

LTR 200928043 (April 2009)

This is in response to your request for a private letter ruling, submitted by your authorized representative by correspondence dated *****, and *****, concerning the proper treatment of a distribution from Decedent A's individual retirement account (IRA X) under section 408(d)(3) of the Internal Revenue Code ("the Code").

Your authorized representative has submitted the following facts and representations:

Decedent A was born on Date 1 and died on Date 2 at age 70. Decedent A was a resident of State C at his death. State C is a community property state. Decedent A was survived by his spouse, Surviving Spouse A, whose date of birth was Date 3.

Immediately prior to his death Decedent A, as owner of two individual retirement accounts (IRAs), transferred the funds in both IRAs to a new IRA, IRA X, of which Custodian P was custodian. The total date of death value of the funds in IRA X was Amount M.

On Date 4, Decedent A and Surviving Spouse A executed a revocable trust declaration creating a trust, Trust T. Trust T was amended and restated on Date 5. Initially, Decedent A and Surviving Spouse A were the co-trustees of Trust T. Pursuant to section 2.1 of Trust T, at the death of Decedent A, Surviving Spouse A became the sole trustee of Trust T.

On Date 6 Decedent A named Trust T the beneficiary of IRA X.

Trust T provides, in Section 3.2, that, upon the death of the first of Decedent A and Surviving Spouse A to die, Trust T is to be subdivided into Subtrust A, Subtrust B and Subtrust C. Section 3.2.2.1 of Trust T provides that Subtrust A is to consist of the survivor's separate property and the survivor's community property. Subtrust B would consist of the balance of the trust estate of the deceased spouse. Subtrust C is to consist of the minimum pecuniary amount necessary as a marital deduction to eliminate any federal estate tax in the estate of the first spouse to die. The trustee is given the power to satisfy the marital deduction amount in cash or in kind, or partly in each.

Section 3.3 governs the operation of Trust A. Surviving Spouse A, as the surviving spouse, is the sole beneficiary of Subtrust A during her lifetime. She is entitled to receive the entire net income for her life, and principal determined by the Trust T trustee to be appropriate for her health, education, support and maintenance. Additionally, the Trust T trustee is required to pay her any of the principal of Subtrust A that she requests. Section 4.2 of Trust T provides that Surviving Spouse A also has the power to amend, revoke or terminate Subtrust A during her lifetime.

During her life, Surviving Spouse A is the sole beneficiary of Subtrusts B and C with the right to receive payment of all net income and principal necessary for her support, health, maintenance and education. Surviving Spouse A may not revoke, amend or terminate Subtrusts B and C.

As sole trustee, Surviving Spouse A has dominion and control over the assets of Trust T. The trustee of Trust T proposes to demand a single sum distribution of IRA X, and allocate the IRA X proceeds to Subtrust A (the Survivor's Trust). As the sole beneficiary of Subtrust A, Surviving Spouse A intends to withdraw the IRA X proceeds from Subtrust A in a single sum. Within 60 days of the date that the Custodian P distributes the IRA X proceeds to the trustee of Trust T, Surviving Spouse A intends to roll over the proceeds into an individual retirement account set up and maintained in the name of Surviving

Spouse A.

Your authorized representative has submitted a representation that under State C fiduciary law, the trustee of Trust T is bound to act in the best interests of the current and future beneficiaries of Trust T and that in this instance an allocation of IRA X to any other Subtrust could subject the trustee to a financial surcharge for breach of her fiduciary responsibilities.

Based on the above facts and representations, you, through your authorized representative, request rulings that:

1. That Surviving Spouse A may be treated as the payee or distributee of IRA X;
2. That IRA X does not represent an inherited individual retirement account within the meaning of Section 408(d)(3)(C) with respect to Surviving Spouse A;
3. That Surviving Spouse A is eligible to roll over the distribution of the proceeds of IRA X into an individual retirement account set up and maintained in her own name pursuant to Code Section 408(d)(3) as long as the rollover of such distribution occurs no later than the 60th day from the date the IRA X proceeds are distributed from the IRA X to Surviving Spouse A, as the trustee of Trust T; and
4. That Surviving Spouse A will not be required to include in gross income for federal income tax purposes for the year in which the amounts are distributed from IRA X and the year in which the above-referenced rollover is timely made (if different) any portion of the amounts distributed from IRA X and contributed to the individual retirement account set up and maintained in Surviving Spouse A's name.

With respect to your ruling requests, Code section 408(d)(1) provides that, except as otherwise provided in this subsection, any amount paid or distributed out of an individual retirement plan shall be included in gross income by the payee or distributee, as the case may be, in the manner provided under section 72. Code section 408(d)(3) provides that section 408(d)(1) does not apply to a rollover contribution if such contribution satisfies the requirements of sections 408(d)(3)(A) and (d)(3)(B).

Code section 408(d)(3)(A)(i) provides that section 408(d)(1) does not apply to any amount paid or distributed out of an IRA to the individual for whose benefit the account is maintained if the entire amount received (including money and any other property) is paid into an IRA (other than an endowment contract) for the benefit of such individual not later than the 60th day after the day on which he receives the payment or distribution.

Code section 408(d)(3)(C)(i) provides, in pertinent part, that, in the case of an inherited IRA, section 408(d)(3) shall not apply to any amount received by an individual from such account (and no amount transferred from such account to another IRA shall be excluded from income by reason of such transfer), and such inherited account shall not be treated as an IRA for purposes of determining whether any other amount is a rollover contribution.

