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Office of Government Ethics
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MEMORANDUM

TO: Designated Agency Ethics Officials

FROM: Marilyn L. Glynn
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SUBJECT: Revocable Living Trusts

On May 31, 2002, the Office of Government Ethics (OGE) published an amendment to 5 C.F.R. § 2634.310. [See 67 Federal Register 37965](#). Section 2634.310 implements the financial disclosure requirements of the Ethics in Government Act of 1978 (the Act), as amended, with respect to certain interests of filers, their spouses and their dependent children as beneficiaries of trusts, estates and other financial arrangements. The rule amendment adds a new note to section 2634.310(a). This note makes clear that financial disclosure reports do not have to disclose certain interests of beneficiaries under revocable inter vivos trusts, commonly known as "living trusts."¹ The purpose of this memorandum is to provide ethics officials with general guidance on the subject of revocable living trusts and to explain the context in which the rule amendment applies.

¹ Specifically, the note provides:

Nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust (also known as a "living trust") with respect to which the filer, his spouse or dependent child has only a remainder interest, whether or not vested, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child. Furthermore, nothing in this section requires the reporting of the holdings or income of a revocable inter vivos trust from which the filer, his spouse or dependent child receives any discretionary distribution, provided that the grantor of the trust is neither the filer, the filer's spouse, nor the filer's dependent child.

Living trusts as "will substitutes"

Revocable inter vivo trusts have become a popular estate planning device in the last several decades. See, e.g., Langbein, The Nonprobate Revolution and the Future of the Law of Succession, 97 Harv. L. Rev. 1108 (1984). It is frequently said that "the most popular reason given for using the living trust in one's estate plan is the avoidance of probate." Patrick, Living Trusts: Snake Oil or Better than Sliced Bread?, 27 Wm. Mitchell L. Rev. 1083, 1092 (2000). In any event, it is very common for ethics officials these days to encounter filers who are beneficiaries under someone else's living trust or who have established such trusts themselves.

In the typical living trust, the grantor (or settlor) conveys property in trust to a trustee (who is often the grantor) and retains a life estate, with the remainder to go to specified beneficiaries upon the termination of the life estate. What makes a living trust revocable is that the grantor expressly reserves the power to revoke the trust entirely and to make lessor changes, such as substitutions of beneficiaries or trustees. In this regard, revocable living trusts have less in common with traditional irrevocable trusts, in which the grantor no longer retains substantial control over the administration of the trust or the disposition of the property, than with wills, which remain "ambulatory" until the death of the testator. See, e.g., Bullis v. Downes, 612 N.W.2d 435, 469 (Mich. App. 2000). Given the control retained by the grantor during his or her lifetime, a living trust "actually functions as a will since it is an ambulatory instrument that speaks at death to determine the settlor's property." In re Estate of Tisdale, 655 N.Y.S.2d 809, 811 (Surr. Ct. 1997). Therefore, it is widely recognized that living trusts are "clearly a will substitute." Georges v. Glick, 856 F.2d 971, 974 n. 2 (7th Cir. 1988), cert. denied, 489 U.S. 1097 (1989).

Financial disclosure requirements for beneficial interests in trusts and estates generally

Section 102(f)(1) of the Ethics in Government Act sets out the financial disclosure requirements for beneficiaries of trusts and other financial arrangements:

each reporting individual shall report the information required to be reported pursuant to subsections (a), (b), and (c) of this section with respect to the holdings of and the income from a trust or other financial arrangement from which income is received by, or with respect to which a beneficial interest in principal or income is held by, such individual, his spouse, or any dependent child. 5 U.S.C. app. 102(f)(1).

The legislative history indicates several related purposes for this provision. First, there was an intent to prevent filers from avoiding reporting requirements "simply by transferring interests" to a trust or other entity that would still benefit the filer financially. H.R. Rep. No. 642, Part 1, 95th Cong., 1st Sess. 40 (1977) (reporting on H.R. 6954). Second, there was concern that situations could arise in which there is an actual or apparent conflict of interest because "any impact on the financial status of the . . . trust also impacts significantly upon the financial status of the reporting individual." Id. Third, it appears that the trust provision was included at least in part to deal with the fact that Federal officials already had created a variety of "blind" trusts, which did not follow any generally accepted standards, in an attempt to comply with conflict of interest requirements; Congress determined that any such pre-existing trusts should be subject to full disclosure if the trusts could not be brought into compliance with the new uniform standards for qualified blind trusts under the Act. See S. Rep. No. 170, 95th Cong., 1st Sess. 123-24 (1977)(reporting on S. 555).

