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THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

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July 1, 2010

Via Electronic Delivery (george.bostick@do.treas.gov)

George Bostick, Esq.
Benefits Tax Counsel
Office of Tax Policy at the Department of Treasury
1500 Pennsylvania Av, NW Room 3044
Washington, DC 20220

Re: Successor Beneficiaries of Trusts (Reg. § 1.401(a)(9)-5, A-7(b) and (c)); Spousal Rollovers When an Estate or Trust is Designated (IRC §§ 402(c) and 408(d))

Dear Mr. Bostick,

I am writing on behalf of The American College of Trust and Estate Counsel ("ACTEC"), a professional association of more than 2,500 lawyers skilled and experienced in estate planning and administration and dedicated to the improvement of the laws in these areas. Members of ACTEC are elected by their peers on the basis of professional reputation and ability in the field of trusts and estates and on the basis of having made substantial contributions to these fields through lecturing, writing, teaching, and bar activities. Fellows of ACTEC have extensive experience in rendering advice to taxpayers on matter of federal taxes, with a focus and estate and gift tax planning and compliance. ACTEC offers technical comments about the law and its effective administration, but does not take positions on matters of policy or political objectives.

We request that the Treasury identify as priorities for guidance two important areas relating to employee benefits, as follows:

1. Authority that provides guidance as to when a beneficiary is disregarded as a "successor beneficiary" in determining the measuring life of a "see-through trust" under the minimum distribution rules (Reg. § 1.401(a)(9)-5, A-7(b) and (c)); and

2. Authority that confirms the result of numerous private letter rulings that allow a spousal rollover when a revocable trust or estate is the named beneficiary and that clarifies the circumstances in which spousal rollover will be permitted (IRC §§ 402(c) and 408(d)(3)).

Successor Beneficiaries of Trusts. Reg. § 1.401(a)(9)-4, A-5 provides that if a trust is named as beneficiary and certain threshold requirements are satisfied, the beneficiaries of the trust (and not the trust itself) will be treated as having been designated for purposes of determining the distribution period under IRC § 401(a)(9).

Reg. § 1.401(a)(9)-5, A-7 provides that "contingent beneficiaries" of such a trust must be counted among the trust's beneficiaries for purposes of determining the distribution period, but "successor beneficiaries" will be disregarded. The distinction between the two is not articulated in the Regulations apart from two examples. From one example (Reg. Section 1.401(a)(9)-5, A-7, Ex. 2), one may extrapolate that remaindermen of a so-called conduit trust lasting for the lifetime of the conduit beneficiary will be treated as successor beneficiaries.[1] The second example, (Reg. Section 1.401(a)(9)-5, A-7, Ex. 1) deals with a non-conduit trust but is of limited utility since it describes a trust which in the real world would not exist.

Non-conduit trusts are widely used as estate planning vehicles for time-honored reasons having nothing to do with income tax planning. The lack of guidance on the contingent beneficiary and successor beneficiary concepts since 2002, when the Regulations were issued, has complicated standard planning for millions of plan participants and IRA owners and introduced unnecessary uncertainty. These issues continue after the death of the participant or IRA owner who has named a trust as beneficiary, when a decision needs to be made as to the applicable payout period.

[1] A conduit trust is one under which all plan or IRA distributions are required to be paid out currently as opposed to accumulated in the trust.

The ad hoc process of private letter rulings is an expensive and, for most taxpayers, unfeasible way of obtaining certainty.

We previously requested guidance on this issue in a letter to the Internal Revenue Service on March 27, 2003, a copy of which is attached. No response was received. Our letter included six examples of common fact patterns and suggested results for each. From the private letter rulings issued since 2003 it appears that the Service is applying what we call in the letter the "snapshot approach" to the fact patterns described in Examples 1 through 3. We are entirely comfortable with this result, but believe that it needs to be stated in a published ruling upon which taxpayers can rely.

Private letter rulings issued since 2003 also indicate that the Service is not applying the rule that we suggest in the case of a non-conduit minor's trust such as described in Example 4. Instead the Service is treating as a contingent beneficiary the person or persons who will take the trust property if the minor dies prior to attaining the age at which the trust will terminate in favor of the minor. We continue to be concerned that this position gives rise to arbitrary and unwarranted results for the reasons stated in the March 27, 2003 letter. However, whatever the position of the Service may be with respect to a minor's trust, we believe that it should be stated in a published ruling since the minor's trust is one of the most frequently used trusts.

