

Part III

Administrative, Procedural, and Miscellaneous

26 CFR § 601.105: Examination of returns and claims for refund, credit, or abatement; determination of correct tax liability.
(Also Part I, §§ 664; 1.664-1, 1.664-2, 1.664-3.)

Rev. Proc. 2005-24

SECTION 1. PURPOSE AND SCOPE

.01 This revenue procedure applies to any charitable remainder annuity trust (CRAT) or charitable remainder unitrust (CRUT) that is created by the grantor, *G*, if, under applicable state law, *G*'s surviving spouse, *S*, has a right of election exercisable on *G*'s death to receive an elective, statutory share of *G*'s estate, and such share could be satisfied in whole or in part from assets of the CRAT or CRUT in violation of § 664(d)(1)(B) or (d)(2)(B) of the Internal Revenue Code. In general, only *inter vivos* CRATs or CRUTs are within the scope of this revenue procedure.

.02 This revenue procedure provides a safe harbor procedure under which the Internal Revenue Service will disregard the right of election for purposes of determining whether the CRAT or CRUT meets the requirements of § 664(d)(1)(B) or (d)(2)(B) continuously since its creation if *S* irrevocably waives the right of election in the manner prescribed in this revenue

procedure. For trusts created before June 28, 2005, the Service will disregard the right of election, even without a waiver, but only if S does not exercise the right of election.

.03 The safe harbor procedure provided by this revenue procedure is not available to a CRAT or CRUT if S exercises the right of election.

SECTION 2. BACKGROUND

.01 In general, a testator is free to dispose of property in accordance with the testator's own wishes. However, in most jurisdictions, state statutes protect S from disinheritance. In most common law jurisdictions, these statutes are in the form of elective share provisions, many of which are based on the elective share provisions of the Uniform Probate Code (UPC), §§ 2-201- 2-214 (amended 1993). Elective share statutes provide S the right to elect to receive a statutory share of G's estate, regardless of whether G made any bequests to S. For purposes of this revenue procedure, S's statutory share of G's estate will be referred to as an "elective share" and the right to elect to receive an elective share will be referred to as a "right of election", regardless of what terms different jurisdictions may use to describe these concepts.

.02 In some states, the elective share is based solely on the probate estate but, in others, G's estate is defined more broadly for purposes of computing the elective share and may include assets of the CRAT or CRUT. In states that have adopted the elective share provisions of the UPC, S has the right of election to take a percentage (generally determined by the duration

of the marriage, but subject to a minimum dollar amount in some cases) of the “augmented estate” provided that certain requirements are met. UPC § 2-202. The augmented estate includes G’s net probate estate, as well as certain nonprobate assets of G, certain property transferred by G to others (including to S) during life, and certain other property. UPC §§ 2-202 and 2-207. The assets of the CRAT or CRUT may be included in the augmented estate and, therefore, may be used to determine and satisfy the elective share amount. UPC § 2-209. In some states, the CRAT or CRUT assets may be used to satisfy the elective share only after other property in the augmented estate first has been exhausted.

.03 Sections 664(d)(1)(B) (in the case of a CRAT) and (d)(2)(B) (in the case of a CRUT) provide that no amount other than the annuity payments described in § 664(d)(1)(A) or the unitrust payments described in § 664(d)(2)(A), respectively, (other than qualified gratuitous payments described in §§ 664(d)(1)(C) and (d)(2)(C)) may be paid to or for the use of any person other than an organization described in § 170(c). The requirements of §§ 664(d)(1)(B) and (d)(2)(B) are not satisfied in situations in which S may exercise the right of election to receive an elective share and the share could include assets of the CRAT or CRUT, because the mere existence of the right of election under applicable law, whether or not exercised, and the resulting possibility that the CRAT or CRUT may be invaded for the benefit of S, causes the trust to fail to qualify under § 664(d).

.04 The Service believes that, in the interest of sound tax

administration and to reduce the burden on taxpayers, it is appropriate to provide a safe harbor procedure that, if followed, will cause the right of election to be disregarded for purposes of determining whether a CRAT or CRUT that is within the scope of this revenue procedure meets the requirements of § 664(d) continuously from the date the trust is created. This procedure generally requires that S irrevocably waive the right of election with regard to the assets of the CRAT or CRUT to ensure that no part of the trust will be used to satisfy the elective share.