In 1980, OGE first published its "final regulations to state in greater detail than the Act the information which must be contained in the financial disclosure report (SF 278)." 45 Federal Register 69776 (October 21, 1980). Included in those regulations was a provision stating in greater detail what kinds of interests in trusts and estates needed to be reported under the Act. The OGE regulation specified that filers did not have to report information about any nonvested interests in an estate. See 45 Federal Register 69784. Furthermore, the regulation stated that the need to report any nonvested interests in certain trusts had to be evaluated on a case-by-case basis in consultation with OGE. Id.

In 1992, this regulation was amended to provide even greater detail with respect to those interests in trusts and estates that were deemed reportable under the Act. See 57 Federal Register 11800 (April 7, 1992). In particular, all nonvested beneficial interests in either a trust or an estate were now excluded altogether. See 5 C.F.R. § 2634.310(a)(2). Moreover, the 1992 amendment added a definition of vested interests and explained the distinction between vested and nonvested interests, based largely on a distillation of common law principles.²

² The definition in section 2634.301(a)(2) reads:

A vested interest is a present right or title to property, which carries with it an existing right of alienation, even though the right to possession or enjoyment may be postponed to some uncertain time in the

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In excluding nonvested interests, OGE recognized that "beneficial interest in principal or income," in section 102(f)(1) of the Act, should not be read so broadly as to require the public disclosure of speculative or uncertain interests. This is evident in the text of the regulatory definition contained in section 2635.310(a)(2): "the uncertainty of the right of enjoyment . . . differentiates a 'vested' and a 'nonvested' interest." OGE also has recognized that the reporting of nonvested interests would not further the statutory purpose of disclosing interests that pose a potential conflict of interest, because OGE has determined that such interests generally are too uncertain to implicate the financial conflict of interest statute, 18 U.S.C. § 208. See Public Financial Disclosure: A Reviewer's Reference 7-30 (1996).

On a closely related subject, OGE has provided additional guidance concerning the reporting of potential interests as a beneficiary under a will. Of particular relevance, OGE has determined that section 102(f)(1) of the Act does not require filers to report the fact that they are named as beneficiary in the will of a living person. Id. OGE has concluded that any potential beneficial interest created by the will of a living person is not vested, within the meaning of section 2634.310(a)(2), a conclusion which is supported by the common law. See, e.g., Cunningham, The Hazards of Tinkering with the Common Law of Future Interests: The California Experience, 48 *Hast. L.J.* 667, 677 (1997). Likewise, OGE has determined that an employee does not have a disqualifying financial interest, under 18 U.S.C. § 208(a), as a result of being named a beneficiary in a will of a person still living. As OGE has explained, "the employee's interest in the assets to be distributed under the will is merely speculative since he may never inherit them." 60 *Federal Register* 47207, 47209 (September 11, 1995)(preamble to proposed 5 C.F.R. part 2640); see also Reviewer's Reference at 7-30 (no financial interest because will can be changed). Indeed, it is sometimes said that an heir or beneficiary of a living person has merely an "expectancy" or a "bare hope of succession," rather than a real "interest" in any property that is part of the estate. Krause v. Krause, 174 *Conn.* 361, 365 (1978); see also In re Braman Estate, 435 *Pa.* 573, 575 n.3 (1969)

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future. This includes a future interest when one has a right, defeasible or indefeasible, to the immediate possession or enjoyment of the property, upon the ceasing of another's interest. Accordingly, it is not the uncertainty of the time of enjoyment in the future, but the uncertainty of the right of enjoyment (title and alienation), which differentiates a "vested" and a "nonvested" interest.

(expectancy is "chance" of obtaining property from living person, and such chances are not themselves rights in property).

Reporting requirements for interests in revocable living trusts

Until now, OGE's regulations and other written guidance have not specifically addressed the reporting requirements of beneficiaries under revocable living trusts. However, the approach taken in the new amendment to section 2634.310 is consistent with, and follows from, OGE's prior treatment of nonvested interests in trusts and estates, especially OGE's prior treatment of beneficiaries under the will of a living testator.

As a technical matter, it may be open to debate whether a remainder interest in a revocable living trust best should be viewed as vested or nonvested. On the one hand, there are early cases concluding that a remainder interest in a revocable inter vivos trust may be viewed as vested, provided that there is no condition of survivorship or other condition precedent to taking possession of the property upon the termination of the prior estate(s). See Randall v. Bank of America National Trust and Savings Ass'n., 119 P.2d 754 (Cal. App. 1941)(vested even though power of revocation or substitution might divest beneficiary at any time); First Nat'l Bank of Cincinnati v. Tenney, 138 N.E.2d 15 (Ohio 1956)(vested remainder subject to defeasance by exercise of power of revocation).

