

Facts

The facts submitted and representations made are as follows:

On Date 1, Husband and Wife opened a joint account with rights of survivorship (Brokerage Account). Each spouse contributed equally to the Brokerage Account during their joint lives. Each spouse could unilaterally withdraw his or her contribution and direct investment and distribution of assets from the account.

On Date 2, Husband died. At Husband's date of death, the Brokerage Account held unit investment trusts, corporate bonds, municipal bonds, certificates of deposit, and approximately \$g in cash.

Shortly after Husband's death, Wife's stockbroker advised her that the Brokerage Account could not be held under the social security number of a deceased individual. Accordingly, on Date 3, approximately one month after Husband's death, Wife directed the stockbroker to transfer title in the Brokerage Account to Wife's name.

During the eight months after Husband's death, Wife directed the stockbroker to sell certain securities in the Brokerage Account and to purchase other securities for the account. During this period, Wife also withdrew certain amounts of cash from the account.

Approximately six months after Husband's death, Wife engaged a law firm to review Husband and Wife's estate plan. At the law firm's advice, on Date 4, in the ninth month after Husband's death, Wife executed a written disclaimer in which Wife disclaimed "her beneficial survivorship interest in [Husband's] share in [the Brokerage Account]." The disclaimed interest represented Husband's share of the Brokerage Account less the assets in that share (and earnings on those assets since Husband's death) in which Wife accepted benefits. The disclaimer was recorded on Date 5, within nine months of Husband's death and a copy was sent to the stock broker on Date 6.

Under Applicable State Law 1, as a result of Wife's disclaimer, Wife is treated as predeceasing Husband with respect to the disclaimed property. Consequently, the disclaimed property is treated as passing to Husband from the Brokerage Account by right of survivorship. After the disclaimer, on Dates 6 and 7, the law firm directed the stock broker to establish and fund three accounts, the TIC Account, the Wife's Account, and the Estate Account. The TIC Account held assets that could not be evenly divided. This account did not include any proceeds from the securities sold in the eight months following Husband's death or any of the securities purchased during that period. Wife and Husband's estate held the TIC Account as tenants in common. The remaining assets in the Brokerage Account were divided between the Wife's Account, held in Wife's name, and the Estate Account, held in the name of Husband's estate, as follows. The Wife's Account held assets attributable to Wife's contributions to the Brokerage Account and also held assets attributable to Husband's contributions with respect to

which Wife directed sales or purchases after Husband's death; that is, any proceeds from the securities sold in the eight months following Husband's death as well as the securities purchased during that period. The Estate Account held assets attributable to Husband's contributions with respect to which Wife made no withdrawals and directed no sales or purchases after Husband's death. Each of the three accounts also held the earnings from the date of Husband's death on the assets placed in each account. The Estate Account and the estate's one-half interest in the TIC Account represent the disclaimed interest.

Under Husband's Will, his residuary estate, including the disclaimed property, i.e., the assets held in the Estate Account and the estate's one-half interest in the TIC Account, (after the payment of debts, expenses, and taxes and a bequest of tangible personalty) passed to the trustee under Husband's revocable trust agreement. That agreement provides for the establishment of a credit shelter trust funded with the largest amount needed to permit Husband's estate to use in full any estate tax unified credit. The balance of Husband's residuary estate passes to a marital trust. Under the terms of the credit shelter trust, the net income is to be paid to Wife at least quarterly for life. During Wife's life, the trustee must also distribute to any among Wife and Husband's children such amounts of principal as the trustee deems necessary or advisable for such beneficiaries' health, education, maintenance, or support. Wife has the noncumulative right during her life to withdraw annually principal equal to the greater of \$5,000 or 5 percent of the market value of the principal on the first day of the calendar year of the withdrawal. At Wife's death, the remaining assets of the credit shelter trust will be combined with the remaining assets of the marital trust and distributed in specified amounts to Husband's sons or their issue. Wife and Husband's two sons are named as cotrustees of any trusts created after Husband's death. Wife may never serve as the sole trustee. At Husband's death, the value of his residuary estate was only sufficient to fund the credit shelter trust. The marital trust was not established. Wife died on Date 8.

Under Applicable State Law 2, an individual who is both a trustee and beneficiary of a trust cannot participate in trustee decisions about making any distributions to that individual as beneficiary of the trust.

You have requested a ruling that Wife's disclaimer of her survivorship interest in the Brokerage Account is a qualified disclaimer under § 2518.

Law and Analysis

Section 2046 provides that disclaimers of property interests passing upon death are treated as provided under § 2518. Section 2518 provides that, if a person makes a qualified disclaimer with respect to any interest in property, the disclaimed interest is treated as if it had never been transferred to the person making the qualified disclaimer for purposes of the federal estate, gift, and generation-skipping transfer tax provisions.