Spousal Rollovers When Estate or Trust is Named. Spousal rollovers of qualified retirement plans and IRAs are allowed under IRC §§ 402(c) and 408(d). Probably hundreds of private letter rulings have been issued going back to the late 1980s which allow a spousal rollover when an estate or trust is named as beneficiary. In the vast majority of these rulings, the spouse as executor, trustee and/or beneficiary may unilaterally effect the rollover, and this appears to be key to the result reached. The preamble to the final Regulations, however, suggests a broader approach.

The basic fact pattern found in the private letter rulings arises frequently. Therefore, we believe that a published ruling is needed. As things now stand, after the death of a plan participant or IRA owner, the spouse will frequently be forced by the plan administrator or IRA sponsor to obtain his or her own ruling, or will simply feel compelled to do so because private letter rulings may not be relied on, in either case at considerable cost and inconvenience.

We requested a published ruling on this issue as well in a letter to the Internal Revenue Service dated April 15, 2009, a copy of which is attached. The letter addresses the issue in greater detail and also requests clarification in a published ruling of the circumstances in which a spousal rollover will be permitted: in particular, whether unilateral control by the spouse is required.

Proposed Resolution. We respectfully request that a published Revenue Ruling or similar pronouncement be issued in each of these two areas. Millions of individual taxpayers, plan administrators and IRA sponsors would benefit from such guidance, as would the Service itself in the resulting reduction in private letter ruling requests. Our Employee Benefits Committee has devoted considerable study to these issues, and would be pleased to work with you in any way that you felt was helpful.

Principal responsibility for preparation of this letter was exercised by Kathleen R. Sherby of Bryan Cave LLP, 211 N. Broadway, St. Louis, Missouri (314) 259-2000; krsherby@BryanCave.com), Secretary of ACTEC and the chair of ACTEC's Employee Benefits in Estate Planning Committee; and Virginia F. Coleman of Ropes & Gray LLP, One International Place, Boston, Massachusetts 02110-2624 (617) 951-7213; Virginia.Coleman@ropesgray.com) whom you should feel free to contact at any time.

We appreciate your attention to this request.

Very truly yours,

Karen M. Moore

Karen M. Moore
President

KMM:ls
attachments
cc: Joseph H. Grant, Internal Revenue Service
Director, Employee Plans

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THE AMERICAN COLLEGE OF TRUST AND ESTATE COUNSEL

Please Address Reply to:

April 15, 2009

Via Hand Delivery

Henry S. Schneiderman
Assistant Chief Counsel (field Service)
Internal Revenue Service
Attn: CC:PA:LPD:PR (Notice 2008-47)
Room 5203
P. O. Box 7604
Ben Franklin Station
Washington, D.C. 20044

Re: Notice 2008-47: Request for Revenue Ruling Regarding Spousal Rollovers – IRC Sections 402(c) and 408(d)(3)

Dear Mr. Schneiderman:

I am writing on behalf of The American College of Trust and Estate Counsel (ACTEC), a professional association of more than 2,500 lawyers skilled and experienced in estate planning and administration and dedicated to the improvement of the law as it affects estate planning and administration.

We request that the Internal Revenue Service (IRS) issue a Revenue Ruling or similar pronouncement upon which all taxpayers may rely dealing with spousal rollovers of qualified retirement plan accounts and IRAs. The issuance of such a ruling would be in the public interest.

<u>Background:</u>

The qualified retirement plan and individual retirement account (IRA) have become some of the most significant assets in a person's estate. The income tax treatment of these assets affects a very large number of taxpayers. One of the most important federal income tax provisions relating to these assets involves the IRA "spousal rollover" provided for under Internal Revenue Code (Code) sections 402(c) and 408(d)(3)(A).