On the other hand, there are more recent cases concluding either that such remainders are nonvested or contingent, or that it is irrelevant whether they are technically vested, given the functional equivalence between revocable living trusts and wills. See Bezzini v. Department of Social Services, 715 A.2d 791 (Conn.App. 1998)(beneficiary of revocable trust does not have vested interest but mere expectancy); Ullman v. Oldensmith, 645 So. 2d 168 (Fla. App. 1994)(beneficiary's interest is contingent upon settlor not exercising power to revoke); In re Estate of Button, 490 P.2d 731 (Wash. 1971)(regardless of whether vested or nonvested, remainder in practical effect is legacy). It has been recognized among some commentators and practitioners that there has been an "evolution of the revocable living trust from a traditional trust, in which the beneficiary takes an immediate equitable interest that confers genuine rights of recourse, to a will-like devise, in which the interest conferred constitutes little more than an expectancy." Smith, Note, Why Limit a Good Thing? A Proposal to Apply the California Antilapse Statute to Revocable Living Trusts, 43 Hast. L.J. 1391, 1407 (1992).

OGE has determined, for purposes of section 102(f)(1), that any "interest" in the remainder of a revocable living trust is just as speculative as the mere expectancy enjoyed by the beneficiary of a living testator. It is plain to OGE that revocable living trusts

are will substitutes, and there is no compelling reason to treat beneficiaries of wills and revocable trusts differently under the financial disclosure rules. See, e.g., Upman v. Clarke, 359 Md. 32, 47 (2000) (no real distinction between gifts through wills and revocable trusts, as both create only expectancy). To the extent that a remainder beneficiary under a revocable living trust may have certain rights, see Continental Bank & Trust Co. v. Country Club Mobile Estates, Ltd., 632 P.2d 869 (Utah 1981), those rights would appear to be largely theoretical and of little practical value during the life of the grantor. See Nonprobate Revolution, 97 Harv. L. Rev. at 1126-28 (hard to envision enforcement by beneficiary since grantor can always revoke trust and enjoy entire corpus); Continental Bank & Trust, 632 P.2d at 873-74 (dissent)(violation of terms of revocable trust would not have been challenged had grantor not died).

Furthermore, OGE sees little connection between the legislative purposes underlying section 102(f)(1), as described above, and the disclosure of remainder interests in a revocable living trust.³ Such expectancies are not only speculative but are so dependent on the control of someone else that there is little potential for the abuses of subterfuge and self-dealing that motivated Congress. Moreover, the reporting of such expectancies necessarily would disclose the interests and estate planning decisions of persons other than the filer and the filer's own spouse and dependent children. The legislative history of the Ethics in Government Act is replete with discussions of the delicate balance between the public's right to know and the privacy rights of individuals, particularly individuals who are not themselves Government employees, and OGE believes that important privacy considerations counsel against compelling such disclosures in the absence of a clear Congressional directive.⁴

³ Of course, as discussed more fully below, the question would be different if the filer, the filer's spouse or the filer's dependent child were the grantor of the trust, in which case we believe that the purposes and language of the Act require disclosure.

⁴ See, e.g., H.R. Rep. 800, 95th Cong., 1st Sess. 29 (1977)(Judiciary Committee report on H.R. 1)("the committee sought to accommodate the public policy considerations underlying requirements for public disclosure of personal financial information and the right of personal privacy which affects all citizens"); 124 Cong. Rec. H10183 (September 20, 1978)(Statement of Rep. Moorhead)(expressing concern for "personal privacy of the official's spouse and children" and concern over possible "constitutional questions"); id. at H10185 (statement of

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We note that our conclusion also is consistent with Federal tax law, which likewise focuses on the fact that the grantor of a revocable trust retains the real power to control and benefit from the trust property. See generally Miller & Rainey, Dying with the "Living" (or "Revocable") Trust: Federal Tax Consequences of Testamentary Dispositions Compared, 37 Vand. L. Rev. 811 (1984). Under the Internal Revenue Code, the grantor of a revocable trust remains the owner of the trust property. See 26 U.S.C. § 676. Moreover, the income of a revocable trust is taxable to the grantor, whether or not the grantor actually receives a distribution of trust income. See 26 U.S.C. §§ 671-678. Similarly, for gift tax purposes, the transfer of property to a revocable trust is not treated as a completed gift to the remainder beneficiaries. See 26 C.F.R. § 25.2511-2(c).

Therefore, the new amendment to section 2634.310(a) provides a note indicating that nothing in that section requires the reporting of the holdings or income of a revocable living trust with respect to which the reporting individual has only a remainder interest. Under the language of this note, it is not necessary to determine whether the remainder technically is vested or nonvested. See 5 C.F.R. § 2634.310(a)(note).