Under § 2518(b), the term “qualified disclaimer” means an irrevocable and unqualified refusal by a person to accept an interest in property, but only if --

- 1) the refusal is in writing,
- 2) the writing is received by the transferor of the interest or his legal representative no later than 9 months after the date on which the transfer creating the interest in the person making the disclaimer is made, or the date on which the person making the disclaimer attains age 21,
- 3) the person making the disclaimer has not accepted the interest or any of its benefits, and
- 4) as a result of the refusal, the interest passes without any direction on the part of the person making the disclaimer and passes either to the decedent's spouse or to a person other than the person making the disclaimer.

Section 25.2518-2(c)(4)(iii) of the Gift Tax Regulations provides that in the case of a transfer to a joint bank, brokerage, or other investment account (e.g., an account held at a mutual fund), if a transferor may unilaterally regain the transferor's own contributions to the account without the consent of the other co-tenant, such that the transfer is not a completed gift under § 25.2511-1(h)(4), the transfer creating the survivor's interest in the decedent's share of the account occurs on the death of the deceased cotenant. Accordingly, if a surviving joint tenant desires to make a qualified disclaimer with respect to funds contributed by a deceased cotenant, the disclaimer must be made within 9 months of the cotenant's death. The surviving joint tenant may not disclaim any portion of the joint account attributable to consideration furnished by that surviving joint tenant.

Section 25.2518-2(d)(1) provides that a qualified disclaimer of property cannot be made with respect to an interest in property if the disclaimant has accepted the interest or any of its benefits, expressly or impliedly, prior to making the disclaimer. Acceptance is manifested by an affirmative act which is consistent with ownership of the interest in property. Acts indicative of acceptance include using the property or the interest in property; accepting income from the property; and directing others to act with respect to the property or interest in property. Merely taking delivery of an instrument of title, without more, does not constitute acceptance. Further, a disclaimant is not considered to have accepted property merely because under applicable local law title to the property vests immediately in the disclaimant upon the death of a decedent. The acceptance of one interest in property will not, by itself, constitute an acceptance of any other separate interests created by the transferor and held by the disclaimant in the same property. See Example 6 of § 25.2518-2(d)(4).

Section 25.2518-2(d)(2) provides that, if a beneficiary who disclaims an interest in property is also a fiduciary, actions taken by such person in the exercise of fiduciary

powers to preserve or maintain the disclaimed property shall not be treated as acceptance of such property or any of its benefits. Thus, an executor who is also a beneficiary may direct the harvesting of a crop or the general maintenance of a home. A fiduciary, however, cannot retain a wholly discretionary power to direct the enjoyment of the disclaimed interest. The regulation refers to § 25.2518-2(e) for rules relating to the effect of directing the redistribution of disclaimed property.

Section 25.2518-2(e)(1) provides that a disclaimer is not a qualified disclaimer unless the disclaimed interest passes without any direction on the part of the disclaimant to a person other than the disclaimant (except as provided in paragraph (e)(2)). The requirements of a qualified disclaimer under § 2518 are not satisfied if -- (i) The disclaimant, either alone or in conjunction with another, directs the redistribution or transfer of the property or interest in property to another person (or has the power to direct the redistribution or transfer of the property or interest in property to another person unless such power is limited by an ascertainable standard); or (ii) The disclaimed property or interest in property passes to or for the benefit of the disclaimant as a result of the disclaimer (except as provided in paragraph (e)(2)).

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

Under § 25.2518-3(a)(1)(i), the disclaimer of all or an undivided portion of any separate interest in property may be a qualified disclaimer even if the disclaimant has another interest in the same property. In general, each interest in property that is separately created by the transferor is treated as a separate interest. Section 25.2518-3(a)(1)(ii) provides that a disclaimant shall be treated as making a qualified disclaimer of a separate interest in property if the disclaimer relates to severable property and the disclaimant makes a disclaimer which would be a qualified disclaimer if such property were the only property in which the disclaimant had an interest. Severable property is property which can be divided into separate parts each of which, after severance, maintains a complete and independent existence. For example, a legatee of shares of corporate stock may accept some shares of the stock and make a qualified disclaimer of the remaining shares.

In the present case, Husband and Wife each contributed equally to the Brokerage Account prior to Husband's death. Each spouse could unilaterally withdraw his or her contributions from the Brokerage Account at any time prior to his or her death. Thus, each spouse's contributions to the account were incomplete gifts until Husband's death. Consequently, under § 2518-2(c)(4)(iii), the transfer creating Wife's survivorship

interest in Husband's share of the Brokerage Account occurred at Husband's death; and under § 2518(a), Wife had 9 months after his death to disclaim any part of her survivorship interest in Husband's share.