Under these provisions, eligible distributions from a qualified retirement plan or IRA that are paid into an IRA for the benefit of the surviving spouse of the qualified retirement plan participant or IRA owner within sixty days of the distribution date (a "spousal rollover") are not subject to inclusion in gross income under Code section 72. Such spousal rollovers are very important, because they allow the surviving spouse to take distributions over his or her own life expectancy, redetermined annually using the Uniform Table, and also to name his or her own beneficiary, who in turn can take distributions over that beneficiary's life expectancy.

The preamble to the Final Income Tax Regulations promulgated under Code section 401(a) (9) (the "Preamble Language") states as follows with respect to the circumstances in which a spousal rollover is available:

> If [a surviving] spouse actually receives a distribution from the IRA, the spouse is permitted to roll that distribution over within 60 days into an IRA in the spouse's own name to the extent that the distribution is not a required distribution, regardless of whether or not the spouse is the sole beneficiary of the IRA owner. Further, if the distribution is received by the spouse before the year that the IRA owner would have been 70 1/2, no portion of the distribution is a required minimum distribution for purposes of determining whether it is eligible to be rolled over by the surviving spouse.

These "spousal rollover" portions of the Code and regulations thereunder are extremely complicated, and often are poorly understood by the average estate planning attorney or accountant, when they are applied to circumstances in which the surviving spouse is not named directly as a beneficiary. Most troubling is the fact that a significant number of retirement plan and IRA plan sponsors are now requiring that a surviving spouse obtain a private letter ruling before the plan sponsor will allow a spousal rollover to be made when an estate or trust, and not the spouse, is named as beneficiary. As a result, the many private rulings addressing this issue (discussed below) and the Preamble Language itself in many cases effectively have been rendered moot. The cost to both the IRS and taxpayers of each taxpayer having to request a private ruling in this circumstance will be enormous.

Therefore, a Revenue Ruling is needed addressing spousal rollovers of a decedent's interest in a Retirement Plan or IRA (the "Decedent's Interest") where an estate or trust (not the surviving spouse) is the named beneficiary of such Decedent's Interest.

Private Rulings:

The IRS has issued many private letter rulings, going back more than a decade,[1] in which a surviving spouse was allowed to roll over a Decedent's Interest even though the beneficiary of the Decedent's Interest in the Retirement Plan or IRA was the decedent's estate or trust. In each of the private letter rulings, the rollover was valid because the surviving spouse was either the executor or trustee of the estate or trust, was in control, and was the sole person who could make the decision to distribute the Decedent's Interest to the surviving spouse. In other words, the Decedent's Interest was *not* treated as having passed through a third-party estate or trust. Instead, the surviving spouse was treated as having received the Decedent's Interest from the decedent.

A recent ruling, PLR 200807025 (Nov. 23, 2007), allowed a spousal rollover where an IRA passed to an estate and became part of a grantor trust which became irrevocable upon the grantor's death. The IRA could have been allocated to any one of four separate subtrusts. The surviving spouse was *not* in complete control of the distributions from the trust. One Co-Trustee of the Marital Trust was the spouse. She and the other Co-trustee of the Marital Trust were required to approve the allocation of the Decedent's Interest to the Marital Trust. The spouse then withdrew the Decedent's Interest from the Marital Trust and requested a favorable ruling that she could roll over the withdrawal to an IRA maintained in her name. The IRS granted her request and quoted the Preamble Language for justification.

In a recent Webcast, however, an IRS representative indicated that the Preamble Language should be read as applying only when the surviving spouse has control and that PLRs similar to 200807025 will likely *not* be granted. He explained that the taxpayer in that private ruling represented that there was no choice as to how the IRA would be allocated among the trusts presented in that fact pattern.

Need for Guidance:

A Revenue Ruling is necessary in order to provide assurance to plan sponsors and guidance to taxpayers as to the circumstances under which a spousal rollover is valid if an estate or trust is named as the beneficiary. As mentioned above, such a ruling will avoid the very significant cost to taxpayers and to the IRS of compelling taxpayers faced with these circumstances to request a private ruling to address this issue, a requirement that is being placed on taxpayers by a significant number of plan sponsors.

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[1] *See, e.g.*, PLR 200324059 (Mar. 18, 2003); PLR 200634065 (April 7, 2006); PLR 200637033 (June 20, 2006), for three examples of more recent rulings.