Nevertheless, the note makes clear that filers are not excused from reporting the holdings and income of a revocable trust if the filer (or the filer's spouse or dependent child) also is the grantor of the trust. As should be clear from the discussion above, the grantor of a revocable living trust retains such rights of control and enjoyment with respect to the trust property that OGE must view the grantor as the true owner of the property. OGE believes this to be the case whether or not the grantor actually receives any distribution from the trust and whether or not the grantor actually serves as trustee. In this instance, what is true for Federal taxation purposes is equally true for financial disclosure purposes under the Ethics in Government Act:

All income and principal is available for distribution to the grantor, and the trust can be terminated at any time during the life of the grantor. The grantor is treated as the owner of the trust for income and estate tax purposes. Thus the grantor is taxed on all income (both income and capital gains) earned by the trust whether or not distributed. No shifting of income or assets away

⁴(...continued)

Rep. McClory)("spouse and dependent disclosure requirements dramatically point up the inherent conflict that exists between the public's right to know and the individual's right to privacy").

from the grantor is achieved with this type of revocable trust.

Abbin, Income Taxation of Fiduciaries and Beneficiaries § 106 (2000).

The note also provides that nothing in section 2634.310 requires the reporting of holdings or income of a revocable living trust from which the reporting individual receives any discretionary distribution, provided again that the beneficiary is not also the grantor. It is true that section 102(f)(1) requires the disclosure of trusts "from which income is received" by the reporting individual, and that section 109(7) of the Act defines "income" as including "income from an interest in an estate or trust." However, OGE does not view discretionary distributions of trust income or principal from a revocable living trust as income within the meaning of these provisions. In OGE's view, a discretionary distribution is no different from a gift, because the distribution is made at the pleasure of the grantor. For purposes of financial disclosure, OGE sees no meaningful distinction between, for example, a gift of money from a filer's parent and a discretionary distribution of money from the parent's revocable living trust.⁵ The Ethics in Government Act clearly treats gifts separately from income or property interests, and gifts are subject to different reporting requirements (and exclusions) than those found in section 102(f). Compare 5 U.S.C. app. § 102(a)(2)(gifts); with §§ 102(f)(1)(income and principal of trust); 102(a)(1)(income); 102(a)(3)(property interests).

The new note is limited, however, to "discretionary" distributions. In many cases, of course, the trust instrument will not even mention present distributions to the filer or, if it does, the terms of the instrument will make clear that such distributions are discretionary. Nevertheless, disclosure still is required with respect to a revocable trust if the trust instrument expressly directs the trustee to make present, mandatory distributions of trust income or principal to the filer (or the filer's spouse or dependent child). In such situations, even though the grantor retains the power to revoke the trust or change beneficiaries, the fact remains that the trust instrument gives the filer present enjoyment—not merely a future interest—and this present enjoyment cannot be interrupted except by an affirmative act of the grantor to alter the trust.

⁵ This view is consistent with the treatment of distributions from revocable trusts under Federal tax law: "the receipt of income or of other enjoyment of the transferred property by the transferee or by the beneficiary . . . constitutes a gift" 26 C.F.R. § 25.2511-2(f).

OGE emphasizes that nothing in the rule amendment changes the reporting requirements with respect to irrevocable trusts. In this connection, it should be noted that revocable living trusts themselves may become irrevocable upon the occurrence of certain events, such as the death of the grantor or other circumstances specified in the trust instrument or state law. See, e.g., Beauchamp, "It's My Money 'Til I Die": When Trustees Must Notify Heirs and Beneficiaries Concerning a Trust That Has Become Irrevocable, 32 McGeorge L. Rev. 670 (2001).

Other ethics considerations

Although the new amendment to section 2634.310 focuses on financial disclosure issues, we note that we would apply a similar analysis to conflict of interest questions arising under 18 U.S.C. § 208. Specifically, we see no reason why the remainder interests of a non-grantor beneficiary in a revocable living trust should be treated any differently than the mere expectancy of a beneficiary under the will of a living testator. In both cases, any potential interest is too speculative to constitute a disqualifying financial interest under section 208. The same would be true if the non-grantor's only interest were an expectancy of receiving discretionary distributions from such a trust; as explained above, such distributions really are gifts, and the bare hope of receiving a gift is simply too speculative to be deemed a disqualifying financial interest under section 208. Of course, if there are any concerns about the appearance of a lack of impartiality under such circumstances, such concerns may be resolved under the mechanism provided in the Standards of Ethical Conduct for Executive Branch Employees. See 5 C.F.R. § 2635.502(a)(2).

Furthermore, discretionary distributions from a revocable living trust could implicate the gift rules, inasmuch as we are generally treating such distributions as gifts. See 5 C.F.R. part 2635, subpart B. This would be the case if the trust grantor were a "prohibited source" or the distribution were made because of the employee's official position. Typically, however, we would expect that such distributions would be "motivated by a family relationship or personal friendship rather than the position of the employee," within the meaning of the relevant exception to the gift prohibitions. 5 C.F.R. § 2635.204(b).