Within nine months after Husband's death, Wife executed a written disclaimer in which she disclaimed her survivorship interest in Husband's share of the Brokerage Account. As a result of Wife's disclaimer, Wife is treated as predeceasing Husband with respect to the disclaimed property which, consequently, is treated as passing to Husband by right of survivorship from the Brokerage Account. After the disclaimer, the disclaimed assets (and the earnings on those assets since Husband's death) were placed in the Estate Account and the estate's share of the TIC Account. The following assets (and the earnings on the assets since Husband's death) were segregated from the disclaimed property and held in Wife's Account or in Wife's share of the TIC Account: assets attributable to Wife's contributions to the Brokerage Account; any cash proceeds obtained from the sale of certain securities directed by Wife and not used to obtain more securities; and securities that Wife directed the broker to purchase in the eight months following Husband's death. See, § 25.2518-2(c)(4)(iii) and § 25.2518-2(d)(1).

After Husband's death, acting on advice from her stockbroker, Wife transferred title in the Brokerage Account to her name. This action did not result in an acceptance by the Wife of Husband's share in the Brokerage Account because under § 2518-2(d)(1), the mere transfer of title of the Brokerage Account to Wife's name is not treated as an acceptance by Wife of Husband's interest in the Brokerage Account or as benefiting Wife for purposes of § 2518(b)(3).

Under § 25.2518-3(a)(1)(ii), Wife's disclaimer of the assets held in the Estate Account and the estate's one-half share of the TIC Account may be a qualified disclaimer even though Wife withdrew cash from the account during the eight months following Husband's death. The cash and securities are severable assets. Wife may accept and benefit from the cash withdrawals and make a qualified disclaimer with respect to the remaining assets in the Brokerage Account. See, § 25.2518-3(d), Example 17.

Under § 25.2518-2(d)(1), Wife is treated as accepting the proceeds obtained from the sale of the securities that she directed the stockbroker to sell and is treated as accepting or benefiting from the securities held in the Brokerage Account that she directed the stockbroker to purchase during the eight months following Husband's death. These assets were transferred to Wife's Account. Accordingly, Wife may not make a qualified disclaimer of such property. Wife did not disclaim these assets. Further, as stated above, the securities are severable assets. Wife may make a qualified disclaimer with respect to certain securities while accepting the benefit of other securities in the account. See § 25.2518-3(a)(1)(ii).

Under Applicable State Law 1, as a result of Wife's disclaimer, Wife is treated as predeceasing Husband with respect to the disclaimed property. Consequently, the disclaimed property is treated as passing to Husband from the Brokerage Account by right of survivorship. Therefore, the disclaimed assets in the Estate Account and the disclaimed one-half of the TIC Account passed under the terms of Husband's Will into Husband's residuary estate and then, under Husband's revocable trust agreement to a credit shelter trust. Thus, for purposes of § 25.2518-2(e)(1), the disclaimed property passed to the credit shelter trust without any direction by Wife.

During Wife's life, the trustee of the credit shelter trust was to pay her the entire net income at least quarterly and was to distribute to any among Wife and Husband's children such amounts of principal as the trustee deemed necessary for a beneficiary's health, education, maintenance, or support. During her life, Wife also had a noncumulative "5 or 5" power over the trust principal. Although Wife held the power as cotrustee to distribute principal from the credit shelter trust to Husband's children, this power was limited by an ascertainable standard. For purposes of § 25.2518-2(e)(1) and (2), Wife is not treated as directing the beneficial enjoyment of the disclaimed property due to her interests as a beneficiary of the credit shelter trust or her power as cotrustee of that trust. See, Examples 4, 5, 6, and 7 of § 25.2518-2(e)(5).

We note that, under Applicable State Law 2, although named as cotrustee, Wife could not participate as a trustee in making any distributions to herself as beneficiary of the credit shelter trust and, thus, for purposes of § 25.2518-2(d)(2), could not be deemed to have accepted any part of the disclaimed property in her role as cotrustee.

Accordingly, we rule that Wife's disclaimer of her survivorship interest in the Brokerage Account, i.e., the assets held in the Estate Account and the estate's one-half share in the TIC Account, is a qualified disclaimer under § 2518.

Except as specifically ruled herein, we express no opinion on the federal tax consequences of the disclaimer under the cited provisions or under any other provisions of the Code.

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

Sincerely yours,

Lorraine E. Gardner
Senior Counsel, Branch 4
Office of Associate Chief Counsel
(Passthroughs and Special
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Enclosure
Copy for section 6110 purposes

cc: