.

The practitioner will want to consider the joint trust in a separate property jurisdiction primarily in the following circumstances:

1. (Non-tax) A need to simplify the clients’ understanding of their estates plan.
Two trusts, and the subtrusts created thereunder, are extremely difficult for laypeople to understand. A joint trust is more understandable: the clients do not have to conceptualize assets going into two different pots, with children’s trusts

being created from multiple different trust documents at the surviving spouse's passing. See Attachment A.

2. (Non-tax) All of the clients' ownership is and will remain "joint." By transferring title of property to a joint trust the clients get to see both of their names on the property, and get to feel that nothing fundamental has changed. This is not the case when they are forced to split property between two separate trusts. See Attachment A.
3. (Tax) Difficulty of funding the credit shelter trust for the "non-propertied" spouse. Often, it is difficult to discuss and reallocate assets to make sure that each credit shelter trust is funded to the maximum extent possible, which will depend on which spouse predeceases the other and what assets that spouse owns. Assuming the PLRs discussed below are correct in their advice, this problem can be avoided by having all assets transferred to the joint trust.

Example 1: Assume that wife has marketable securities of \$2,000,000, an IRA of \$1,000,000; and that husband and wife rent but do not own a residence. In this greatly simplified example, reallocation of assets to maximize credit shelter funding is not optimal. In this instance, \$1,500,000 of the marketable securities would be reallocated to the husband. If husband dies first, there is no estate tax and the \$1,500,000 is allocated to the credit shelter trust. At the wife's subsequent passing, her IRA of \$1,000,000 is under the wife's \$1,500,000 credit shelter amount and there is no tax. The problem with this reallocation is that if wife dies first, the \$1,000,000 IRA must go the credit shelter trust for the husband and cannot be rolled over to the husband's name, to extend the deferred payout of the IRA for income tax purposes. So though reallocation can ensure estate tax planning, it interferes with income tax planning. With a joint trust, the marketable securities would be available to fund the first spouse's credit shelter trust, and the IRA could be payable to the surviving spouse, thereby maximizing both income and estate tax planning, a great result.

4. Full basis step up in the hand of the survivor as to non-IRD assets . Last year, John Martin discussed, and effectively argued, that a full step up in basis should be available for assets (non-IRD) in a joint trust. There are private letter rulings to the contrary. So there is still much uncertainty in this area; and the use of the joint trust to try to achieve a favorable basis step up as to ALL of the property may not occur. Importantly, nothing ventured, nothing gained.

Example 2: Husband owns \$1,500,000 of securities with low basis assets (\$100,000 income tax basis). Wife owns a \$1,000,000 house with a basis of \$150,000. For income tax purposes, there is a race to who will die first → that person will get an income tax step up. With the use of a joint trust, as discussed below, the practitioner could posture the client's assets so that regardless of who dies first, the total value of all assets in the joint trust, the full \$2,500,000, receives a step up in basis.

III. CAREFUL WITH THAT AXE EUGENE: WHEN NOT TO USE A JOINT TRUST

A. Loss of Separate Identity of Property for Divorce and Other Purposes

If assets are transferred to a joint trust, the separate identity of the property could be lost for purposes of divorce. Practitioners, including divorce attorneys, may argue to the contrary, especially if there is bookkeeping of “his, hers and ours” maintained within the joint trust. But that seems like an accident waiting to happen.

Example 3: Husband marries later in life, coming into the marriage with a business in his own name valued at \$10,000,000 and other investment assets equal to \$10,000,000. If these assets are placed into a joint trust in a common law property jurisdiction, and the joint trust does not attempt to preserve the “separateness” of this property for marital deduction purposes, then on divorce, the wife could effectively argue that the character has been transmuted (or transmogrified) into marital property because of her joint control over the trust.

If the transmutation of separate property to marital property could be a problem, then the joint trust just should **not** be used. It is much simpler in that case, if the goal is to preserve the separate nature of property, to use separate trusts.

The ability of one spouse to deal separately with his or her “separate” property – to buy, sell or otherwise change the form of the investment – or to change his or her estate plan without the consent of the other spouse, is adversely impacted by a joint trust. Clearly, a joint trust should only be used in stable first marriage situations – and this caution remains true today.

One theme is that the use of the joint trust in a second marriage situation, in which one spouse comes into the marriage with kids from a prior marriage, is very difficult. The author advocates staying away from this use of the joint trust until such time as the issues pertinent to that special situation are worked out in more detail.

B. Loss of Creditor Protection

Conceivably, all of the assets of both spouses may become subject to the claims of creditors of just one spouse. In addition, all of the assets of both spouses may become subject to the environmental liabilities of just one spouse’s separate property. These results can usually be avoided if separate trusts are used.

C. Tax Risks: Not Unifying the Credit?

The issue involves what is becoming the most troublesome estate tax section, Code §2036. Section 2036 provides:

“GENERAL RULE. --- The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money’s worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death –

- i. The possession or enjoyment of, or the right to the income from, the property, or
- ii. The right, either alone in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.”

If, after the death of the first spouse, the surviving spouse (a) is the trustee of all of the assets of the joint trust **or** (b) receives the income from all of the assets of the joint trust, then all of the assets may be includible in the surviving spouse's estate by reasons of section 2036 (in an improperly drafted joint trust). All of the unified credit of the first spouse to die is wasted, and unnecessary estate tax may be paid in the second estate. This can be avoided by proper drafting, noted below.

Example 4: Husband and wife place \$5,000,000 into a joint trust which provides that at the first spouse's passing, a credit shelter trust (for \$1,500,000) is set up for the benefit of the surviving spouse. The remainder goes outright to the surviving spouse. If there is no provision in the joint trust making it clear that ALL property is included in the first spouse's gross estate – such as a general power of appointment by the first spouse to die over all the property – then the surviving spouse could, as a beneficiary of the credit shelter trust, be argued to have contributed the property to the credit shelter trust (e.g., the surviving spouse was a contributor of funds to the joint trust). If that is the case, then 2036 could operate to include all of the credit shelter trust in the surviving spouse's estate, thereby defeating the purpose of the credit shelter trust.

D. Avoiding Taxable Gift on Funding and at the First Spouse's Death

Taxable gifts may be made by the spouses to each other when the trust is funded, and those gifts may not qualify for the marital deduction. If one transfers property to a trust beyond his or her unilateral control, then arguably there has been a divestment of the enjoyment of property, and a gift for a gift tax purposes. Though the other spouse is a beneficiary, that gift may not qualify for the marital deduction.

Example 5: Imagine husband transferring property in trust for the benefit of his wife, and retaining no right to revoke that trust. Imagine that the trust provides that wife gets income and principal pursuant to an ascertainable standard as determined by the trustee. That transfer is a completed gift for gift tax purposes, is a non-qualifying terminable interest, and does not qualify for the marital deduction. Ugly. If a joint trust requires joint action for termination or return of property, then the joint trust has created gift tax problems.

IV. THE IRS TO THE RESCUE: WE LIVE IN TROUBLED TIMES

A. Private Letter Rulings Provide Guidelines.

Recent private letter rulings now suggest that a joint trust will work even in a taxable estate, and that the credit shelter trust and taxable gift concerns noted above, can be avoided.

In planning for a potentially taxable situation (that is, where the clients' combined assets exceed one estate tax exemption – greater than \$1.5 million in 2005, greater than \$2 million in 2006, and so on), it is important to draft the joint trust to fall within the boundaries expressed in the recent PLRs, and specifically PLR 200101021.

B. Private Letter Ruling 20-0101021 (10/2/2000)²

H and W (also referred to as Grantor A and Grantor B) create a joint trust of which H is the initial trustee. The trust was to be funded with property which H and W owned in tenancy by the entireties. The following is a summary of the most important provisions:

1. During Joint Lives of the Grantors

- (a) Income and Principal of the Joint Trust. During the joint lives of the grantors, the trustee is to apply income and principal for their comfort, support, maintenance, health and general welfare. The trustee (*one of the grantors*) may also pay additional sums to either of both of the grantors, or to a third party for the benefit of either grantor, as Grantor A directs, or if he is not capable of this decision, as Grantor B directs.
- (b) Amendment of the Trust. Either grantor may amend the trust while both grantors are living by delivering the amendment in writing to the other grantor at least 90 days before it becomes effective.
- (c) *Termination of the Trust. While both grantors are living, either one could terminate the trust by written notice to the other grantor. If the trust was terminated, the trustee was directed to deliver the trust property to both grantors in their name as tenants in common.

*Upon the death of the first grantor, the first grantor had a testamentary general power of appointment over the entire joint trust to be exercised by will.
- (d) An irrevocable Credit Shelter Trust was to be funded, if the spouse survived by six months. This happened to be a pecuniary formula: “an amount of Trust property sufficient to equal the largest amount that can pass free of federal estate tax by reason of the unified credit” is to be allocated to the Credit Shelter Trust.
- (e) An outright bequest of the balance of the estate was to be made to the surviving grantor (the surviving spouse).
- (f) Terms of the credit shelter trust:
 - i) During the life of the surviving grantor, the trustee was to pay or apply for her/his benefit any part of the income and/or principal of the trust as is reasonably necessary for the survivor’s support and maintenance (ascertainable standards). In the 2000 PLR, the trustee at the outset was H. The ruling is silent as to the identity of trustee following first death (although no indication H would

² Probably the only adverse point in the ruling was added to Ruling 3. There the IRS did comment that only those assets contributed to the joint trust by the first grantor to die would receive a basis adjustment under Code §1014(a). Otherwise, pursuant to Code §1014 (e), a basis adjustment is denied those assets owned by the surviving grantor. Unfortunately, although commentators did argue that there should be a full basis adjustment for property passing to a credit shelter trust (particularly a spray trust like this one), in this ruling the IRS clearly disagrees with that conclusion.

have to resign if survivor, and does not seem to present a problem if W acted as trustee if H died).

- ii) The trustee could also pay income and principal to the joint descendants of the grantors for their maintenance, support and education (ascertainable standards).
- (g) Limited power of appointment in the surviving spouse. At the death of the surviving spouse, "he or she shall have a limited power to appoint the Credit Shelter Trust among the grantors' joint descendants." If the spouse failed to exercise the limited power, then the trust was to be divided into shares for children (and descendants of a deceased child).

2. Favorable Conclusions

- (a) Non-completed gifts. The contribution of jointly held assets to the joint trust did not constitute a gift by either Grantor A or Grantor B : The IRS decided each grantor's power to terminate the trust and receive his or her contributed property back meant that the initial property contributed to the trust was not a completed gift. Reg. §25.2511-2. However, it will not always be the case that jointly held property will be contributed to the trust. In those cases in which unequal amounts of property are contributed to the joint trust, the principles in this ruling need to be extended.

In that case, each spouse must have a **unilateral** right to terminate the trust. This will either (1) prevent a completed gift, or (2) if there is a completed gift, that gift will qualify for the marital deduction. For example, if on termination each spouse gets back what that spouse contributed, there is **no** completed gift.

If a spouse gets back less than what that spouse contributed, then there is a completed gift, but the gift qualifies for the marital deduction if the other spouse can terminate and get that property.

Example 6: Imagine one spouse contributing 90 % and the other 10% to a joint trust. Each spouse has the unilateral right to terminate, and on termination all property is contributed to the spouses as tenants in common. Because each spouse gets back 50% on a unilateral right to terminate, one spouse has made a 40% gift to the other spouse. But this is a completed gift because of the other spouse's unilateral right to obtain the excess. And further, the other spouse's unilateral right to obtain the excess should qualify for the gift for the marital deduction. Treas. Reg. 25.2523-1(f)(6).

- (b) Drafting tip #1: To prevent completed gifts from occurring as to all the property contributed by one spouse to the other, or to make sure that if there is a completed gift it qualifies for the marital deduction, include two powers in the trust: (1) make sure that each spouse has the unilateral right to terminate the trust during their joint lifetimes, and (2) define what each spouse will get back on termination (though one PLR didn't have this additional requirement and it didn't raise a concern).