Further, taxpayers may not rely on private letter rulings granted to others.[2] This means that, regardless of the interpretation applied to the Preamble Language in private letter rulings, practitioners may not wish to recommend spousal rollovers when an estate or trust, rather than the spouse, is named as the beneficiary unless they obtain a private letter ruling for the client or the IRS makes its position official, such as by issuing a revenue ruling. Given the ubiquitous nature of retirement plans and IRAs, such an official position would be of great benefit to all.

In addition, clarifying the meaning of the Preamble Language would be beneficial. Based upon the private letter rulings and informal statements from IRS representatives, it is unclear whether a surviving spouse must be in complete control of the distribution for a rollover to be valid, or whether the spouse can roll over the distribution to a spousal IRA regardless of whether the spouse is in control of the distribution as long as a spouse receives a distribution pursuant to the terms of the estate or trust.

Proposed Resolution:

We respectfully request that the IRS issue as soon as practicable a revenue ruling (or other pronouncement upon which taxpayers may rely) that a spousal rollover may be accomplished by a surviving spouse with a distribution (other than a required minimum distribution) actually received by him or her from a deceased spouse's qualified retirement plan or IRA even though a trust or estate is named as the beneficiary of that qualified retirement plan or IRA.

In addition, the ruling should clarify whether spousal control over the distribution from the trust or estate named as beneficiary is or is not required.

In our view, based on the Preamble Language, it seems that it is sufficient for a valid spousal rollover that the spouse actually receives a distribution of the Decedent's Interest in accordance with the terms of the decedent's estate or trust or governing state law. Therefore, control by the spouse should not be required. However, clarification of this point, regardless of the outcome, is essential to provide certainty in this area and eliminate the need for seeking individual private letter rulings in order to complete a spousal rollover.

We appreciate your attention to this request.

Very truly yours,

Dennis I. Belcher

Dennis I. Belcher,
President

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[2] Internal Revenue Code §6110(k)(3).

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March 27, 2003

Marjorie Hoffman, Esq.
Senior Technician Reviewer
Employee Benefits & Exempt Organizations
Internal Revenue Service
CC:EBEO, Room 5201
1111 Constitution Avenue, N.W.
Washington, DC 20224

Re: Request for Published Ruling Clarifying Reg. § 1.401(a)(9)-5, A-7(b) and (c)

Dear Marjorie:

This letter is submitted by the American College of Trust and Estate Counsel on behalf of its Employee Benefits Committee.[1] It follows up on your suggestion to your fellow panel members prior to the ALI-ABA Video Law Review program this past May that with the issuance of "final" regulations under Section 401(a)(9) the Internal Revenue Service would be amenable to issuing further guidance in the form of published rulings. You also said you would welcome the input of practitioners as to where such guidance was needed.

At the time, some panel members suggested that one area that remained unclear after the final regulations, and as to which further guidance would be welcome, was the distinction between a "contingent beneficiary" and a "successor beneficiary" under Reg. § 1.401(a)(9)-5, A-7(b) and (c), respectively. This distinction is crucial to the determination of whether there is a "designated beneficiary" of a qualified plan or IRA where a trust is named as beneficiary: a potential recipient of funds under the trust that is treated as a "contingent beneficiary" will be taken into account in determining the designated beneficiary, whereas a potential recipient that is treated as a "successor beneficiary" will not be. One or more qualified plans or IRAs are the largest financial asset of many individuals, and as a result standard estate planning principles will call for the beneficiary of all or some portion of the plan or IRA to be a trust. Estate planning practitioners need to know what are the consequences under the distribution rules of naming one or another kind of trust as a beneficiary. In addition, if it is important that the plan or IRA have a designated beneficiary, practitioners need to know what are the rules that must be followed in order to achieve that result.

Recent private letter rulings have only heightened the confusion surrounding this subject and thus the need for published guidance. Private letter rulings, issued on an

[1] The American College of Trust and Estate Counsel is a professional association of over 2,600 lawyers throughout the United States, elected to membership by their peers on the basis of their professional reputation, ability, and contributions in legal matters affecting estate planning.

ad hoc basis in response to particular fact situations, are not intended to provide general guidance and are a poor vehicle for this purpose. The purpose of this letter, therefore, is to illustrate for you by example the questions which need to be answered, and to offer our suggestions in each case as to what the result should be. It is hoped that the examples could form the basis for a published ruling.