.05 No waiver of the right of election is required if the applicable state law does not provide S with a right of election, exercisable at the time of G's death, to receive an elective share of G's estate. For example, in community property jurisdictions, elective share provisions are generally unnecessary because S typically has vested ownership in one-half of the community property. Additionally, no waiver is required if, under applicable state law, S's elective share of G's estate may not include any assets of the CRAT or CRUT (other than the annuity or unitrust interest payable to S as the named recipient). For example, no waiver is required if, under applicable state law, the trust's property is excluded from the base for computing the elective share by reason of G's receipt of adequate and full consideration for the transfer or the written consent to or joinder in the transfer by S and, in fact, the consideration is paid or the consent or joinder is given.

SECTION 3. APPLICATION OF SAFE HARBOR

.01 *In General.* With respect to any CRAT or CRUT within the scope of

this revenue procedure, S's right of election to receive an elective share of G's estate, if the share could include any assets of a CRAT or CRUT created or funded by G, will be disregarded for purposes of determining whether the CRAT or CRUT has met the requirements of § 664(d)(1)(B) or (d)(2)(B) continuously since its creation if all of the requirements of section 3 of this revenue procedure are satisfied. For CRATs and CRUTs within the scope of this revenue procedure created by G on or after June 28, 2005, the failure of S to waive the right of election in accordance with the requirements of this revenue procedure will result in the CRAT or CRUT failing to qualify under § 664(d) continuously since its creation, whether or not S exercises the right of election. For CRATs and CRUTs within the scope of this revenue procedure created by G before June 28, 2005, the failure of S to waive the right of election, combined with S's exercise of that right of election, will result in the CRAT or CRUT failing to qualify under § 664(d) continuously since its creation. Thus, for all CRATs and CRUTs, regardless of when they were created, a waiver under this revenue procedure of S's right of election will provide certainty that the right of election will not cause the trust to fail to qualify under § 664(d) continuously since its creation.

.02 Waiver Effective Under State Law. S must irrevocably waive the right of election to whatever extent necessary to ensure that no part of the trust (other than the annuity or unitrust interest of which S is the named recipient under the terms of the trust) may be used to satisfy the elective share. A valid waiver of the elective share or right of election will satisfy the requirements of

the preceding sentence if the waiver is valid under applicable state law, in writing, and signed and dated by S. This revenue procedure does not require a waiver of S's right as the named recipient to receive the annuity or unitrust payment from the CRAT or CRUT.

.03 Timing of Waiver. For CRATs or CRUTs created by G on or after June 28, 2005, section 3.02 of this revenue procedure must be satisfied on or before the date that is 6 months after the due date (excluding extensions of time to file actually granted) of Form 5227, Split-Interest Trust Information Return, for the year in which the later of the following occurs:

- (1) the creation of the trust;
- (2) the date of G's marriage to S;
- (3) the date G first becomes domiciled or resident in a jurisdiction whose law provides a right of election that could be satisfied from assets of the trust; or
- (4) the effective date of applicable state law creating a right of election.

.04 Trustee To Retain Copy. A copy of the signed waiver must be provided to the trustee of the CRAT or CRUT. The trustee must retain the copy in the official records of the trust so long as the contents thereof may become material in the administration of any internal revenue law. See § 1.6001-1(e) of the Income Tax Regulations.

SECTION 4. EXAMPLES

In each of the following examples, G created a CRAT that provides an

annuity to *G* for *G*'s life. Upon *G*'s death, the remainder of the trust will pass to an organization that meets the requirements of § 170(c). In each example (except *Example 3*), at the time the CRAT is created, applicable state law provides *S* a right of election to receive an elective share of *G*'s estate and the share would include (and could be satisfied from) assets of the trust.

.01 *Example 1.* *G* creates the trust in 2007 while married to *S*. On or before the date that is 6 months after the due date (excluding extensions of time to file actually granted) of the Form 5227 for the trust for calendar year 2007, *S* irrevocably waives *S*'s right of election to receive an elective share with regard to the assets in the trust (but does not waive the right of election with regard to *G*'s probate estate).