Drafting Example 1: *“This trust may be revoked in whole or in part during the Trustors' joint lifetimes by a written instrument signed by either Trustor and delivered to the Trustees and the other Trustor. On revocation, the Trustees shall promptly deliver to each Trustor the designated portion of the trust assets belong to each Trustor as set forth in Schedule A.”* [In schedule A, list fraction of the trust belonging to each grantor]

- (c) Includability in First Spouse's Gross Estate. Second, in the ruling, the trust created a testamentary general power of appointment in the first spouse to pass away. As a result, the IRS ruled that the value of the entire joint trust would be includible in the estate of the first grantor to die.
- (d) Drafting tip #2: In order to avoid taxable gifts concerns by the second spouse at the passing of the first spouse, make sure the first spouse has a general power of appointment over all trust property at his or her passing. Further, because all property will be included in the first spouse's gross estate, this means that all property is available to fund the credit shelter trust. That is, property does not have to be allocated among spouses to allow for proper funding. Merely having the property in the joint trust is enough.

Drafting Example 2: *On the death of the first to die of husband and wife (such person hereinafter being referred to as the “deceased spouse”), any power of revocation or termination shall cease and the trustee shall distribute the Lifetime Trust [define it to mean all of the property then in the joint trust] to any one or more persons or organizations (including the deceased spouse's estate) as the deceased spouse appoints by will, specifically referring to this general power of appointment. A testamentary power of appointment granted under this instrument may be exercised only by a will specifically referring to the power. The appointment may be either outright or subject to such trusts and conditions as the holder of the power designates. The holder of the power may grant further powers of appointment to any person to whom principal may be appointed. In determining whether a testamentary power of appointment has been exercised, the trustee may rely on an instrument admitted to probate in any jurisdiction as the will of the holder of the power or may assume the power of appointment was not exercised in the absence of actual notice of the holder's will within three months after the holder's death.*

- (e) No 2036 Problem. Third, because of the general power of appointment that the first spouse to die has over all the joint trust property, the IRS ruled that any property of the surviving grantor which passes to the Credit Shelter Trust will not be treated as a gift/transfer/assignment (or otherwise) by the surviving grantor. It will be treated instead as having been placed in the Credit Shelter Trust by the deceased grantor.
- (f) Drafting tip #3: In order to make sure the surviving spouse is not the “grantor”, “transferor,” or “creator” of any interest that the surviving spouse receives at the first spouse's passing under the joint trust, which is essential to preserve the credit shelter trust (if the surviving spouse is

the grantor of the trust created for the surviving spouse's benefit at the first spouse's passing, this would create Code section 2036 concerns, and that trust would be includable in the surviving spouse's gross estate at his or her passing) make sure the first spouse has a general power of appointment over all trust property at his or her passing. See drafting Example 2.

V. WHAT'S ALL THIS ABOUT POWERS OF APPOINTMENT AND BASIS?

Code §1014(a) provides that the basis of property in the hands of a person acquiring the property from a decedent is the fair market value of the property at the date of the decedent's death (or alternate valuation date). Section 1014(e), however, provides an exception to the general rule of §1014(a). If appreciated property was acquired by the decedent by gift during the one-year period ending on the date of the decedent's death, and the property passes from the decedent to the donor of such property, the basis of such property in the hands of the donor is the adjusted basis of the property in the hands of the decedent immediately before the death of the decedent.

While practitioners believe (and older rulings indicate) that if the property passed to a Family Trust, this meant it did not return "to" the donor, the IRS ruled otherwise. *See, e.g.*, PLR 90-26036 (Mar. 28, 1990). It ruled that section 1014(e) will apply to any trust property includable in the deceased grantor's gross estate that is attributable to the surviving grantor's contribution to the trust and that is acquired by the surviving grantor, either directly or indirectly, pursuant to the deceased grantor's exercise or failure to exercise, the general power of appointment.

In support of this position, the IRS cites the legislative history of Code §1014(e) – See H.R. Rept. 97-201, 97th Cong, 1st Sess. (July 24, 1981). The legislative history talks about indirect return in the form of a gift that increases the marital deduction in the donor spouse's estate:

The denial of a stepped-up basis applies where the donor receives the benefit of the appreciated property regardless of whether the bequest by the decedent to the donor is a specific bequest, a general bequest, a pecuniary bequest, or a residuary bequest. However, in the case of a pecuniary bequest, the donor will receive the benefit of the appreciated property only if the inclusion of the appreciated property in the estate of the decedent affected the amount that the donor receives under a pecuniary bequest.

The Service may not be correct in its conclusion here. As John Martin points out in his article on joint trusts in [Real Property, Probate and Trust Journal](#):

“The application of section 1014(e) to the Tax Plan Joint Trust may be challenged. It clearly rests on recognizing a gift from the surviving spouse to the first spouse to die at the instant of the first spouse's death. A gift that is triggered by the death of the donee possesses a certain mythical element. More critically, a relinquishment of dominion and control is difficult to see when the surviving spouse possessed control before the decedent's death.”

It remains to be seen whether the basis adjustment, to a full step up at the first spouse's passing, is sustainable.

VI. THE PRAGMATICS: TO BE (A JOINT TRUST) OR NOT TO BE (A JOINT TRUST)

Consider joint trusts in separate property jurisdictions for clients that will have trouble allocating assets between themselves to fund the credit shelter trust, being sure to put a general power of appointment exercisable by the first spouse to die. Also consider a joint trust in a separate property jurisdiction for clients in non-taxable estate situations who own property jointly and want to continue this form of ownership.

Attachment A: Non-Tax Joint Trust**A. Discussion to Form**

A joint trust is a revocable trust established by a husband and wife as joint settlors — and generally as joint trustees. The primary purposes of the joint trust are simplicity, provide for incapacity, and avoid probate on the death of each spouse.

The trust is designed to provide the husband and wife with joint control over their marital assets. After the death of the first spouse to die, the surviving spouse may withdraw the trust assets or dispose of them as the surviving spouse wishes. Thus, there is no attempt to create the trust equivalent of a joint and mutual will.

The following form requires that the spouses acknowledge that assets transferred to the trust will become marital property for purposes of the Illinois Marriage and Dissolution of Marriage Act. 750 ILCS 5/503. If the clients wish to preserve the separate ownership characteristics of their premarital, inherited, or other separate property, *this form should not be used*. Instead, the separate living trust form should be used and a separate trust created for each spouse. Thus, this trust is a substitute for joint tenancy ownership.

In Paragraph 2.1, the spouses are jointly given power to amend the instrument. Either spouse may revoke the instrument. If the instrument is revoked, trust property is distributed to the spouses together as joint tenants with right of survivorship.

In Paragraph 5.3, the surviving spouse is given the power to revoke the trust and/or withdraw all of the property. There is no attempt in the form to limit the ability of the surviving spouse to dispose of the trust assets (or terminate the trust). At the surviving spouse's death, the surviving spouse has a general power of appointment. Thereafter, the trust follows the modular approach of this handbook, establishing a Single Fund Trust until all children have reached age 25 and then dividing into Separate Trusts for each child.

B. Form: Nontaxable Joint Tenancy Revocable Trust

[CLIENT] AND [SPOUSE] JOINT TENANCY TRUST

We, [CLIENT] and [SPOUSE], have transferred ten dollars to ourselves as trustees. That asset and any other assets received by the trustee (the “trust estate”) shall be held in trust subject to the provisions of this instrument.

Article 1
Introduction

1.1 *Family.* We are married to each other. _____ is sometimes referred to as “husband” and _____ as “wife.” The first to die of us shall be referred to as the “deceased spouse” and the survivor shall be referred to as the “surviving spouse.” We have _____ children now living, namely _____. We intend by this instrument to provide for all our children, including any born or adopted in the future.

1.2 *Name of Trust.* The name of this trust, as amended at any time and from time to time, shall be the [CLIENT] AND [SPOUSE] JOINT TENANCY TRUST.

1.3 *Transfer of Property.* We expressly acknowledge and intend that all property transferred to this trust is marital property or is intentionally converted to marital property by the act of transfer and that we are aware of the consequences of such property being classified as marital property. Marital property under this instrument is marital property as defined in the Illinois Marriage and Dissolution of Marriage Act, 750 ILCS 5/101, *et seq.*, as amended from time to time.

Article 2
Right to Amend or Revoke

2.1 *During Joint Lifetimes.*

(a) *Right To Amend.* While we are both living, this instrument may be amended by a written instrument signed by both of us, referring to this instrument and delivered to the trustee.

(b) *Right To Revoke.* While we are both living, this instrument may be revoked by a written instrument signed by either of us, referring to this instrument and delivered to the other and to the trustee. On revocation, the trustee shall deliver the trust property to us as joint tenants with right of survivorship. The trust property shall retain its character as marital property.

2.2 *After Death of First To Die.* After the death of the first of us to die, the surviving spouse may amend or revoke the Survivor’s Trust at any time by written instrument signed by the surviving spouse, referring to this instrument and delivered to the trustee. If the surviving spouse revokes the Survivor’s Trust, the trustee shall deliver the assets of such trust to the surviving spouse or as the surviving spouse directs.

Article 3
Administration of Trust During Joint Lifetimes

While we are both living, the trustee shall administer the trust estate as follows:

3.1 *Payments Prior to Incapacity.* As long as neither of us is incapacitated, the trustee shall pay to us as much of the income and principal as we jointly request from time to time.

3.2 *Payments During Incapacity.* As long as either or both of us are incapacitated, the trustee may pay to each of us as much of the income and principal as the trustee considers necessary for the health, maintenance in reasonable comfort, education, or best interests of that person.

3.3 *Accumulation of Excess Income.* Any income not paid in each year and any income not paid at the death of the first of us to die shall be added to principal.

3.4 *Determination of Incapacity.* Either of us shall be incapacitated if that person is under a legal disability or is unable to give prompt and intelligent consideration to financial affairs. The determination of a person's inability shall be made in writing, signed by that person's personal physician and, if that person's spouse is then living and able to so act, by the spouse, and delivered to the trustee, or if that person is then acting as trustee, to the successor trustee. The trustee may rely conclusively on that writing.

Article 4 Gift on Death of Deceased Spouse

On the death of the deceased spouse, the trustee shall distribute the balance of the trust estate to the trustee to hold as the Survivor's Trust.

Article 5 Survivor's Trust

The trustee shall administer the Survivor's Trust as follows:

5.1 *Mandatory Payment of Income.* Beginning with the death of the deceased spouse, the trustee shall pay all the income to the surviving spouse. On the death of the surviving spouse, any accrued or unpaid income shall be added to principal.

5.2 *Discretionary Payment of Principal.* The trustee may pay to the surviving spouse as much of the principal as the trustee from time to time considers necessary for the health, maintenance in reasonable comfort, and best interests of the surviving spouse.

5.3 *Lifetime Right of Withdrawal.* During the surviving spouse's life, the trustee shall distribute as much or all of the principal to the surviving spouse as the surviving spouse from time to time requests by written instrument delivered to the trustee during the surviving spouse's lifetime.

5.4 *Power of Appointment at Death.* On the death of the surviving spouse, the trustee shall distribute the Survivor's Trust not required for payment of the surviving spouse's debts, administration expenses, and death taxes to any one or more persons, organizations, and the surviving spouse's estate as the surviving spouse appoints by will, specifically referring to this power of appointment.

5.5 *Distribution on Termination.* On the death of the surviving spouse, the trustee shall distribute the Survivor's Trust not effectively appointed as follows:

(a) *Death Taxes and Other Charges.* The trustee shall pay the surviving spouse's debts, administration expenses, and death taxes as required by this instrument.

