

the value of the corpus of the trust is not includible in the value of *B*'s gross estate under section 2041.

26 CFR 20.2041-3: Powers of appointment created after October 21, 1942.

General power of appointment; conjunctive control of trust. One third of the value of a trust created by three siblings, each of whom named an adult child as one of three trustees who together had complete discretionary power over the assets of the trust and individually had the right to name a relative as successor, is includible in a decedent-trustee's estate as property subject to a general power of appointment under section 2041 of the Code.

Rev. Rul. 76-503

Advice has been requested as to the amount includible in a decedent's gross estate as the value of property subject to a general power of appointment, under section 2041 of the Internal Revenue Code of 1954, in the circumstances described below.

In 1973, three siblings named *A*, *B*, and *C* owned equal interests in their family business. They decided to place the business in trust for the benefit of their descendants and with a view toward keeping the family enterprise intact. Each sibling-grantor designated one of the sibling's adult children as one of the three trustees of the trust. Under the terms of the trust, income is to be accumulated and added to principal until the trust terminates. The trust shall terminate exactly twenty years after the death of the last surviving descendant of *A*, *B*, and *C* who is living at the date of creation of the trust.

The trustees are empowered to manage the trust assets in their complete discretion. They are also empowered to distribute trust property to whomever they select, including themselves, in such proportions, at such times, and for such purposes as

they see fit. Each trustee is privileged to designate one of the trustee's relatives to serve as a successor trustee in the event of the trustee's death or resignation. In the absence of such a designation, the oldest adult living descendant of the deceased or resigned trustee who is willing to serve as the new trustee shall occupy the vacant trustee position.

The decedent, *D*, was selected by *A* to be one of the three trustees and *D* continued in that position until *D*'s death in 1975.

The question presented is whether any amount is includible, with respect to the trust described above, in *D*'s gross estate under section 2041 of the Code as the value of property subject to a general power of appointment, in view of the fact that the power was held jointly by *D* and two cotrustees.

Section 2041(a)(2) of the Code requires inclusion in the gross estate of the value of all property with respect to which the decedent has, at the time of death, a "general power of appointment" created after October 21, 1942.

Section 2041(b) of the Code provides, in relevant part, the definition of the term "general power of appointment" as follows:

(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) * * *

(B) * * *

(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.

For purposes of clauses (ii) and (iii), a power shall be deemed to be exercisable in favor of a person if it is exercisable in favor of such person, his estate, his creditors, or the creditors of his estate.

Section 20.2041-3(c) of the Estate Tax Regulations provides the following with respect to jointly held powers of appointment created after October 21, 1942:

* * * * *

(2) Such power is not considered a general power of appointment if it is not exercisable by the decedent except with the consent or joinder of a person having a substantial interest in the property subject to the power which is adverse to the exercise of the power in favor of the decedent, his estate, his creditors, or the creditors of his estate. An interest adverse to the exercise of a power is considered as substantial if its value in relation to the total value of the property subject to the power is not insignificant. For this purpose, the interest is to be valued in accordance with the actuarial principles set forth in § 20.2031-7 or, if it is not susceptible to valuation under those provisions, in accordance with the general principles set forth in § 20.2031-1. A taker in default of appointment under a power has an interest which is adverse to an exercise of the power. A coholder of the power has no adverse interest merely because of his joint possession of the power nor merely because he is a permissible appointee under a power. However, a coholder of a power is considered as having an adverse interest where he may possess the power after the decedent's death and may exercise it at that time in favor of himself, his estate, his creditors, or the creditors of his estate. Thus, for example, if X, Y, and Z held a power jointly to appoint among a group of persons which includes themselves and if on the death of X the power will pass to Y and Z jointly, then Y and Z are considered to have interests adverse to the

exercise of the power in favor of X. Similarly, if on Y's death the power will pass to Z, Z is considered to have an interest adverse to the exercise of the power in favor of Y. * * *

(3) A power which is exercisable only in conjunction with another person, and which after application of the rules set forth in subparagraphs (1) and (2) of this paragraph constitutes a general power of appointment, will be treated as though the holders of the power who are permissible appointees of the property were joint owners of property subject to the power. The decedent, under this rule, will be treated as possessed of a general power of appointment over an aliquot share of the property to be determined with reference to the number of joint holders, including the decedent, who (or whose estates or creditors) are permissible appointees. Thus, for example, if X, Y, and Z hold an unlimited power jointly to appoint among a group of persons, including themselves, but on the death of X the power does not pass to Y and Z jointly, then Y and Z are not considered to have interests adverse to the exercise of the power in favor of X. In this case X is considered to possess a general power of appointment as to one-third of the property subject to the power.

