

CURRENT RULES GOVERNING POWERS OF APPOINTMENT

Under IRC § 2041(b), 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 power to consume, invade, or appropriate property for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent shall not be deemed a general power of appointment.**

The value of all property that is subject to a general power of appointment exercisable by the decedent will be included in the decedent's estate pursuant to § 2041. A general power of appointment means a power that is exercisable in favor of the decedent, his estate, his creditors or the creditors of his estate. The term includes all powers that are, in substance and effect, powers of appointment, regardless of the nomenclature used in creating the power and regardless of local property law connotations. A power to consume, invade, or appropriate income or corpus, or both, for the benefit of the decedent which is limited by an ascertainable standard relating to the health, education, support, or maintenance of the decedent is, by reason of § 2041(b)(1)(A), not a general power of appointment. A power is limited by such a standard if the extent of the holder's duty to exercise and not to exercise the power is reasonably measurable in terms of his needs for health, education, or support (or any combination of them). As used in this subparagraph, the words “support” and “maintenance” are synonymous and their meaning is not limited to the bare necessities of life. A power to use property for the comfort, welfare, or happiness of the holder of the power is not limited by the requisite standard. Examples of powers which are limited by the requisite standard are powers exercisable for the holder's “support,” “support in reasonable comfort,” “maintenance in health and reasonable comfort,” “support in his accustomed manner of living,” “education, including college and professional education,” “health,” and “medical, dental, hospital and nursing expenses and expenses of invalidism.” In determining whether a power is limited by an ascertainable standard, it is immaterial whether the beneficiary is required to exhaust his other income before the power can be exercised.

If the power of appointment may be exercised by the decedent only in conjunction with (1) the creator of the power, or (2) a person who has a substantial interest in the property that is subject to the power and such interest is adverse to an exercise of the power in favor of the decedent, the power is not considered to be a general power of appointment.

The following powers are defined by Regs. § 20.2041-1 as not constituting a power of appointment for § 2041 purposes:

1. The power to amend only the administrative provisions of the trust, which cannot substantially affect the beneficial enjoyment of the trust property or income;
2. The power of management, investment, custody of assets, or the power to allocate receipts and disbursements as between income and principal, exercisable in a fiduciary capacity where the holder has no power to enlarge or shift any of the beneficial interests except as an incidental consequence of the discharge of the fiduciary duties; and
3. The right of a beneficiary of a trust to assent to a periodic accounting, thereby relieving the trustee from further accountability, as long as such does not consist of any power to enlarge or shift the beneficial interest.

The common element in each of the above is that the power cannot be used to enlarge or shift any of the beneficial interests. Thus, powers that may be thought of as administrative in nature will not result in estate tax inclusion under § 2041.