(b) *Gifts of Tangible Personal Property.* The trustee shall make gifts of tangible personal property as follows:

(1) *By Written Direction.* First, as the surviving spouse directs by any

written instrument signed by the surviving spouse. The surviving spouse may from time to time amend or revoke the written instrument, and any subsequent instrument shall control to the extent it conflicts with prior ones. Any decisions made in good faith by the trustee in distributing tangible personal property shall not be subject to review, and the trustee shall be held harmless from any cost or liability as to those decisions. The surviving spouse shall be deemed to have left only those written instruments that the trustee is able to find after reasonable inquiry within 60 days after the surviving spouse's death.

(2) *Gifts of Remaining Tangible Personal Property.* All tangible personal property not otherwise effectively disposed of shall be distributed in shares of equal value to our children who survive the surviving spouse (to the exclusion of the descendants of any child who does not survive the surviving spouse), to be divided among them as they agree or, if they cannot agree within 60 days after the surviving spouse's death, as the trustee determines.

(c) *Remaining Trust Property.* The trustee shall distribute the remaining Survivor's Trust as follows:

(1) *Any Child Under Age 25.* If there is a then living child of ours under age 25, to the trustee to hold as the Children's Single Fund Trust; or

(2) *No Child Under Age 25.* If there is no then living child of ours under age 25, to the trustee to allocate in shares of equal value for our then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of ours is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, *per stirpes* to the child's then living descendants.

Article 6 Children's Single Fund Trust

The trustee shall administer the Children's Single Fund Trust as follows:

6.1 *Discretionary Payment of Income and Principal.* The trustee may pay as much of the income and principal to any one or more of our children and their descendants as the trustee from time to time considers necessary for the health, maintenance in reasonable comfort, or education of each of them. The trustee may make the payments in equal or unequal shares, taking into account the present and prospective needs of those persons. Any income not so paid in each year shall be added to principal at the end of each year.

6.2 *Distribution on Termination.* When there is no living child of ours under age 25, the trustee shall terminate the Children's Single Fund Trust by allocating it in shares of equal value for our then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of ours is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, *per stirpes* to the child's then living descendants.

Article 7 Child's Separate Trusts

Any trust property allocated for a child of ours subject to the Child's Separate Trust withholding

provisions shall be added to or used to fund the principal of a Child's Separate Trust for the child. The trustee shall administer each Child's Separate Trust as follows:

7.1 *Mandatory Payment of Income.* The trustee shall pay all the income to the child.

7.2 *Discretionary Payment of Principal.* The trustee may pay to the child as much of the principal as the trustee from time to time considers necessary for the health, maintenance in reasonable comfort, or education of the child.

7.3 *Lifetime Withdrawal of Principal.* After the child has attained age _____, the trustee shall distribute as much of the principal to the child as the child from time to time requests by written instrument delivered to the trustee during the child's life, not exceeding in the aggregate half in value before the child has attained age _____. For purposes of this paragraph, the value of the principal shall be determined as of the time the child first exercises the right to withdraw, plus the value of any subsequent additions as of the time of addition.

7.4 *Power of Appointment at Death.* On the death of the child, the trustee shall distribute the Child's Separate Trust to any one or more persons, organizations, and the child's estate as the child appoints by will, specifically referring to this power of appointment.

7.5 *Distribution on Termination.* On the death of the child, the trustee shall distribute the Child's Separate Trust not effectively appointed as follows:

(a) *Any Descendant Living.* If the child has a descendant then living, *per stirpes* to the child's then living descendants; or

(b) *No Descendant Living.* If the child has no descendant then living but we have a descendant then living, to the trustee to allocate in shares of equal value for our then living children, subject to the Child's Separate Trust withholding provisions, provided that if a child of ours is not then living but a descendant of the child is then living, the trustee shall distribute the share that would have been allocated for the deceased child, if living, *per stirpes* to the child's then living descendants.

Article 8

Distribution to Beneficiaries Under Prescribed Age

Any property to be distributed (other than a discretionary payment or a distribution pursuant to a power of appointment) to a beneficiary who is not a child of ours and is under age _____ at the time of distribution shall immediately vest in the beneficiary, but the trustee shall retain the property as a separate trust for the beneficiary on the following terms. The trustee may pay to the beneficiary as much of the income and principal as the trustee deems advisable for the beneficiary's health, maintenance in reasonable comfort, education, or best interests. Any income not so paid in each year shall be added to principal at the end of each year. The trustee shall distribute the remaining trust assets to the beneficiary when the beneficiary attains age _____ or to the beneficiary's estate if the beneficiary dies prior to receiving the assets. If at the time the trust is created or during the administration of the trust the beneficiary is under age 21, the trustee may terminate the trust and distribute the property to a custodian for the beneficiary under a Uniform Transfers or Gifts to Minors Act.

Article 9

Contingent Gift Provision

On the death of the last to die of all beneficiaries of any trust (the "termination date"), any of the trust not otherwise distributable shall be distributed half to husband's heirs and half to wife's heirs. Heirs

and their respective shares shall be determined under the laws of descent and distribution of Illinois at the death of the surviving spouse for property located in Illinois as if we had each died on the termination date unmarried and domiciled in Illinois.

Article 10 Trustee Succession

10.1 *Resignation.* A trustee may resign at any time by signed notice to the other trustee, if any, and to the income beneficiaries.

10.2 *Individual Trustee Succession.* Each acting individual trustee (unless limited in the instrument in which the trustee was designated) may, by signed instrument filed with the trust records, (a) designate one or more individuals or qualified corporations to act with or to succeed the trustee consecutively or concurrently, in any stated combination and on any stated contingency, and (b) amend or revoke the designation before the designated trustee begins to act.

10.3 *Default of Designation.* If at any time a person ceases to act as trustee and no other trustee is designated or willing to succeed that person, then the other trustee shall act as the sole trustee. If at any time no trustee is acting and no designated trustee is able and willing to act, then the first of the following who is able and willing to act shall be trustee:

(a) _____;

(b) _____;

(c) _____;

(d) Any individual or qualified corporation appointed in an instrument signed by a majority of the income beneficiaries.

10.4 *Corporate Trustee Substitution.* A corporate trustee may be removed at any time by an instrument signed by a majority of the income beneficiaries but only if, on or before the effective date of removal, a qualified corporation has been appointed corporate trustee in the same manner.

Article 11 Trustee Actions

11.1 *Control.* Except as otherwise provided, whenever more than one trustee is acting, the "trustee" means all trustees collectively, and a majority of the trustees qualified to participate in an action or decision of the trustees shall control. Any trustee who is not qualified to participate in or dissents from such action or decision shall not be liable therefor.

11.2 *Accountings.* Upon written request, the trustee shall send a written account of all trust receipts, disbursements, and transactions and the property comprising the trust to each income beneficiary and, at the option of the trustee, to the future beneficiaries of the trust. A future beneficiary of a trust is a person to whom the assets of the trust would be distributed or distributable if the trust then terminated. Unless court proceedings on the account are commenced within three months after the account is sent, the account shall bind and be deemed approved by all of the following beneficiaries who have not filed written objections to the account with the trustee within three months after the account is sent, and the trustee shall be deemed released by all such beneficiaries from liability for all matters covered by the account as though such account was approved by a court of competent jurisdiction: (a) each beneficiary to whom the account was sent and (b) if the account was sent to all income and future beneficiaries of the

trust, then all beneficiaries of the trust who have any past, present, or future interest in the matters covered by the account.

11.3 *Trustee's Right to Account Settlement Before Distribution.* Before distribution of any trust principal, the trustee shall have the right to require settlement of any open accounts of the trust from which the distribution is being made, either by the written approval and release of all beneficiaries having an interest in the distribution or, if the releases cannot be obtained, by court settlement of the open accounts. All the trustee's reasonable fees and expenses (including attorneys' fees) attributable to approval of the trustee's accounts shall be paid by the trust involved.

11.4 *Acceptance of Predecessor's Accounts.* On the signed direction of the income beneficiaries, the trustee shall accept without examination the accounts rendered and property delivered by or for a predecessor trustee or executor for either of us. Such acceptance shall fully discharge the predecessor trustee or executor and shall bind all beneficiaries.

11.5 *Notice.* If a beneficiary is under legal disability, the trustee shall give any notice or accounting to the beneficiary's personal representative, if any, and if none, to a parent of the beneficiary, if any, and if none, to any person who the trustee believes has demonstrated concern for the interest of the beneficiary. That person may sign any instrument for the beneficiary.

11.6 *Special Trustees.* If the trustee (the "principal trustee") is unable or unwilling to act as trustee as to any property, such person or qualified corporation as the principal trustee shall designate by signed instrument shall act as special trustee as to that property. Any special trustee may resign at any time by giving written notice to the principal trustee. The special trustee shall have the powers granted to the principal trustee under this instrument, to be exercised with the approval of the principal trustee. Net income and any proceeds of sale shall be paid to the principal trustee, to be administered under this instrument. The principal trustee may remove and replace the special trustee at any time.

11.7 *Delegation to Co-Trustee.* Any individual trustee may delegate any or all of that trustee's powers and duties to a co-trustee, except that no trustee shall be permitted to delegate any discretion with respect to the distribution of income or principal to a beneficiary. Any delegation may be for a definite or indefinite period and may be revoked by the delegating trustee. Any delegation or revocation shall be in writing, signed by the delegating trustee, and delivered to the co-trustee to whom the delegation is made. Any person or institution may rely on the written certification of a co-trustee that the co-trustee has the power to act without concurrence of any other trustee, provided, however, that the co-trustee shall attach to the written certification a copy of the instrument by which the powers and duties have been delegated.

11.8 *Compensation.* The trustee shall be entitled to reimbursement for expenses and to reasonable compensation.

11.9 *Determinations by Trustee.* The trustee's reasonable determination of any question of fact shall bind all persons.

11.10 *Third-Party Dealings.* The trustee's certification that the trustee is acting according to this instrument shall protect anyone dealing with the trustee. No one need see to the application of money paid or property delivered to the trustee.

11.11 *Exoneration of Trustee.* Any individual trustee acting in good faith shall not be liable for any act or omission. No trustee shall be liable for any act or omission of another trustee.

11.12 *Bond.* No trustee need give bond to, qualify before, or account to any court.

11.13 *Powers of Successor Trustee.* Unless expressly limited, each successor trustee shall have

all the titles, powers, duties, discretions, and immunities of the original trustee.