.02 *Example 2.* *G* creates the trust in 2006, and is unmarried on the date the trust is created. On May 1, 2007, *G* marries *S*. On or before the date that is 6 months after the due date (excluding extensions of time to file actually granted) of the Form 5227 for the trust for calendar year 2007, *S* irrevocably waives the right of election to receive an elective share with regard to the assets in the trust (but does not waive the right of election with regard to *G*'s probate estate).

.03 *Example 3.* *G* creates the trust in 2008 while married to *S*. Under applicable state law in effect on the date that *G* creates the trust, the elective share does not include the assets in the trust. Effective on March 1, 2009, applicable state law is amended to give *S* the right of election to receive an elective share of the "augmented estate," which, by definition, includes the

assets of the trust. On or before the date that is 6 months after the due date (excluding extensions of time to file actually granted) of the Form 5227 for the trust for calendar year 2009, S irrevocably waives the right of election to receive an elective share with regard to the assets in the trust (but does not waive the right of election with regard to G's probate estate).

In each of *Examples 1* through *3*, assuming that S's timely waiver of the right of election is valid under applicable state law and satisfies the other requirements of this revenue procedure, the existence of the right of election will be disregarded for the purpose of determining whether the trust has qualified continuously since its creation as a CRAT under § 664(d)(1)(B). Further, in each of *Examples 1* through *3*, the result would be the same if, instead of executing only a partial waiver, S had waived the full right of election with respect to all assets in G's augmented estate.

.04 *Example 4.* G creates the trust in 2007 while married to S. Under applicable state law in effect on the date that G creates the trust, the elective share includes the assets in the trust. Later in the same year, applicable state law is amended to provide that the augmented estate does not include the assets of a CRAT or CRUT and the amendment applies retroactively to include the trust created by G. Accordingly, no waiver of the right of election is required with respect to the assets of the trust in order for the trust to continue to qualify as a CRAT.

.05 *Example 5.* The facts are the same as in *Example 2* except that the waiver is contained in, or is signed pursuant to the requirements of, a

prenuptial agreement. Unless the agreement as a whole (or only the waiver) is subsequently found to be invalid or unenforceable, the waiver will satisfy the requirements of this revenue procedure.

.06 *Example 6.* The facts are the same as in *Example 1*, except that S dies in 2010. In 2012, G marries S2. S2 refuses to waive S2's right to receive an elective share with regard to the assets in the trust. The existence of S's right of election will be disregarded for the purpose of determining whether the trust has qualified continuously since its creation up until G's marriage to S2, as a CRAT under § 664(d)(1)(B). However, because S2 did not timely and irrevocably waive S2's right to receive an elective share with regard to the assets in the trust, the trust does not qualify as a CRAT under § 664(d)(1)(B).

If, in these examples, G had instead created a CRUT, the results would be the same for purposes of § 664(d)(2)(B).

SECTION 5. EFFECTIVE DATE

This revenue procedure is effective as of March 30, 2005.

SECTION 6. PAPERWORK REDUCTION ACT

The collection of information contained in this revenue procedure has been reviewed and approved by the Office of Management and Budget in accordance with the Paperwork Reduction Act (44 U.S.C. 3507) under control number 1545-1936.

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless the collection of information displays a valid OMB control number.

The collection of information in this revenue procedure is in section 3. This information is required to be collected and retained in order to ensure that a trust meets the requirements of § 664(d)(1) or (d)(2). This information will be used to determine whether the eligibility requirements under those statutes for treatment as a CRAT or CRUT have been met. The collection of information is required to obtain a benefit. The likely respondents are individuals.

The estimated total annual reporting burden is 150,000 hours.

The estimated annual burden per respondent varies from 1 hour to 2 hours, depending on individual circumstances, with an estimated average burden of 1 1/2 hours to complete the statements required under this revenue procedure. The estimated number of respondents is 100,000.

The estimated annual frequency of responses is on occasion.

Books or records relating to a collection of information must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and tax return information are confidential, as required by 26 U.S.C. 6103.

SECTION 7. DRAFTING INFORMATION

The principal author of this revenue procedure is Susan H. Levy. For further information regarding this revenue procedure contact Susan H. Levy on (202) 622-3090 (not a toll free call) or Bradford R. Poston on (202) 622-3060 (neither a toll free call).