In the above-quoted portion of section 20.2041-3(c)(2) of the regulations, the example provided describes Y and Z as having substantial interests, in the property subject to the jointly held power of appointment, that are adverse to exercise of the power in favor of the decedent X because the power will pass to Y and Z upon the death of X. In such a situation, Y and Z will be able to exercise, by themselves, the power in their own favor after the death of X, so it is in their economic interest to refuse to agree to exercise the power in favor of X during X's lifetime. Their ability to benefit themselves is thus enlarged by the death of X. In such circumstances, the Code and regulations (quoted above) provide that the potential survivors of the decedent hold an interest and that it is adverse to the exercise of the power in favor of the decedent.

Where, however, as in the example in section 20.2041-3(c)(3) of the regulations, the surviving coholders of the power do not receive, at the death of the decedent, the entire power of appointment between them-

selves but must continue to share the power with the decedent's replacement, they would not necessarily be in a better economic position after the decedent's death than they are before the death. In such a situation, the fact that the coholders may survive the decedent does not mean that they stand to profit by refusing to exercise the power in favor of the decedent during the decedent's lifetime. Therefore, the coholders of the power do not have an interest that is adverse to exercise of the power in favor of the decedent for purposes of section 2041(b)(1)(c)(ii) of the Code.

If the coholders of the power, who must share their power with the decedent's replacement upon the death or resignation of the decedent, have no interest in the subject property other than as coholders of, and permissible appointees under, the power, those facts alone cannot support the conclusion that they hold adverse interests. As a result, the decedent's power meets the definition of a "general power of appointment" because the coholders of the power in actuality have no substantial interest in the subject property, which is adverse to the exercise of the power in favor of the decedent.

If the coholders of the decedent's general power of appointment are, along with the decedent, permissible appointees of the subject property, the amount includible in the decedent's gross estate is the value of the subject property divided by the total number of holders of the power who are also permissible appointees, pursuant to section 2041(b)(1)(C)(iii) of the Code and section 20.2041-3(c)(3) of the regulations, quoted above.

Accordingly, in the instant case, one third of the value of the trust (as of the date of death of D or appropriate alternate valuation date) is includible in the gross estate of D under section 2041 of the Code as property subject to a general power of appointment.

Section 2042.—Proceeds of Life Insurance

26 CFR 20.2042-1: *Proceeds of life insurance.*

Life insurance policy in trust; incidents of ownership. A decedent who had purchased a life insurance policy on his life, transferred complete ownership to his wife, and upon her death, as trustee of a residuary trust for the benefit of their children that included the policy, could use the loan value to pay premiums, elect to receive annual dividends, borrow on the policy and assign or pledge it, and determine how the proceeds were paid, possessed sufficient incidents of ownership to require inclusion of the policy proceeds in his estate.

Rev. Rul. 76-261

Advice has been requested whether, under the circumstances described below, the insured-decedent possessed sufficient incidents of ownership in an insurance policy held in a fiduciary capacity to require inclusion of the policy proceeds in the gross estate under section 2042 of the Internal Revenue Code of 1954.

In 1957 the decedent, H, purchased an insurance policy on decedent's life. Decedent's spouse, W, was named beneficiary. In 1962 H transferred complete ownership of the policy to W and added the names of their children as beneficiaries. In 1971 W died. In W's will, H was named executor of W's estate and trustee of a residuary trust established for the benefit of their children. The insurance policy on H's life was included in W's residuary estate.

H, as trustee, was granted absolute and unfettered discretion to distribute the current income from the trust to the beneficiaries or accumulate the income and add it to corpus. In addition, H, as trustee, was empowered in the management and investment of the trust property to do any and all things that a natural person, free from