Article 12 **Trustee Powers**

In addition to all powers granted by law, the trustee shall have the following powers, to be exercised in a fiduciary capacity:

12.1 *Retention.* To retain any property transferred to the trustee, regardless of diversification and regardless of whether the property would be considered a proper trust investment;

12.2 *Sale.* To sell at public or private sale, contract to sell, grant options to buy, convey, transfer, exchange, or partition any real or personal property of the trust for such price and on such terms as the trustee sees fit;

12.3 *Real and Tangible Personal Property.* To make leases and subleases and grant options to lease, although the terms thereof commence in the future or extend beyond the termination of any trust; to purchase, operate, maintain, improve, rehabilitate, alter, demolish, abandon, release, or dedicate any real or tangible personal property; and to develop or subdivide real property, grant easements, and take any other action with respect to real or tangible personal property that an individual owner thereof could take;

12.4 *Borrowing.* To borrow money from any lender, extend or renew any existing indebtedness, and mortgage or pledge any property in the trust;

12.5 *Investing.* To invest in bonds, common or preferred stocks, notes, options, common trust funds, mutual funds, shares of any investment company or trust, or other securities, life insurance, partnership interests, general or limited, limited liability company interests, joint ventures, real estate, or other property of any kind, regardless of diversification and regardless of whether the property would be considered a proper trust investment;

12.6 *Joint Investments; Distribution; Determination of Value.* To make joint investments for two or more trusts held by the same trustee; to distribute property in cash or in kind, or partly in each; and to allocate or distribute undivided interests, different property, or disproportionate interests to the beneficiaries, and to determine the value of any property so allocated or distributed; but no adjustment shall be made to compensate for a disproportionate allocation of unrealized gain for federal income tax purposes, and no action taken by the trustee pursuant to this paragraph shall be subject to question by any beneficiary;

12.7 *Rights as to Securities.* To have all the rights, powers, and privileges of an owner of the securities held in trust, including, but not limited to, the powers to vote, give proxies, and pay assessments and to participate in voting trusts, pooling agreements, foreclosures, reorganizations, consolidations, mergers, and liquidations and, incident to such participation, to exercise or sell stock subscription or conversion rights;

12.8 *Conservation of Assets.* To take any action that an individual owner of an asset could take to conserve or realize the value of the asset and with respect to any foreclosure, reorganization, or other change with respect to the asset;

12.9 *Delegation.* To employ agents, attorneys, and proxies of all types (including any firm in which a relative of either of us or his or her spouse is a partner, associate, or employee or is otherwise affiliated) and to delegate to them any powers the trustee considers advisable;

12.10 *Payment of Expenses and Taxes.* To pay all expenses incurred in the administration of the trust and to pay all taxes imposed on the trust;

12.11 *Determination of Principal and Income.* To determine in cases not covered by statute the allocation of receipts and disbursements between income and principal, except that (a) if the trust is beneficiary or owner of an individual account in any employee benefit plan or individual retirement plan, income earned after death in the account shall be income of the trust, and if the trustee is required to pay all trust income to a beneficiary, the trustee shall collect and pay the income of the account to the beneficiary at least quarterly (and to the extent that all income cannot be collected from the account, the deficiency shall be paid from the principal of the trust); (b) reasonable reserves for depreciation, depletion, and obsolescence may be established out of income and credited to principal only to the extent that the trustee determines that readily marketable assets in the principal of the trust will be insufficient for any renovation, major repair, improvement, or replacement of trust property that the trustee deems advisable; and (c) any premium paid for interest-bearing debt obligations shall be amortized as an income expense;

12.12 *Dealings with Fiduciaries.* To deal with, purchase assets from, or make loans to the fiduciary of any trust made by either of us or a trust or estate in which any beneficiary under this trust has an interest, even though a trustee under this instrument is the fiduciary, and to retain any assets or loans so acquired, regardless of diversification and regardless of whether the property would be considered a proper trust investment; to deal with a corporate trustee under this instrument individually or a parent or affiliate company; and to deal with the fiduciary of any other estate, trust, or custodial account even though the fiduciary is a trustee under this instrument;

12.13 *Compromising Claims.* To litigate, compromise, settle, or abandon any claim or demand in favor of or against the trust;

12.14 *Nominee Arrangements.* To hold any asset in the name of a nominee, in bearer form or otherwise, without disclosure of any fiduciary relationship;

12.15 *Elections Under Retirement Plans.* To elect, pursuant to the terms of any employee benefit plan, individual retirement plan, or insurance contract, the mode of distribution of the proceeds thereof, or change the beneficial ownership, and no adjustment shall be made in the interests of the beneficiaries to compensate for the effect of the election or change;

12.16 *Liability Insurance.* To purchase liability and casualty insurance of any kind for the protection of the trust estate, including comprehensive liability insurance;

12.17 *Accepting Additional Property.* To accept additional property from any source and administer it as a part of the trust and, if the addition is made by a will, to accept the statement of the personal representative of the estate of the transferor that the property delivered to the trustee constitutes all of the property to which the trustee is entitled without any duty to inquire into such representative's administration or accounting;

12.18 *Environmental Matters.* To inspect and monitor businesses and real property (whether held directly or through a partnership, corporation, trust, or other entity) for environmental conditions or possible violations of environmental laws; to remediate environmentally damaged property or to take steps to prevent environmental damage in the future, even if no action by public or private parties is currently pending or threatened; to abandon or refuse to accept property that may have environmental damage; and to expend trust property to do the foregoing; and no action or failure to act by the trustee pursuant to this paragraph shall be subject to question by any beneficiary;

12.19 *Qualified Conservation Easements.* To create, on land meeting the requirements of Code

§2031(c)(8)(A), a qualified conservation easement, as defined in Code §2031(c)(8)(B), with or without the consent of any beneficiary, and to make the election provided in Code §2031(c)(6); and

12.20 *Ability To Take Other Actions.* To do all other acts to accomplish the proper management, investment, and distribution of the trust.

Article 13 **Administrative Provisions**

13.1 *Administration After Death of Deceased Spouse.* After the death of the deceased spouse, the trustee may hold the trust estate a separate trust until all payments, allocations, and distributions directed by this instrument have been completed. The trustee may from time to time distribute income or principal in satisfaction of the succeeding trusts, distributive shares, or gifts and shall distribute the trust estate in complete satisfaction of such trusts, shares, or gifts as soon as practicable after the deceased spouse's death.

13.2 *Income Payments.* Mandatory income payments shall be made at least quarterly.

13.3 *Standard for Discretionary Payments.* In the exercise of discretion to make a payment to a beneficiary, the trustee may consider all income and resources known to the trustee to be available to the beneficiary and the standard of living of the beneficiary.

13.4 *Exercise of Power of Appointment.* A testamentary power of appointment granted under this instrument may be exercised only by a will specifically referring to the power. The appointment may be either outright or subject to such trusts and conditions as the holder of the power designates. The holder of the power may grant to any person to whom principal may be appointed further powers of appointment. In determining whether a testamentary power of appointment has been exercised, the trustee may rely on an instrument admitted to probate in any jurisdiction as the will of the holder of the power or may assume the power of appointment was not exercised in the absence of actual notice of the holder's will within three months after the holder's death.

13.5 *No Advancements.* No payment made to any beneficiary under this instrument shall be treated as an advancement.

13.6 *Allocation of Assets and Income.* For purposes of funding any pecuniary gifts, the trustee may allocate or distribute assets in any manner, but the trustee shall value each asset at its fair market value on the date on which the asset is allocated or distributed.

13.7 *Small Trust Termination.* The trustee may terminate any trust with a value at the time of termination less than the Minimum Trust Value. This power may not be exercised by a trustee who is a beneficiary of the trust. The Minimum Trust Value shall be the sum of (a) \$100,000 and (b) the percentage increase, if any, in the cost of living from January 1 of the year in which we executed this instrument until January 1 of the year of termination multiplied by \$100,000. For this purpose, the increase in the cost of living shall be determined pursuant to the Consumer Price Index for Urban Wage Earners and Clerical Workers, U.S. City Average, All Items, as published by the Bureau of Labor Statistics of the U.S. Department of Labor. If that index ceases to be published, there shall be substituted any other index the trustee determines to reflect similar information. Distribution under this paragraph shall be to the income beneficiaries in the proportions they are entitled to receive the income or, if their interests are indefinite, to the income beneficiaries in equal shares.

13.8 *Facility of Payment.* The trustee may make any payments (other than distributions on termination) to a beneficiary under legal disability or whom the trustee determines to be unable to

properly manage his or her affairs in any of the following ways: (a) to the legally appointed guardian of the beneficiary, (b) to an adult relative or friend of the beneficiary in reimbursement for proper expenditures on behalf of the beneficiary, (c) to a custodian for the beneficiary under a Uniform Transfers or Gifts to Minors Act, (d) by making direct expenditures for the benefit of the beneficiary, or (e) to the beneficiary directly. The trustee may make distributions of tangible personal property to a beneficiary under legal disability or whom the trustee determines to be unable to properly manage his or her affairs in any of the ways listed in (a), (c), or (e) above.

13.9 *Spendthrift.* No interest under this instrument shall be assignable by any beneficiary or be subject to the claims of his or her creditors, including claims for alimony or separate maintenance. The preceding sentence shall not be construed as restricting in any way the exercise of any right of withdrawal or power of appointment or the ability of any beneficiary to release his or her interest.

13.10 *Consolidation and Division of Trusts.* The trustee may at any time consolidate any trust held under this instrument with any other trust if the beneficiaries of the trusts are the same and the terms of the trusts are substantially similar. Further, the trustee, in the trustee's absolute discretion, may divide a trust (the "initial trust") into two or more separate trusts and may segregate an addition to a trust (the "initial trust") as a separate trust.

(a) *Funding.* In dividing the initial trust, if the division is to be effective as of the death of either of us or as of the death of any other person, the trustee shall fund each separate trust with property having an aggregate fair market value fairly representative of the appreciation or depreciation in value from the date of such death to the date of division of all property subject to the division.

(b) *Terms.* A trust created pursuant to this paragraph shall have the same terms and conditions as the initial trust, and any reference to the initial trust in this instrument shall refer to that trust. The rights of beneficiaries shall be determined as if that trust and the initial trust were aggregated, but (1) different tax elections may be made as to the trusts, (2) disproportionate discretionary distributions may be made from the trusts, (3) taxes may be paid disproportionately from the trusts, (4) upon termination the share of a remainder beneficiary (including any recipient trust) may be satisfied with disproportionate distributions from the trusts, and (5) a beneficiary of the trusts may disclaim an interest in one of the trusts without having to disclaim an interest in another trust. In administering, investing, and distributing the assets of the trusts and in making tax elections, the trustee may consider differences in federal tax attributes and all other factors the trustee believes pertinent.

13.11 *Accrued and Unpaid Income.* On the death of any beneficiary, any accrued or unpaid income shall be paid as income to the next beneficiary succeeding in interest.

13.12 *Controlling Law.* The validity and effect of each trust and the construction of this instrument and of each trust shall be determined in accordance with the laws of Illinois. The original situs and original place of administration of each trust shall also be Illinois, but the situs and place of administration of any trust may be transferred at any time to any place the trustee determines to be for the best interests of the trust.

13.13 *Life Insurance.* Each of us retains during our respective separate lives all rights under insurance policies payable to the trustee on our separate lives, including the right to change the beneficiaries and to assign any policies to any lender, including any trustee, as security for any loan. During the life of an insured the trustee shall have no responsibility with respect to the policies for the payment of premiums or otherwise. After the death of an insured, the trustee shall take whatever action the trustee considers best to collect the proceeds of any policies then payable to the trustee, but the trustee need not incur expense or take legal proceedings unless indemnified. Payment to and the receipt of the

trustee shall be a full discharge of the liability of any insurance company, which need not take notice of this instrument or see to the application of any payment.

Article 14 **Payment of Death Taxes, Expenses, and Debts**

14.1 *Payments.* After the death of either of us, the trustee shall make the following payments:

- (a) *Death Taxes.* All of that person's death taxes.
- (b) *Expenses.* All of that person's expenses for last illness, funeral, and burial; costs of safeguarding and delivering tangible personal property; and estate administration expenses.
- (c) *Debts.* All of that person's debts, other than debts secured by life insurance, by an interest in a land trust or cooperative, or by real property.

14.2 *Source of Payments Generally.* The trustee shall make all payments required under this Article as follows:

- (a) *Death of Deceased Spouse.* At the death of the deceased spouse, from the trust estate.
- (b) *Death of Surviving Spouse.* At the death of the surviving spouse, from the principal of the Survivor's Trust remaining after distribution of any gifts of tangible personal property or gifts of specific sums of money.

If the cash and readily marketable assets from which the above payments are to be made are insufficient to make the foregoing payments in full, the trustee shall notify the respective executor of the amount of insufficiency and request payment. Notwithstanding the preceding three sentences:

- (a) The trustee shall pay from the disclaimed assets the amount by which the death taxes of the deceased spouse are increased by reason of a disclaimer of any portion of the gift to the Survivor's Trust; and
- (b) The trustee shall pay from the disclaimed assets all generation-skipping transfer taxes on direct skips occurring at the death of one of us as a result of a disclaimer if that deceased person is considered the transferor.