Code section 408(d)(3)(C)(ii) provides that an IRA shall be treated as inherited if the individual for whose benefit the account is maintained acquired such account by reason of the death of another individual, and such individual was not the surviving spouse of such other individual. Thus, pursuant to Code section 408(d)(3)(C)(ii), a surviving spouse who acquires IRA proceeds from and by reason of the death of her husband, may elect to treat those IRA proceeds as her own and roll them over into her own IRA. Code section 408(d)(5) provides, generally, that section 408(d) does not apply to any amount required to be distributed pursuant to Code section 408(a)(6).

Code section 408(g) provides that this section (section 408) shall be applied without regard to any com-

munity property laws.

On April 17, 2002, Final Income Tax Regulations (“regulations”) were published in the Federal Register with respect to Code section 401(a)(9) and 408(a)(6). (See also 2002-19 I.R.B. 852, May 13, 2002). Section 1.408-8 of the regulations, Question and Answer 5, provides that a surviving spouse of an IRA owner may elect to treat the spouse’s entire interest as a beneficiary in an individual’s IRA as the spouse’s own IRA. In order to make this election, the spouse must be the sole beneficiary of the IRA and have an unlimited right to withdraw amounts from the IRA. If a trust is named as beneficiary of the IRA, this requirement is not satisfied even if the spouse is the sole beneficiary of the trust.

The Preamble to the regulations provides, in relevant part, that a surviving spouse who actually receives a distribution from an IRA is permitted to roll that distribution over into his/her own IRA even if the spouse is not the sole beneficiary of the deceased’s IRA as long as the rollover is accomplished within the requisite 60 day period. A rollover may be accomplished even if IRA assets pass through either a trust and/or an estate.

In this case, your authorized representative has submitted that Surviving Spouse A is not only permitted to demand a single sum distribution of IRA X, and allocate the IRA X proceeds to Subtrust A by the terms of Trust T, but she is compelled to do so as a fiduciary for the benefit of the beneficiaries of Trust T under State C law. It is further represented that an allocation of IRA X to any other Subtrust could subject the trustee to a financial surcharge for breach of her fiduciary responsibilities under State C law. Additionally, with respect to any Code section 408(g).implications, the Service notes that under the property laws of State C, IRA X constituted community property at the death of Decedent A. As such, the language of Trust T required that it be allocated to Subtrust A. Thus, the trustee of Trust T, Surviving Spouse A, had no discretion with respect as to which of the three Trust T subtrusts to allocate Surviving Spouse A’s community property interest in IRA X. The Service notes that determining if IRA X was/is community property and, as such, which of the three subtrusts was/is to receive said IRA X lies outside the scope of Code section 408.

However, once IRA X is properly allocated to Subtrust A pursuant to the terms of Trust T, the Service must apply the requirements of Code section 408 to determine whether IRA X may be contributed into an IRA set up and maintained, in the name of Surviving Spouse A.

We note that under the facts stated above, Surviving Spouse A is the sole trustee of Trust T. Additionally, she has the right under the terms of Trust T applicable to Subtrust A to receive the income of Subtrust A and also to request any and all of the principal of Subtrust A including IRA X. Under this set of facts, we believe it is appropriate to treat Surviving Spouse A as the payee and beneficiary of IRA X for purposes of Code sections 408(d)(1) and 408(d)(3).

Thus, with respect to your ruling requests, we conclude that:

1. That Surviving Spouse A may be treated as the payee or distributee of IRA X for purposes of Code section 408(d)(1);
2. That IRA X does not represent an inherited individual retirement account within the meaning of Section 408(d)(3)(C) with respect to Surviving Spouse A;
3. That Surviving Spouse A is eligible to roll over the distribution of the proceeds of IRA X into an individual retirement account set up and maintained in her own name pursuant to Code Section 408(d)(3) as long as the rollover of such distribution occurs no later than the 60th day from the date the IRA X proceeds are distributed from the IRA X to Surviving Spouse A, as the trustee of Trust T; and
4. That Surviving Spouse A will not be required to include in gross income for federal income tax

purposes for the year in which the amounts are distributed from IRA X and the year in which the above-referenced rollover is timely made (if different) any portion of the amounts distributed from IRA X and contributed to the individual retirement account set up and maintained in Surviving Spouse A's name.

This ruling letter assumes that IRA X either is or was qualified under Code section 408(a) at all times relevant thereto. It also assumes that the rollover IRA to be set up by Surviving Spouse a will also meet the requirements of Code section 408(a) at all times relevant thereto. Finally, it assumes that your rollover of the IRA X distribution will be made within the time frame referenced in Code section 408(d)(3)(A)(i).

Note: this letter ruling does not authorize Surviving Spouse's contributing amounts required to be distributed under Code section 401(a)(9), applicable to IRAs pursuant to Code section 408(a)(6) (if any), into her rollover IRA.

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

A copy of this letter is being sent to your authorized representative in accordance with a power of attorney on file in this office.

No opinion is expressed as to the tax treatment of the transaction described herein under the provisions of any other section of either the Code or regulations, which may be applicable thereto.

If you wish to inquire about this ruling, please contact *****, I.D. # *****-*****, at (202) 283-*****. Please address all correspondence to SE:T:EP:RA:T3.

Sincerely yours, Frances V. Sloan, Manager, Employee Plans Technical Group 3.