In all the following examples, it is assumed that the trust described is named as beneficiary of a qualified plan or IRA, and that the trust is not a "conduit" trust, so that some portion of the distributions from the plan or IRA will or may be accumulated in the trust and not paid out currently.

1. Trust provides for all income to be paid to X for life, remainder at the death of X to Y, who is younger than X, if Y is then living. If Y does not survive X, the remainder will go to C, which is a charity.[2]

Suggested result:. C is a successor beneficiary and not a contingent beneficiary. Thus C will not be taken into account in determining the identity of the designated beneficiary, and X is the designated beneficiary.

There are two possible rules which could lead to this result, either of which would be equally workable. Since the rules may lead to different results in different situations, however (see, for instance, Example 2, below), it is important for practitioners to know which rule is operative.

One rule is that a contingent remainderman under a trust (C in the above example), who will take only if the primary remainderman (Y in the above example) does not survive to take, will be treated as a successor beneficiary except a primary remainderman who is older than the current beneficiary. The rationale behind this rule is that a primary remainderman who is younger than the current beneficiary will be presumed to survive the current beneficiary and thus to take. By contrast, if the primary remainderman is older than the current beneficiary, the primary remainderman will be presumed not to survive the current beneficiary, so that the contingent remainderman will take on the death of the current beneficiary. Applying this principle, which we will call the "life expectancy rule," to Example 1, since Y is younger than X and C will take only if Y does not survive X, C is treated as a successor beneficiary.

The other rule which could be applied in this circumstance is that a remainderman under a trust will be treated as a contingent beneficiary if and only if he or she would take upon the hypothetical death of the current beneficiary on the beneficiary determination date. All remaindermen who would not take in this circumstance will be treated as successor beneficiaries. Under this principle, which we will call the "snapshot rule," contingent remaindermen would always be treated as successor beneficiaries. Applying this rule to Example 1, since Y would take if X were to die on the beneficiary determination date, and C would take nothing, C is treated as a successor beneficiary.

We note that if instead the Service were to take the position in the above example that C was a contingent beneficiary, a position which we strongly feel is ill-advised, it would be incumbent upon the Service also to make it clear to practitioners under what circumstances, if at all, the naming of a charity, or intestate heirs, or some other beneficiary which was not an individual, as a contingent remainderman would *not* cause the trust to fail to have a designated beneficiary. For instance, assume the trust in the above example instead provided on the death of X for distribution to the descendants of the grantor by right of representation (per stirpes) with C charity to take only if no descendants survived X, and on the beneficiary determination date the grantor had five children, twelve grandchildren and three great-grandchildren. Would C be treated as a contingent beneficiary in that circumstance? If not, what rule would be applied to differentiate that case from the trust described in Example 1?

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[2] This example is identical in substance to Example 1 in Reg. § 1.401(a)(9)-5, A-7(c)(3) except for the addition of C as contingent remainderman. The example in the regulation postulates that no one has a beneficial interest in the trust other than the primary remaindermen, the children of the grantor. This is a somewhat puzzling statement, since the trust property must pass to some person or entity, either by the terms of the governing instrument or applicable state law, if the children do not survive the income beneficiary.

2. Trust is the same as in example 1 except that Y, the primary remainderman, is older than X.

Suggested result: The result depends on whether the operative rule is the life expectancy rule or the snapshot rule. We are indifferent as to which rule is to be applied, so long as the rule is clearly stated and consistently applied.

Under the life expectancy rule, C would be a contingent beneficiary and thus there would be no designated beneficiary, because Y is older than X and thus will be assumed not to survive to take on the death of X. Thus, one must look to the next remainderman, which is C. Note, however, that if the trust provided that if Y did not survive X Y's children would succeed to Y's interest, and C would take only if none of Y's children survived, and if at the beneficiary determination date Y had one or more children who were younger than X, C would be treated as a successor beneficiary under the life expectancy rule, and the designated beneficiary would be X.