14.3 *Apportionment and Reimbursement for Death Taxes and Expenses.* Neither of us waives any rights the trustee has under Code §§2206, 2207, 2207A, and 2207B or any similar statutes of any state (or any comparable provisions in effect at our respective deaths), and we authorize the trustee to take such actions as are necessary to obtain reimbursement under such Code sections and statutes, including withholding distributions. We waive all other rights to reimbursement and apportionment.

14.4 *Tax Elections.* The trustee may make elections under tax laws and employee benefit plans and may make allocations of any available GST exemption as the trustee deems advisable. No adjustment shall be made between principal and income or in the relative interests of the beneficiaries to compensate for any such election or allocation.

Article 15 **Definitions**

15.1 *Balance of the Trust Estate.* The “balance of the trust estate” means the trust estate (including assets received from the deceased spouse’s probate estate or any other source) reduced by:

- (a) Any payments of the deceased spouse’s expenses, debts, and death taxes required to be paid from such property; and
- (b) Any gifts of specific assets and any pecuniary gifts made at the deceased spouse’s death.

15.2 *Child and Descendant.*

(a) *Child.* A “child” of a person means only (1) a child born to the person or to the person’s spouse while they are lawfully married; (2) a natural child of the person born while the parents are not lawfully married if the parents subsequently become lawfully married, but only for purposes of any allocation or distribution made after that marriage; (3) a child lawfully adopted by the person prior to that child’s attaining age 21; or (4) a natural child of that person if that person is a female.

(b) *Descendant.* A child of a person is a “descendant” of that person and of all ancestors of that person. A person’s descendants include all such descendants whenever born. “Our descendants” refers only to descendants of our marriage. Except when distribution or allocation is directed to descendants *per stirpes*, the word “descendants” includes descendants of every degree whether or not a parent or more remote ancestor of a descendant is also living.

(c) *Child in Gestation.* A child in gestation on the date any allocation or distribution is to be made shall be deemed to be living on that date if the child is subsequently born alive and lives for at least 90 days.

15.3 *Code.* References to sections of the “Code” refer to the Internal Revenue Code of 1986, as amended from time to time, and include corresponding provisions of subsequent federal tax laws.

15.4 *Death Taxes.* “Death taxes” includes all estate, transfer, inheritance, and other succession taxes (including penalties and interest) imposed by reason of death. “Death taxes” shall not include generation-skipping transfer taxes imposed on any generation-skipping transfers other than direct skips made at the decedent’s death of which the decedent is the transferor.

15.5 *Education.* “Education” means a preschool, grade school, middle school, high school, college, university, and professional or postgraduate education, any vocational studies or training, reasonable related living expenses, and reasonable travel expenses to and from the educational institution.

15.6 *Incapacity.* A person (other than either one of us) shall be considered incapacitated if under a legal disability or unable to give prompt and intelligent consideration to financial affairs. The existence of the inability may be determined by a physician, and any person may rely on written notice of the determination. A person already acting as trustee shall cease to act on incapacity.

15.7 *Income Beneficiary.* An “income beneficiary” means a person to whom or for whose benefit income of any trust is or may be currently distributed.

15.8 *Per Stirpes.* Whenever assets are to be allocated for or distributed to the descendants of a person “*per stirpes*,” those assets shall be divided into equal shares, one such share for each then living child of that person and one such share for each deceased child of that person who has a descendant then living. Any such deceased child’s share shall then be allocated for or distributed to that child’s descendants *per stirpes* in accordance with the preceding sentence and this sentence.

15.9 *Qualified Corporation.* A “qualified corporation” means any bank, trust company, or other corporate entity that is authorized to act as a trustee and that is not a related or subordinate party under Code §672(c) as to any beneficiary under this instrument.

15.10 *Spouse.* The “spouse” of any person, other than either of us, means the individual legally married to, and not legally separated from, that person on the date of the distribution then in question or on the date of the prior death of that person.

15.11 *Tangible Personal Property.* “Tangible personal property” means all personal and household effects, jewelry, automobiles, collections, and other tangible personal property that the deceased spouse owns at the time of death or that is then included as part of the deceased spouse’s separate property or share of marital property (including insurance thereon but excluding business use property, precious metals, and unset gems).

Article 16

Spouse’s Occupancy of Residential Property in Trust

The provisions of this Article shall apply if any interest in property that was used by us as a residence at the time of the death of the first of us to die (“the residence”) is allocated to the Survivor’s Trust. “Residence” includes a house or condominium (or the beneficial interest in a land trust that holds title to a house or condominium), cooperative apartment, or nursing home or retirement community arrangement, and any fractional interest therein.

16.1 *Retention and Use of Residence.* The trustee is authorized to retain the residence for the surviving spouse’s life notwithstanding that the residence may constitute a large part or all of the principal of the trust and may lack the diversification or productivity ordinarily considered prudent for trust investments. The surviving spouse may continue to use and occupy the residence rent free, provided that the surviving spouse pays all taxes, assessments, insurance premiums, ordinary repair bills, and other expenses of protecting and maintaining the residence. Notwithstanding the preceding sentence, if any expense payable by the surviving spouse pursuant to the preceding sentence would be chargeable against the principal of a trust, the trustee shall distribute to the surviving spouse as much of the principal of the trust as is necessary to reimburse the surviving spouse for payment of that expense or, if requested to do so by the surviving spouse, the trustee shall pay that expense directly from the principal of the trust. As long as the surviving spouse pays expenses as required by the preceding two sentences of this paragraph, the trustee shall not sell the residence except as provided in the following paragraph.

16.2 *Sale and Purchase of Residence.* Upon the surviving spouse’s written request, the trustee shall sell all or any part of the residence for its fair market value and shall retain the proceeds of the sale as principal. Upon the surviving spouse’s written request, the trustee shall purchase or construct any new residence the surviving spouse shall request out of the proceeds of any sale under this paragraph and shall thereafter hold the new residence as “the residence” subject to the provisions of this Article. The surviving spouse may at any time purchase the residence from the trustee for its fair market value, determined as of the date the surviving spouse delivers to the trustee a written purchase offer.

16.3 *Trustee’s Liability.* No trustee shall be accountable for any loss sustained by reason of any action taken or omitted pursuant to this Article, and the powers granted under this Article shall be exercised only in a fiduciary capacity.

Article 17

Captions and Context of Terms

Captions shall have no impact or meaning as to the terms of this instrument. Singular and plural and masculine, feminine, and neuter shall be interchangeable as required or permitted in the context of this instrument.

Signed and agreed on _____, 20__.

[CLIENT], individually and as trustee

[SPOUSE], individually and as trustee

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

On _____, 20__, [CLIENT] personally appeared before me and acknowledged that this instrument was executed as that person's free act and deed.

Notary Public

STATE OF ILLINOIS)
) ss.
COUNTY OF _____)

On _____, 20__, [SPOUSE] personally appeared before me and acknowledged that this instrument was executed as that person's free act and deed.

Notary Public

This document was prepared by: _____

Attachment B
Relevant Code Sections for the Joint Trust
1014(a), (b) and (e), 2036, 2038, 2041, and 2523

SECTION 1014. BASIS OF PROPERTY ACQUIRED FROM A DECEDENT

(a) IN GENERAL

Except as otherwise provided in this section, the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent shall, if not sold, exchanged, or otherwise disposed of before the decedent's death by such person, be— (1) the fair market value of the property at the date of the decedent's death, . . .

(b) PROPERTY ACQUIRED FROM THE DECEDENT

For purposes of subsection (a), the following property shall be considered to have been acquired from or to have passed from the decedent:

(1) Property acquired by bequest, devise, or inheritance, or by the decedent's estate from the decedent; . . .

(9) In the case of decedents dying after December 31, 1953, property acquired from the decedent by reason of death, form of ownership, or other conditions (including property acquired through the exercise or non-exercise of a power of appointment), if by reason thereof the property is required to be included in determining the value of the decedent's gross estate under chapter 11 of subtitle B or under the Internal Revenue Code of 1939. In such case, if the property is acquired before the death of the decedent, the basis shall be the amount determined under subsection (a) reduced by the amount allowed to the taxpayer as deductions in computing taxable income under this subtitle or prior income tax laws for exhaustion, wear and tear, obsolescence, amortization, and depletion on such property before the death of the decedent. Such basis shall be applicable to the property commencing on the death of the decedent. . . .

(e) APPRECIATED PROPERTY ACQUIRED BY DECEDENT BY GIFT WITHIN 1 YEAR OF DEATH

(1) IN GENERAL. In the case of a decedent dying after December 31, 1981, if--

(A) appreciated property was acquired by the decedent by gift during the 1-year period ending on the date of the decedent's death, and

(B) such property is acquired from the decedent by (or passes from the decedent to) the donor of such property (or the spouse of such donor),

the basis of such property in the hands of such donor (or spouse) shall be the adjusted basis of such property in the hands of the decedent immediately before the death of the decedent.

(2) DEFINITIONS

For purposes of paragraph (1)--

(A) APPRECIATED PROPERTY. The term "appreciated property" means any property if the fair market value of such property on the day it was transferred to the decedent by gift exceeds its adjusted basis. . . .

SECTION 2036. TRANSFERS WITH RETAINED LIFE ESTATE**(a) GENERAL RULE**

The value of the gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death--

- (1) the possession or enjoyment of, or the right to the income from, the property, or
- (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom

SECTION 2038. REVOCABLE TRANSFERS**(a) IN GENERAL**

The value of the gross estate shall include the value of all property.

(1) TRANSFERS AFTER JUNE 22, 1936

To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished during the 3 year period ending on the date of the decedent's death.

(b) DATE OF EXISTENCE OF POWER

For purposes of this section, the power to alter, amend, revoke, or terminate 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 alteration, amendment, revocation, or termination takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose, if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

SECTION 2041. POWERS OF APPOINTMENT**(a) IN GENERAL**

The value of the gross estate shall include the value of all property. . . .

(2) POWERS CREATED AFTER OCTOBER 21, 1942

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 such a power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent, such property would be includible in the decedent's gross estate under sections 2035 to 2038, inclusive. For purposes of this paragraph (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.

(b) DEFINITIONS

For purposes of subsection (a)--

(1) GENERAL POWER OF APPOINTMENT

The term "general power of appointment" means a power which is exercisable in favor of the decedent, his estate, his creditors, or the creditors of his estate; except that

(A) A power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment. . . .

(C) In the case of a power of appointment created after October 21, 1942, which is exercisable by the decedent only in conjunction with another person--

(i) If the power is not exercisable by the decedent except in conjunction with the creator of the power--such power shall not be deemed a general power of appointment.

(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 exercise of the power in favor of the decedent--such power shall not be deemed a general power of appointment. For the purposes of this clause a person who, after the death of the decedent, may be possessed of a power of appointment (with respect to the property subject to the decedent's power) which he may exercise in his own favor shall be deemed as having an interest in the property and such interest shall be deemed adverse to such exercise of the decedent's power.

(iii) If (after the application of clauses (i) and (ii)) the power is a general power of appointment and is exercisable in favor of such other person--such power shall be deemed a general power of appointment only in respect of a fractional part of the property subject to such power, such part to be determined by dividing the value of such property by the number of such persons (including the decedent) in favor of whom such power is exercisable.

SECTION 2523. GIFT TO SPOUSE

(a) ALLOWANCE OF DEDUCTION

Where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

(b) LIFE ESTATE OR OTHER TERMINABLE INTEREST

Where, on the lapse of time, on the occurrence of an event or contingency, or on the failure of an event or contingency to occur, such interest transferred to the spouse will terminate or fail, no deduction shall be allowed with respect to such interest--

(1) if the donor retains in himself, or transfers or has transferred (for less than an adequate and full consideration in money or money's worth) to any person other than such donee spouse (or the estate

of such spouse), an interest in such property, and if by reason of such retention or transfer the donor (or his heirs or assigns) or such person (or his heirs or assigns) may possess or enjoy any part of such property after such termination or failure of the interest transferred to the donee spouse; or

(2) if the donor immediately after the transfer to the donee spouse has a power to appoint an interest in such property which he can exercise (either alone or in conjunction with any person) in such manner that the appointee may possess or enjoy any part of such property after such termination or failure of the interest transferred to the donee spouse. For purposes of this paragraph, the donor shall be considered as having immediately after the transfer to the donee spouse such power to appoint even though such power cannot be exercised until after the lapse of time, upon the occurrence of an event or contingency, or on the failure of an event or contingency to occur.