Under the snapshot rule, C would be a successor beneficiary, because if X died at the beneficiary determination date Y would take. The fact that Y was older than X would be irrelevant.[3]

3. Trust is the same as in example 1 except that X also has a testamentary special power of appointment exercisable in favor of the grantor's children and more remote descendants, all of whom are younger than X.

Suggested result: The result is the same as in Example 1 and is not affected by the special power of appointment, regardless of whether the life expectancy rule or the snapshot rule is applied. Under either rule, all the possible appointees are contingent beneficiaries: under the life expectancy rule because they are all younger than X, and under the snapshot rule because any of them could take on the hypothetical death of X on the beneficiary determination date depending on how the power of appointment was exercised. Because all possible appointees are younger than X, X remains the designated beneficiary. This result would be the same no matter how the class of appointees was defined, so long as members of the class were "identifiable" within the meaning of Reg. § 1.401(a)(9)-4, A-1 and were all younger than the holder of the power of appointment.[4]

4. Trust is a discretionary trust for the benefit of minor child A until A reaches age 30, whereupon the trust will terminate by distribution outright to A. If A does not survive until age 30, the trust will terminate in favor of A's children or, if none, in favor of charity C. A has no children at the beneficiary determination date.

Suggested result: All remaindermen other than A, who will take only if A does not survive until age 30, will be treated as successor beneficiaries, so that A is the designated beneficiary.

We feel that there are powerful policy reasons for this result. This kind of trust is a standard vehicle for the holding of property for young children; its sole purpose is to defer outright ownership until the child

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[3] PLR 200252097, although it did not by its terms apply the final regulations, suggests that the Service is applying the snapshot rule. There the trust named as beneficiary was for the benefit of Taxpayer C for life, terminating in favor of C's children at C's death or, if none, in favor of the heirs of the grantor living at C's death. At the beneficiary determination date, C was childless, and the grantor's heirs were C's siblings, all of whom were older than C. The Service held that D, the oldest of C's siblings, was the designated beneficiary.

[4] The result we suggest is consistent with what appears to be the view of the Service as stated in PLR 200235038. There the beneficiary of an IRA was a trust for the benefit of child C, under which C had a testamentary power of appointment exercisable in favor of anyone other than C's estate, his creditors, or a "Disqualified Appointee". A "Disqualified Appointee" was defined as any individual older than C, any person other than a trust or an individual, or any trust having as a beneficiary an individual older than C. The Service held that the designated beneficiary under the trust was C because "any potential beneficiary of taxpayer C's interest in IRA X must be no older than taxpayer C."

reaches sufficient maturity to be able to deal responsibly with the assets. The probability that the child will survive to the termination date of the trust is overwhelming. To require that someone else be treated as a designated beneficiary, or that there be no beneficiary at all, based on a hypothetical disposition of the trust which almost certainly will not happen, seems arbitrary and not in accordance with the reality as to who is the beneficiary of the trust. We note also that in this circumstance, a determination that the designated beneficiary is anyone other than the minor child is likely to have a severe adverse consequence in terms of the permissible payout period.

We understand that there might be concern about abuse if a rule were adopted that the designated beneficiary of all trusts which by their terms terminated in favor of the current beneficiary during the beneficiary's actuarially determined life expectancy was the current beneficiary. At some point, if the trust terminates at age 50, 60 or beyond, the likelihood that the current beneficiary will in fact take becomes less than overwhelming, and the likelihood that the trust will terminate in favor of remaindermen other than the current beneficiary becomes more than negligible. We suggest, therefore, that the Service adopt a cut-off age beyond which, if the trust does not by its terms terminate, the designated beneficiary will be determined on the same basis as if the trust by its terms lasted for the beneficiary's lifetime. Extrapolating from the generation-skipping transfer tax (IRC § 2632(c)), we would further suggest age 46 as the cut-off age.[5] In other words, if a trust will terminate in favor of the current beneficiary at age 45 or before, remaindermen other than the current beneficiary will be disregarded; if, however, the trust will terminate in favor of the current beneficiary at age 46 or older, remaindermen who take if the current beneficiary does not survive to take will be taken into account on the same basis as if the trust by its terms went for the life of the current beneficiary.