An exercise or release at any time by the donor, either alone or in conjunction with any person, of a power to appoint an interest in property, even though not otherwise a transfer, shall, for purposes of paragraph (1), be considered as a transfer by him. Except as provided in subsection (e), where at the time of the transfer it is impossible to ascertain the particular person or persons who may receive from the donor an interest in property so transferred by him, such interest shall, for purposes of paragraph (1), be considered as transferred to a person other than the donee spouse.

(c) INTEREST IN UNIDENTIFIED ASSETS

Where the assets out of which, or the proceeds of which, the interest transferred to the donee spouse may be satisfied include a particular asset or assets with respect to which no deduction would be allowed if such asset or assets were transferred from the donor to such spouse, then the value of the interest transferred to such spouse shall, for purposes of subsection (a), be reduced by the aggregate value of such particular assets.

(d) JOINT INTERESTS

If the interest is transferred to the donee spouse as sole joint tenant with the donor or as tenant by the entirety, the interest of the donor in the property which exists solely by reason of the possibility that the donor may survive the donee spouse, or that there may occur a severance of the tenancy, shall not be considered for purposes of subsection (b) as an interest retained by the donor in himself.

(e) LIFE ESTATE WITH POWER OF APPOINTMENT IN DONEE SPOUSE

Where the donor transfers an interest in property, if by such transfer his spouse is entitled for life to all of the income from the entire interest, or all the income from a specific portion thereof, payable annually or at more frequent intervals, with power in the donee spouse to appoint the entire interest, or such specific portion (exercisable in favor of such donee spouse, or of the estate of such donee spouse, or in favor of either, whether or not in each case the power is exercisable in favor of others), and with no power in any other person to appoint any part of such interest, or such portion, to any person other than the donee spouse--

(1) the interest, or such portion, so transferred shall, for purposes of subsection (a) be considered as transferred to the donee spouse, and

(2) no part of the interest, or such portion, so transferred shall, for purposes of subsection (b)(1), be considered as retained in the donor or transferred to any person other than the donee spouse.

This subsection shall apply only if, by such transfer, such power in the donee spouse to appoint the interest, or such portion, whether exercisable by will or during life, is exercisable by such spouse alone and in all events. For purposes of this subsection, the term "specific portion" only includes a portion determined on a fractional or percentage basis.

(i) DISALLOWANCE OF MARITAL DEDUCTION WHERE SPOUSE NOT CITIZEN

If the spouse of the donor is not a citizen of the United States--

(1) no deduction shall be allowed under this section,

(2) section 2503(b) shall be applied with respect to gifts which are made by the donor to such spouse and with respect to which a deduction would be allowable under this section but for paragraph (1) by substituting "\$100,000"* for "\$10,000", and

(3) the principles of sections 2515 and 2515A (as such sections were in effect before their repeal by the Economic Recovery Tax Act of 1981) shall apply, except that the provisions of such section 2515 providing for an election shall not apply.

[* for 2005, the amount that can be transferred annually to a non-citizen spouse is: \$117,000]

Attachment C**PLR 200101021**

200101021 10/2/2000

Code Sections 2033, 2038, 2041, 2501, 2523

- * Section 2033: Property in which decedent had an interest
- * Section 2038: Revocable transfers (included v. not included in gross estate)
- * Section 2041: General power v. not a general power
- * Section 2501: Imposition of gift tax (imposed v. not imposed)
- * Section 2523: Gift to spouse (marital deduction allowed v. not allowed)

This is in response to your letter dated November 24, 1999, and subsequent correspondence, requesting a ruling concerning the estate and gift tax consequences of the creation of a proposed trust (Trust) under sections 2033, 2038, 2041, 2501, and 2511 of the Internal Revenue Code.

The facts and representations submitted are summarized as follows: Grantor A and Grantor B, who are husband and wife, propose to create a joint trust ("Trust"). Grantor A will be the initial trustee of Trust. The Grantors will fund Trust with assets that they own as tenants by the entireties having a value of approximately \$x.

Under the terms of Trust, during the joint lives of the Grantors, the trustee may apply income and principal of Trust as the trustee deems advisable for the comfort, support, maintenance, health and general welfare of the Grantors. The trustee may also pay additional sums to either or both of the Grantors or to a third person for the benefit of either or both Grantors as Grantor A directs, or if he is not capable of this decision, then as Grantor B directs. While both Grantors are living, either one may terminate Trust by written notice to the other Grantor. If Trust is terminated, the trustee will deliver the trust property to the Grantors in both their names as tenants in common. Either Grantor may also amend the trust while both grantors are living by delivering to the other Grantor the amendment in writing at least 90 days before the effective date of the amendment.

Upon the death of the first Grantor to die, he or she possesses a testamentary general power of appointment, exercisable alone and in all events, to appoint part or all of the assets of Trust, free of trust, to such deceased Grantor's estate or to or for the benefit of one or more persons or entities, in such proportions, outright, in trust, or otherwise as the deceased Grantor may direct in his or her will.

If the first Grantor to die fails to fully exercise his or her testamentary general power of appointment, and providing the surviving Grantor survives the first Grantor to die by at least six months, an amount of Trust property sufficient to equal the largest amount that can pass free of federal estate tax by reason of the unified credit, is to be transferred to an irrevocable Credit Shelter Trust. Any amount in excess of the amount needed to fully fund the Credit Shelter Trust that has not been appointed by the deceased Grantor will pass outright to the surviving Grantor

The terms of the Credit Shelter Trust provide that during the life of the surviving Grantor, the trustee is to pay or apply for the benefit of the surviving Grantor any part of the income and/or principal of the trust as is reasonably necessary for the survivor's support and maintenance. The trustee shall also have the authority to pay or apply for the benefit of the joint descendants of the Grantors any portion of the income and/or principal of the trust as the trustee deems necessary for such descendants maintenance, support, and education. All distributions however, shall be limited by an ascertainable standard relating to health, education, support, or maintenance. Upon the death of the surviving Grantor, he or she shall have a limited power to appoint the Credit Shelter Trust assets to any one or more of the class consisting of the

Grantors' joint descendants. Any assets not so appointed are to be divided into equal shares so as to provide one share for each living child of both Grantors and one share for the surviving issue collectively, per stirpes, of a deceased child of both Grantors.

You have requested the following rulings:

1. The contribution of jointly held assets to Trust will not constitute a gift by either Grantor A or Grantor B.
2. Payments to or for the benefit of either Grantor during the term of Trust will not be considered a gift, or, if so, the gift will qualify for the gift tax marital deduction.
3. The value of the entire Trust will be includible in the gross estate of the first Grantor to die.
4. On the death of the first deceasing Grantor, the surviving Grantor will be treated as making a gift that qualifies for the marital deduction, to the deceasing Grantor, with respect to the portion of the Trust property that is attributable to the surviving Grantor's contributions to the Trust.
5. To the extent that the Credit Shelter Trust is funded, any portion of the funds that will pass to the trust that originated with the surviving Grantor will not constitute a gift by such Grantor.
6. Future payments from the Credit Shelter Trust to beneficiaries other than the surviving Grantor will not constitute a gift from the surviving Grantor to those beneficiaries, and none of the assets attributable to the surviving Grantor held in the Credit Shelter Trust will be includible in his or her gross estate.

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

Section 2033 provides that the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2038(a) of the Code provides that the value of the gross estate includes the value of all property of which the decedent has at any time made a transfer (except where there has been a bona fide sale for adequate and full consideration in money or money's worth) by trust or otherwise where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property or where the decedent relinquished this power within the three year period ending on the date of the decedent's death.

Section 2041(a)(2) provides for the inclusion in the gross estate of any property to which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

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

Section 20.2041-1(b)(2) provides that the term power of appointment does not include powers reserved by the decedent to himself within the concepts of sections 2036 to 2038.

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 25.2511-2(b) provides that as to any property, or part 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. Section 25.2511-2(c) provides that a gift is incomplete in every instance in which a donor reserves the power to re-vest the beneficial title to the property to himself or herself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

Section 1014(a) provides that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from the decedent is the fair market value of the property at the date of the decedent's death (or alternate valuation date).

Section 1014(b)(9) provides that, for purposes of section 1014(a), property acquired from the decedent includes property acquired from the decedent by reason of death, form of ownership, or other conditions, including property acquired through the exercise or non-exercise of a power of appointment, if the property is required to be included in determining the value of the decedent's gross estate for federal estate tax purposes.

Section 1014(e), however, provides an exception to the general rule of section 1014(a). Under section 1014(e), if appreciated property was acquired by the decedent by gift during the one-year period ending on the date of the decedent's death and the property is acquired from the decedent by, or passes from the decedent to, the donor of such property, the basis of such property in the hands of the donor is the adjusted basis of the property in the hands of the decedent immediately before the death of the decedent.

RULING #1. Grantor A and Grantor B propose to transfer property held as tenants by the entireties to Trust. The Grantors will each retain the power to terminate Trust by written notice to the other Grantor. If Trust is terminated, the trustee will deliver the trust property to the Grantors in both their names as tenants in common. We conclude that the initial contribution of assets to Trust as proposed will not constitute a completed gift by either Grantor under section 25.2511-2(c), since each will retain the right, exercisable unilaterally, to revoke their respective transfer, and re-vest title in themselves.

RULING #2. If either Grantor exercises the right to terminate Trust, each Grantor will receive an undivided 50% interest in the remaining balance of the Trust corpus, as a tenant in common. Therefore, distributions of Trust property to either Grantor during their joint lives will constitute a gift by the other Grantor to the extent of 50% of the value of Trust assets distributed. The gift will qualify for the gift tax marital deduction under section 2523.

RULING #3 AND #4. Upon the death of the first Grantor to die, he or she will possess a testamentary power exercisable alone and in all events, to appoint part or all of the assets of the Trust, free of trust, to such deceased Grantor's estate or to or for the benefit of one or more persons or entities, in such proportions, outright, in trust, or otherwise as the deceased Grantor may direct in his or her will.

We conclude that, on the death of the first Grantor to die, the portion of the Trust property attributable to the property the deceased Grantor transferred to Trust will be includible in the deceased Grantor's gross estate under section 2038. The balance of the property attributable to the property the surviving Grantor contributed to Trust will be includible in the deceased Grantor's gross estate under section 2041.

Further, on the death of the first deceasing Grantor, the surviving Grantor is treated as relinquishing his or her dominion and control over the surviving Grantor's one-half interest in Trust. Accordingly, on the death of the first deceasing Grantor, the surviving Grantor will make a completed gift under section 2501 of the surviving Grantor's entire interest in Trust. This gift will qualify for the marital deduction under section 2523.

In addition, section 1014(e) will apply to any Trust property includible in the deceased Grantor's gross estate that is attributable to the surviving Grantor's contribution to Trust and that is acquired by the surviving Grantor, either directly or indirectly, pursuant to the deceased Grantor's exercise, or failure to exercise, the general power of appointment. See, H.R. Rept. 97-201, 97th Cong., 1st Sess. (July 24, 1981).

RULINGS #5 AND #6. As discussed above, the surviving Grantor is treated as making a completed gift of his or her interest in Trust on the death of the first deceasing Grantor. Also, as discussed above, a portion of the Trust property will be subject to inclusion in the deceased Grantor's gross estate under section 2038, and a portion will be subject to inclusion under section 2041. Accordingly, to the extent the Credit Shelter Trust is funded, property passing to the trust is treated as passing from the deceased Grantor, and not from the surviving Grantor.

Similarly, any future payments from the Credit Shelter Trust to beneficiaries other than the surviving Grantor will not constitute a gift from the surviving Grantor to those beneficiaries. None of the assets held in the Credit Shelter Trust will be includible in the surviving Grantor's gross estate, since the surviving Grantor will possess only a special power of appointment with respect to the assets in the Credit Shelter Trust.

Except as ruled above, we express or imply no opinion concerning the federal tax consequences of this transaction under the cited provisions of the Code or any other provision 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.

Sincerely yours,
Associate Chief Counsel
(Passthroughs and Special Industries)
By _____
George Masnik
Branch Chief
Branch 4

Attachment D**PLR 200210051**

200210051 12/10/2001

Code Sections 2033, 2038, 2041, 1014, 2501, 2523

- * Section 2033: Property in which decedent had an interest
- * Section 2038: Revocable transfers (included v. not included in gross estate)
- * Section 2041: Powers of appointment (included v. not included in gross estate)
- * Section 1014: Appreciated property acquired by decedent by gift within one year of death
- * Section 2501: Imposition of gift tax (imposed v. not imposed)
- * Section 2523: Gift to spouse (marital deduction allowed v. not allowed)

This is in response to the June 25, 2001 letter and other correspondence requesting rulings concerning the estate and gift tax consequences applicable to a trust.

You have requested the following rulings:

1. The value of the entire Trust will be includible in the gross estate of the first spouse to die.
2. On the death of the first spouse, the surviving spouse will be treated as making a gift that qualifies for the marital deduction to the deceased spouse with respect to the portion of the Trust property that is attributable to the surviving spouse's contributions to the Trust.
3. To the extent that the Family Trust is funded, any portion of the property that passes to the Family Trust that originated with the surviving spouse will not constitute a gift by such spouse.
4. Future payments from the Family Trust to beneficiaries other than the surviving spouse will not constitute a gift from the surviving spouse to these beneficiaries, and none of the property attributable to the surviving spouse held in the Family Trust will be includible in the estate of the surviving spouse.

The facts submitted are as follows:

Husband and Wife, collectively the Donors, created Trust on Date 1. Trust was amended and restated on Date 2. Trust is funded with assets that the Donors own as joint tenants with right of survivorship or in their individual capacity.

Article VI of Trust provides that the Trust may be altered or amended by either Donor with the consent of the trustee(s) while both Husband and Wife are living. Article VI further provides that during the joint lives of Husband and Wife, the Trust may be revoked by either of the Donors, in whole or in part, and the trustee(s) shall, if so directed, transfer and convey in accordance with the direction of the Donors, any or all of the Trust property then held. Upon the death of either Husband or Wife, the Trust will become irrevocable.

Article XVIII provides that during the joint lives of the Donors, the trustee(s) shall pay all of the net income to the Donors, unless the Donors request in writing that a portion of such income be added to the principal. Article XVIII further provides that the trustee(s) shall pay to the Donors, or in accordance with their instructions, so much of the principal as the Donors, or either Donor, may request.

Article XIX provides for division of Trust upon the death of the first of the Donors to die.

Article XIX, Paragraph A provides that an amount of Trust property equal to the maximum marital deduction allowable to the deceased spouse's gross estate reduced by the amount necessary to create the largest taxable estate, which after utilizing the unified credit, will result in no tax due is to be transferred to a Marital Trust. During the life of the surviving spouse, the trustee(s) shall pay the net income to the surviving spouse at least quarter-annually, and such amounts of principal as the surviving spouse may direct. Upon the death of the surviving spouse, the trustee(s) shall pay over any remaining principal to such persons that the surviving spouse shall appoint by his or her Last Will.

Article XIX, Paragraph B provides that the remaining balance of Trust property is to be placed in a Family Trust. During the life of the surviving spouse, the trustee(s) is to pay all the net income to the surviving spouse. The trustee(s) may also pay so much principal allocated to the Family Trust to or for the benefit of surviving spouse and the issue of both Donors, as the trustee(s) shall deem advisable for their health, support, maintenance, or education. Upon the death of the surviving spouse, the remaining income and principal in the Family Trust shall be distributed to the Donor's living issue per stirpes.

Article XXVII of Trust provides that the following persons will act as trustee(s) in the following order of succession: 1) Husband and Wife shall act as co-trustees during their joint lives, 2) the surviving Donor, 3) the living children of the Donors jointly or the survivor(s) of Donors' children, 4) trustee(s) chosen by a majority of the beneficiaries, and 5) additional or successor trustees may be appointed by the trustees then serving.

LAW AND ANALYSIS

RULING 1

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

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Section 2038(a) provides that the value of the gross estate includes the value of all property, to the extent of any interest therein, of which the decedent has at any time made a transfer (except in case of a bona fide sale for adequate and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property or where the decedent relinquished this power during the three-year period ending on the date of the decedent's death.

Section 2041(a)(2) provides that the value of the gross estate shall include the value of all property to which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

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

Section 20.2041-1(b)(2) of the Estate Tax Regulations provides that the term "power of appointment" does not include powers reserved by the decedent to himself within the concept of sections 2036 to 2038.

Section 1014(a) provides that the basis of property in the hands of a person acquiring the property from a decedent or to whom the property passed from a decedent is the fair market value of the property at the date of the decedent's death (or alternate valuation date).

Section 1014(b)(9) provides that, for purposes of section 1014(a), property acquired from the decedent includes property acquired from the decedent by reason of death, form of ownership, or other conditions, including property acquired through the exercise or non-exercise of a power of appointment, if the property is required to be included in determining the value of the decedent's gross estate for federal estate tax purposes.

Section 1014(e), however, provides an exception to the general rule of section 1014(a). Under section 1014(e), if appreciated property was acquired by the decedent by gift during the one-year period ending on the date of the decedent's death, and the property is acquired from the decedent by, or passes from the decedent to, the donor of such property, the basis of such property in the hands of the donor is the adjusted basis of the property in the hands of the decedent immediately before the death of the decedent.

In this case, each Donor holds a power to revoke the entire trust during their joint lifetime. Thus, the portion of the Trust property that the deceased Donor transferred to the Trust would be includible in the deceased Donor's gross estate under section 2038.

Either Donor has the power to direct the trustee(s) to pay so much of the principal as the Donor may request to himself or in any other manner in accordance with the Donor's instructions. This power is not limited to specific individuals, and can be exercised in favor of Donor, Donor's creditors, Donor's estate, and the creditors of Donor's estate. Thus, the portion of the Trust property that the surviving Donor transferred to the Trust would be includible in the deceased Donor's gross estate under section 2041.

In addition, section 1014(e) will apply to any Trust property includible in the deceased Donor's gross estate that is attributable to the surviving Donors contribution to Trust and that is acquired by the surviving Donor, either directly or indirectly, pursuant to the deceased Donor's exercise, or failure to exercise, the general power of appointment over the Trust property.

RULING 2

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 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part 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. Section 25.2511-2(c) provides that a gift is incomplete in every instance in which a donor reserves the power to re-vest the beneficial title to the property in himself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

In this case, the surviving Donor will relinquish dominion and control over his or her interests in the Trust property on the death of the first Donor. Accordingly, on the death of the first Donor, the surviving Donor will make a completed gift under section 2501 of the surviving Donor's entire interest in Trust. This gift will qualify for the marital deduction under section 2523.

RULING 3

As discussed above, the surviving Donor is treated as making a completed gift of his or her interest in Trust on the death of the first deceasing Donor. Also, as discussed above, a portion of Trust property will

be subject to inclusion in the deceased Donor's gross estate under section 2038, and a portion will be subject to inclusion under section 2041. Accordingly, to the extent the Family Trust is funded, property passing to the Family Trust is treated as passing from the deceased Donor, and not from the surviving Donor.

RULING 4

Any future payments from the Family Trust to beneficiaries other than the surviving Donor will not constitute a gift from the surviving Donor to those beneficiaries. None of the assets held in the Family Trust will be includible in the surviving Donors gross estate, since the surviving Donor will possess only an income interest with respect to the assets in the Family Trust.

In accordance with the Power of Attorney on file with this office, a copy of this letter is being sent to the taxpayer.

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.

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.

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

Sincerely Yours,
Lorraine E. Gardner
Assistant to Branch Chief, Branch 4
Office of the Associate Chief Counsel
(Passthroughs and Special Industries)

Attachment E**PLR 200403094**

200403094 9/24/2003

Code Sections 2041, 2501, 2523

- * Section 2041: Powers of appointment (included v. not included in gross estate)
- * Section 2501: Imposition of gift tax (imposed v. not imposed)
- * Section 2523: Gift to spouse (marital deduction allowed v. not allowed)

This responds to a letter dated October 8, 2002, and subsequent correspondence, requesting rulings regarding the federal estate and gift tax consequences of the proposed creation of a trust.

FACTS

The facts submitted and representations made are as follows. Husband will execute Trust and fund it with his own assets.

Under the terms of Trust, Article 3 provides that Husband reserves "personal rights," including the right to amend or revoke Trust and to withdraw income or principal. Husband's personal rights will be suspended while Husband is absent for reasons specified in Trust or while he is incompetent as determined under procedures specified in Trust.

If these personal rights are suspended, the trustees are authorized to make gifts from Trust to Wife and descendants or to trusts primarily for their benefit, but not in excess of the exclusion amounts under section 2503 of the Internal Revenue Code. If an individual eligible to receive gifts is acting as trustee, the aggregate gifts to that individual in any calendar year cannot exceed the greater of \$5,000 or 5% of the aggregate value of the trust estate.

During Husband's life, the trustees will pay to Husband any income or principal they deem necessary or advisable for his best interests. If Husband's personal rights are suspended, the trustees will also pay any income or principal the trustees deem necessary or advisable for the health, education, support, and maintenance of Husband's descendants and of Wife.

Article 4.5 provides:

At my wife's death, if I am still living, I give to my wife a testamentary general power of appointment, exercisable alone and in all events to appoint part of the assets of the Trust estate, having a value equal to (I) the amount of my wife's remaining applicable exclusion amount less (ii) the value of my wife's taxable estate determined by excluding the amount of those assets subject to this power, free of trust to my deceased wife's estate or to or for the benefit of one or more persons or entities, in such proportions, outright, in trust, or otherwise as my wife may direct in her Will.

The trust assets distributed in satisfaction of Wife's exercise of this power will be selected by the trustee and valued as of Wife's date of death. Trust further provides that, at Husband's death, if Wife survives Husband, after the payment of taxes, administration expenses, and other costs, the trustees will distribute to Wife as the "marital gift" a fraction (determined under a formula) of the residue of Trust. The balance of the residue will be held as Husband's Family Trust. Any portion of the marital gift that Wife disclaims will be held as part of Husband's Family Trust. If Wife does not survive Husband, the entire residue will be held as Husband's Family Trust.

During Wife's life, Wife will receive any of the income and principal of Husband's Family Trust that the trustees in their discretion deem necessary or advisable for her health, education, support, and maintenance. The trustees may also pay any income and principal they deem necessary or advisable for the health, education, support, and maintenance of Husband's descendants. If Husband's Family Trust holds Husband's residence, Wife will have the exclusive use of that residence for life or until the trustees determine that the residence is no longer needed for such purpose. No rent or other costs will be charged to Wife, and the trustees will pay all of the expenses of maintaining the residence. The trustees may not sell the residence without Wife's consent unless she is disabled. If the residence is sold, the trustees may purchase or build a replacement residence which will be subject to the provisions applicable to the residence that was sold.