We are aware that our suggested result is contrary to the result reached in PLR 200228025, which was decided under the 1987 proposed regulations. PLR 200228025 involved a trust for the benefit of two grandchildren, which would terminate with respect to 50% when each grandchild reached age 30. If one grandchild died before that age, the other would take the entire trust. If *both* grandchildren died before age 30, a collateral relative, age 67, would take. The ruling does not state who would take if the 67 year old was not alive to take, which was surely highly probable in the extremely unlikely event that both grandchildren died before age 30; that evidently was not considered relevant. The ruling held that the designated beneficiary was the 67 year old. We respectfully submit that at least under the final regulations this result is wrong, and that the older of the two grandchildren should instead have been treated as the designated beneficiary.

5. Trust is a discretionary trust for A for life, terminating at A's death in favor of A's estate.

Suggested result: A is the designated beneficiary, because A's estate should be treated as "stepping into the shoes of" the beneficiary for 401(a)(9) purposes and thus as the equivalent of the beneficiary.

A position the Service has recently taken in the charitable remainder trust ("CRT") area strongly supports this result. Normally, a CRT set up for the benefit of a second trust for an individual, rather than for the benefit of the individual directly, may last only for a term of up to 20 years rather than for the individual's lifetime. In Rev. Rul. 2002-20, however, the Service held that in certain circumstances, a trust as beneficiary of a CRT will be treated as the equivalent of an individual beneficiary, thus permitting the CRT to run for the life of the individual beneficiary of the second trust.

Rev. Rul. 2002-20 involved three CRTs established for the benefit of three slightly different trusts for the benefit of C, a disabled individual. All three of the beneficiary trusts lasted for C's lifetime and provided for distributions to be made solely to C. On C's death, two of the three beneficiary trusts terminated in favor of C's estate; the other gave C a general power of appointment over all funds which were not required to reimburse Medicaid for assistance provided to C during life, in default of which the trust assets would be distributed to charity. The ruling holds that in all three situations, the CRT may

[5] Section 2632(c) defines a "GST trust" in part in terms of whether or not the trust will distribute to a "non-skip person" (*i.e.* a member of the generation immediately below the grantor) before age 46. If so, there is a statutory presumption that the non-skip person will take.

last for C's lifetime, because "Upon C's death, the assets remaining in Trust B will be distributed either to C's estate or, after reimbursing the state for any Medicaid benefits provided to C, will be subject to C's general power of appointment. In these situations, the use of the assets in Trust B during C's life and at C's death is consistent with the manner in which C's own assets would be used. C, therefore, is considered to have received the unitrust amounts directly from Trust A [the CRT] . . .". Similarly in this context, payment of the trust assets to the beneficiary's estate on termination of a trust should be treated as the equivalent of payment to the beneficiary himself, because it is the same ultimate disposition of the property which would have occurred had the beneficiary received the trust assets during life.

We are aware, of course, that the estate *of the employee* cannot be a designated beneficiary because only an individual can be a designated beneficiary. Reg. § 1.401(a)(9)-4, A-3. There is no inconsistency between this rule, however, and a recognition that the estate *of an individual, named beneficiary* will be treated in the same way as the named beneficiary.

6. Same as in example 5, except that upon A's death A has a testamentary general power of appointment, exercisable in favor of any person or persons including A's estate. In default of appointment, distribution will be made to C charity.

Suggested answer: A is the designated beneficiary, because a testamentary general power of appointment, exercisable in favor of the estate, should be treated in the same way as if the estate were directly named as beneficiary. To draw a distinction between the two would elevate form over substance. Rev. Rul. 2002-20 treats the two as indistinguishable in the CRT context, and they should likewise be treated as indistinguishable in this context.

We would very much appreciate your consideration of these questions for a published ruling, and would be pleased to work with you toward this end in any way that you felt was helpful. Although in all cases, as described above, we have our own views as to what we feel the answer should be, at this point we feel any answers at all, so long as they are clear, would be preferable to the current state of confusion.

Yours sincerely,

Virginia F. Coleman

Virginia F. Coleman, Immediate Past Chair
Employee Benefits Committee

Ronald D. Aucutt

Ronald D. Aucutt, President