Wife is granted a testamentary special power to appoint the assets of Husband's Family Trust remaining at Wife's death to any of Husband's descendants. Upon the death of the survivor of Wife and Husband, any assets of Husband's Family Trust that Wife does not appoint will be distributed to Husband's then living descendants, per stirpes, or one-half to Wife's heirs and one-half to Husband's heirs determined under state law as if Wife and Husband had each died on that date as residents of State.

Husband is named as the trustee of all trusts to be established under Trust until his death or disability with two individuals named as successors.

Wife plans to execute Will. Article 2.1 of Will makes gifts of Wife's tangible personality.

Article 2.2 of Will provides:

I exercise in favor of my estate the power of appointment given to me by section 4.5 of the Trust created by [Husband] dated [____], and direct that assets having a value equal to (i) the amount of my remaining applicable exclusion amount less (ii) the value of my taxable estate, determined by excluding the amount of those assets subject to this power, be distributed to my estate as soon after my death as possible.

Article 2.3 of Will provides that if Husband survives Wife, Husband will receive a fraction of Wife's residuary estate, after the payment of estate taxes, debts, and expenses, determined as follows:

The numerator of the fraction will be the smallest pecuniary amount that, if given outright to [Husband], would eliminate or reduce to the lowest possible sum the state and federal estate tax liability of (Wife's) estate. This amount will be calculated by taking into account [Wife's] applicable exclusion amount and all other tax credits, deductions, and other preferences allowed to [Wife's] estate.

The balance of the residuary estate will be held as a separate trust (Wife's Family Trust). If Husband does not survive Wife, the entire residuary estate will be held as the Family Trust. Under Article 3 of Will, any part of the gift to Husband that he disclaims will become part of Wife's Family Trust.

Article 4.1 of Will provides that, during Husband's life, Husband will receive any of the income and principal of Wife's Family Trust that the trustees deem necessary or advisable for his health, education, support, and maintenance. The trustees may also pay any income and principal they deem necessary or advisable for the health, education, support, and maintenance of Husband's descendants. If Wife's Family Trust holds Wife's residence, Husband will have the exclusive use of that residence for life or until the trustees determine that the residence is no longer needed for such purpose. No rent or other costs will be charged to Husband, and the trustees will pay all of the expenses of maintaining the residence. The trustees may not sell the residence without Husband's consent unless he is disabled. If the residence is sold, the trustees may purchase or build a replacement residence to which the provisions of article 4.1 will apply.

Under article 4.1(d), Husband is granted a testamentary special power to appoint the assets of Wife's Family Trust remaining at his death to any of his descendants.

Under article 4.2, upon the death of the survivor of Wife and Husband, any assets of Wife's Family Trust that Husband does not appoint will be distributed to Wife's then living descendants, per stirpes, or one-half to Wife's heirs and one-half to Husband's heirs determined under state law as if Wife and Husband had each died on that date as residents of State.

Husband is named as the trustee of all trusts to be established under Will with two individuals named as successors.

You have requested the following rulings:

1. On the death of Wife during Husband's lifetime, if Wife exercises the power of appointment granted her under article 4.5 of Trust, Husband will be treated as making a gift that qualifies for the federal gift tax marital deduction to Wife with respect to that portion of Trust appointed by Wife.
2. If Wife predeceases Husband, of the assets in Trust, the value of Trust assets over which Wife holds a power of appointment under article 4.5 of Trust will be included in Wife's gross estate.
3. Any assets that originated in Trust and that pass to or from Wife's Family Trust established under the Will will not constitute a gift from Husband to the other beneficiaries of Wife's Family Trust.
4. Any assets that originated in Trust and that pass to Wife's Family Trust established under the Will will not be included in Husband's gross estate.

LAW AND ANALYSIS

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

Section 2033 provides that the value of the gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

Under section 2036(a), the value of the gross estate includes the value of all property to the extent of any interest in the property which the decedent has transferred without receiving adequate and full consideration in money or in money's worth, by trust or otherwise, retaining for life either (1) the possession or enjoyment of, or the right to income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

Section 2038(a) provides that the value of the gross estate includes the value of all property of which the decedent has at any time made a transfer (except where there has been a bona fide sale for adequate and full consideration in money or money's worth, by trust or otherwise, where the enjoyment thereof was subject at the date of death to any change through the exercise of a power by the decedent to alter, amend, revoke, or terminate the interest in the property, or where the decedent relinquished this power within the three-year period ending on the date of the decedent's death.

Section 2041(a)(2) provides for the inclusion in the gross estate of any property over which the decedent possesses, at the time of his death, a general power of appointment created after October 21, 1942.

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

Section 20.2041-1(b)(2) of the Estate Tax Regulations provides that the term A general power of appointment@ does not include powers reserved by the decedent to himself within the concepts of sections 2036 to 2038.

Section 20.2041 (c)(1) provides that a power of appointment is not a general power if by its terms it is either (a) exercisable only in favor of one or more designated persons or classes other than the decedent or his creditors, or the decedent's estate or the creditors of 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.

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 25.2511-2(b) of the Gift Tax Regulations provides that as to any property, or part 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. Section 25.2511-2(c) provides that a gift is incomplete in every instance in which a donor reserves the power to re-vest the beneficial title to the property to himself or herself.

Section 2523 provides that where a donor transfers during the calendar year by gift an interest in property to a donee who at the time of the gift is the donor's spouse, there shall be allowed as a deduction in computing taxable gifts for the calendar year an amount with respect to such interest equal to its value.

RULINGS #1 AND #2:

Husband proposes to execute Trust and transfer to it property held in Husband's separate name. Husband will retain the power to amend or revoke Trust and to withdraw assets from Trust (unless these powers are suspended due to Husband's incapacity or absence under limited circumstances) until his death. Thus, under section 25.2511-1(c), Husband's initial contribution of assets to Trust will not be a completed gift, because he will retain the right to withdraw assets and to revoke his transfer and re-vest title in himself.

Under article 4.5 of Trust, if Wife predeceases Husband, at her death Wife will possess a testamentary general power to appoint to Wife's estate or to or for the benefit of one or more persons or entities, Trust assets equal in value to Wife's remaining applicable exclusion amount less the value of Wife's taxable estate determined as if she did not possess this power. Accordingly, we conclude that, if Wife predeceases Husband, the value of Trust assets over which Wife holds a power of appointment under article 4.5 of Trust will be included in Wife's gross estate.

Further, on the death of Wife during Husband's lifetime, if Wife exercises that power of appointment, Husband is treated as relinquishing his dominion and control over the property subject to that power of appointment. Accordingly, on the death of Wife during Husband's lifetime, if Wife exercises the power of appointment granted her under article 4.5 of Trust, Husband will make a completed gift under section 2501. Husband's gift will qualify for the federal gift tax marital deduction under section 2523.

RULINGS#3 AND #4:

Wife plans to execute Will, in which, if she predeceases Husband, she will exercise to the fullest extent the power granted under article 4.5 of Trust. Under the terms of Will, if Husband survives Wife, he will receive an outright payment of a fractional share of her residuary estate. The balance of the residuary estate will be held in Wife's Family Trust. The trustee will pay to Husband and to Husband's descendants any amount of income and principal of Wife's Family Trust that the trustees deem necessary or advisable for the health, education, support, and maintenance of Husband and his descendants. Further, if the trust holds Wife's residence, during his life, Husband will have the exclusive use of that residence, and Wife's Family Trust will pay all costs associated with that use. Husband is named as the initial trustee of Wife's Family Trust. Husband will have a testamentary special power to appoint the assets of Wife's Family Trust among his then living descendants. Any assets that he fails to appoint will be distributed to Wife's then living descendants, per stirpes, or one-half to Wife's heirs and one-half to Husband's heirs determined under State law as if Wife and Husband had each died on that date as residents of State.

Husband will be treated as making a completed gift to Wife of that portion of Trust appointed by Wife, if Wife predeceases Husband. Thus, at her death, Wife will be treated as the owner of the Trust assets she appoints. Under article 2.2 of Will, the Trust assets Wife appoints will be distributed to Wife's estate and will pass under Will. Under the terms of Will, those assets may be among the assets in Wife's residuary estate used to fund Wife's Family Trust. Accordingly, we conclude that any assets that originated in Trust and that pass to or from Wife's Family Trust established under the Will will not constitute a gift from Husband to the other beneficiaries of Wife's Family Trust.

Under the terms of Wife's Family Trust, in his role as either a beneficiary or a trustee, Husband will not have a general power under section 2041, because distributions of income and principal from Wife's Family Trust are subject to an ascertainable standard. Further, any interest Husband might have under Wife's Family Trust in a residence in which he may have had an ownership interest would not cause that residence to be includible in his gross estate under section 2036. Accordingly, we conclude that any assets that originated in Trust and that pass to Wife's Family Trust established under the Will will not be included in Husband's gross estate.

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.

The rulings contained in this letter are based upon information and representations submitted by the trustee 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.

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

Sincerely yours,

Lorraine F. Gardner
Senior Counsel, Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special Industries)

Attachment F**Sample Letter as The Joint Declaration of Trust: Advantages and Dangers (non-taxable transfer)**
Sample provided by Janet Rae Montgomery, Esq.

Where the total value of all assets held by a married couple does not exceed twice the estate tax exemption (a total of \$3,000,000 at the current exemption level), clients often request that a single "joint" Declaration of Trust be used in their estate plan, with both husband and wife acting as co-trustees.

The advantages to the Joint Trust are:

1. A Joint Trust is easy to fund: all assets (except tax advantaged assets such as retirement plan accounts, IRA's, etc.) are transferred to one trust: there are no allocation decisions to be made, and no splitting of assets.
2. Both clients act as co-trustees and exercise generally the same type of joint control that they had over joint tenancy assets.
3. The Joint Trust can include provisions that allow either client to act alone.
4. At the first death, the "Family" or "Bypass" trust is fully funded with the estate tax exemption amount, thus insuring that the full exemption will be used at that time.
5. Assets in excess of the exemption amount are allocated to the Marital Trust, which benefits the surviving spouse alone during life.
6. After the death of the first to die, the surviving spouse can act as sole trustee, and can be a discretionary beneficiary under the Family Trust, with the Family Trust assets still being excluded from the survivor's estate when the survivor dies.

The disadvantages to the Joint Trust are:

1. Creditor protection features are lost. Often, one spouse will have greater exposure to creditor's claims because of that spouse's occupation, or otherwise. Assets held in the other spouse's name (or in the other spouse's Declaration of Trust) ordinarily will not be exposed to these creditors. Assets held in a joint Declaration of Trust will be exposed.
2. Only assets "contributed by" the first spouse to die are eligible for income tax basis step-up under section 1014 of the Internal Revenue Code; assets contributed by the surviving spouse, which are then acquired (directly or indirectly) by the surviving spouse after the first death, do not receive an income tax basis adjustment.
3. A "paper trail" should be established when the trust is funded, to show which assets came from which spouse.
4. Ongoing accounting of the trust asset should be preserved, in order to deal with changes in investments: only assets which can be traced back to the contribution made by the first spouse to die can get the basis step-up when the first spouse dies.
5. Property with a "separate" status for marital law purposes may lose this status (or it may be difficult to prove that the "separate" status was maintained) in the event property is to be divided in the event of a divorce.

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6. Without careful and complex drafting, assets contributed by the survivor may get NO BASIS STEP-UP at either death: basis step-up may not be allowed at the first to die if it cannot be shown that assets were contributed by the first decedent. Basis step-up will NOT be allowed for assets at the survivor's death to the extent those assets were allocated to the Family Trust.
 7. Finally, the tax advantages in using a Joint Declarations of Trust have been only informally approved, through two IRS Private Letter Rulings. This type of ruling is not formal precedent for anyone but the taxpayer who submitted the request for the Ruling. While there is general consensus that the result of the Rulings can be extended to other taxpayers, there is no legal precedent for doing so. In addition, the IRS can (and often does) reverse the position it has taken in a Private Letter Ruling.